No. 11-

IN THE
Supreme Court of the United States

IN RE: MDL-1824 TRI-STATE WATER RIGHTS LITIGATION.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Water Supply Act of 1958 ("WSA"), 43 U.S.C. § 390b, authorizes the Army Corps of Engineers to reallocate federal reservoir storage to support local water supply demands, but requires the Corps to obtain Congressional approval if a reallocation would constitute a "major * * * operational change." *Id.* § 390b(d). Two circuits have rendered conflicting decisions with respect to the WSA as it applies to Lake Lanier, a federal reservoir upstream of Atlanta whose waters flow through the Southeast and have sparked a three-decade water conflict among Georgia, Alabama, and Florida. The D.C. Circuit held that the Corps could not unilaterally reallocate 22 percent of Lanier's storage to Atlanta-area water supply because that would be a "major operational change." In the case below, by contrast, the Eleventh Circuit held that the Corps may be able to reallocate an even larger portion of the reservoir—34 percent—*without* Congressional approval, and that the WSA's "major operational change" limitation may be circumvented by relying on a project's underlying authorization.

The question presented is: Whether the Corps must comply with the explicit statutory limit in the WSA that requires Congressional approval before the Corps undertakes a major reallocation of federal reservoir storage to provide local water supply.

PARTIES TO THE PROCEEDINGS

The Petitioners are the State of Florida and the City of Apalachicola, Florida. Both were appellees below.

Respondents which were appellants/cross-appellees below are the State of Georgia; the City of Atlanta; Fulton County; DeKalb County; the Cobb County-Marietta Water Authority; the City of Gainesville; the Atlanta Regional Commission; the Lake Lanier Association; and Gwinnett County, Georgia. Respondents which were appellees below are the State of Alabama; Alabama Power Company; and Southeast Federal Power Customers, Inc. Respondents which were appellees/cross-appellants below are the U.S. Army Corps of Engineers; John McHugh, in his official capacity as Secretary of the United States Army; Jo-Ellen Darcy, in her official capacity as the Assistant Secretary of the Army-Civil Works; Major General Merdith W.B. Temple, in his official capacity as Acting Chief of Engineers, U.S. Army Corps of Engineers; Brigadier General Todd T. Semonite, in his official capacity as Commander, South Atlantic Division, U.S. Army Corps of Engineers; and Colonel Steven J. Roemhildt, Commander, Mobile District, U.S. Army Corps of Engineers.

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida and City of Apalachicola respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. 1a-86a) is reported at 644 F.3d 1160. The opinion of the District Court (App. 87a-187a) is reported at 639 F. Supp. 2d 1308.

JURISDICTION

The Eleventh Circuit entered judgment on June 28, 2011. App. 1a. Rehearing was denied on September 16, 2011. App. 188a. On November 9, 2011, Justice Thomas extended the time to file this petition to February 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Water Supply Act, 43 U.S.C. § 390b (1958), provides in relevant part:

> (b) *Storage in reservoir projects; agreements for payment of cost of construction or modification of projects*. In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water * * * .
>
> * * *
>
> (d) *Approval of Congress of modifications of reservoir projects*. Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section 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 as now provided by law.

INTRODUCTION

Two Courts of Appeals have issued diametrically opposed decisions with respect to the same body of water—a massive federal reservoir whose outflows serve three states and have triggered a decades-long interstate water war. The divergent decisions were driven by the courts' conflicting interpretations of an important federal statute that this Court has never construed. The Court should grant the writ to resolve the split and clarify the fate of a water source that "is of the utmost importance to * * * millions of power customers and water users" throughout Florida, Alabama, Georgia, and the Gulf Coast. App. 84a.

The case concerns Lake Sidney Lanier, one of the nation's largest federal reservoirs. Lake Lanier sits on the Chattahoochee River above Atlanta. South of the lake, the Chattahoochee runs past Atlanta, along the Georgia-Alabama border, into the Apalachicola River in Florida, and thence to Apalachicola Bay. The waters stored in Lake Lanier are important to generate power, facilitate navigation, and ensure the survival of ecologically sensitive resources downstream in Florida and Alabama. But localities in Georgia seek to use those same waters for local water supply. Those divergent interests have spawned a cross-border water dispute that has produced 13 different decisions in six federal courts.

The essence of the dispute is whether the Army Corps of Engineers may, without Congressional approval, reallocate Lake Lanier's water storage[1] away from its original uses—downstream flows for power generation and navigation—and toward direct withdrawals and releases from the lake for local water supply. Any such reallocation would have a profound effect on downstream interests because water reserved in storage for direct withdrawal is not available for downstream release when needed. It also would unilaterally rebalance the interests weighed by Congress in authorizing the reservoir.

In 2002, the Corps agreed to reallocate to local water supply some 22 percent of Lanier's storage capacity—enough to cover the entire National Mall in water almost 800 feet deep. Florida and Alabama protested, and the D.C. Circuit rejected the plan as

[1] In this context, "storage" refers to the amount of space in Lake Lanier allocated to a particular project purpose. App. 10a. As we discuss below, the Corps releases water from the reservoir to serve the purpose for which the space has been allocated.

unlawful under the Water Supply Act ("WSA"). The WSA authorizes the Corps to modify reservoir allocations to allot storage for local water supply. *Id.* § 390b(b). However, it requires Congressional approval if the reallocation would work a "major * * * operational change[ ]" to the reservoir. *Id.* § 390b(d). The D.C. Circuit concluded that a 22 percent reallocation was a major operational change and that the plan accordingly required Congressional approval. *Southeastern Fed. Power Customers, Inc.* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 898 (2009); App. 190a-212a.

The Eleventh Circuit has now issued a decision that contradicts *Geren* and provides the Corps broad discretion to reallocate storage without Congress's approval. Georgia asked the Corps to reallocate *34 percent* of Lanier's storage—a much larger reallocation than the one disapproved in *Geren*—to satisfy Atlanta's water demands. App. 66a. Consistent with its longstanding interpretation of its authority, the Corps refused. It found that such a large reallocation would "involve * * * major operational changes" and required Congress's approval under the WSA. App. 25a. But the Eleventh Circuit has now rejected that view. It held that the Corps has some measure of authority under an earlier statute to reallocate Lanier's storage; that the WSA merely "supplement[s]" that authority; and that the WSA provision requiring Congressional approval for "major operational changes" may be circumvented. App. 64a-67a, 76a-80a. It remanded, having given the Corps a green light to reallocate massive amounts of storage without obtaining Congress's imprimatur.

The decision below directly conflicts with that of the D.C. Circuit. It undercuts Congress's power to

control the Nation's reservoirs. It affects the competing interests of three states to a single stream of water—"a necessity of life that must be rationed among those who have power over it." *New Jersey* v. *New York*, 283 U.S. 336, 342 (1931). It will adversely impact important downstream ecologies in the river basin and limit the extent to which downstream states can benefit from hydropower and river navigation. And like an original action, it implicates "the manner of use" of "interstate lakes and rivers." R. Stern et al., *Supreme Court Practice* 242 (9th ed. 2007). This Court should grant the writ and hold that the D.C. Circuit was correct: Before the Corps can fundamentally reallocate a major federal water source to local supply at the expense of downstream needs, it must obtain the approval of Congress.

STATEMENT

A. The Affected Rivers and Lake Lanier.

1. The Chattahoochee River begins as a mountain spring on the Appalachian Trail in northeastern Georgia. App. 5a. Emerging from the Blue Ridge Mountains, the river flows past Atlanta and along the Georgia-Alabama border. *Id.* "At the Florida-Georgia border the Chattahoochee joins the Flint River and they become the Apalachicola River, which eventually flows into the Apalachicola Bay and the Gulf of Mexico." *Alabama* v. *U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1122 (11th Cir. 2005). The rivers and the areas they drain are referred to as the Apalachicola-Chattahoochee-Flint, or "ACF," Basin.[2]

The Chattahoochee is Atlanta's primary water source. But it is just as important to Florida and

[2] *See* www.sam.usace.army.mil/pa/acf-wcm/pdf/acf_map.pdf.

Alabama as a source of drinking water, water supply, hydroelectric power, recreation, and sustenance for riverine ecologies. "Southeastern Alabama relies upon the Chattahoochee for much of its water supply[.]" D. Stephenson, *The Tri-State Compact: Falling Waters & Fading Opportunities*, 16 J. Land Use & Envtl. L. 83, 85 (2000). The Apalachicola River "empties into the Apalachicola Bay, which provides approximately 90% of Florida's oyster harvest." *Id.* The Bay, in turn, is a critical nursery for the Gulf of Mexico—and one whose productivity depends on robust river flows. *See infra* 29. And the Apalachicola "has the highest species density of amphibians and reptiles in the North American Continent north of Mexico"; it is home to numerous protected species. *Georgia* v. *U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 n.6 (11th Cir. 2002).

2. Lake Lanier's history dates to 1925, when Congress asked the Corps to consider hydroelectric projects in the area. App. 5a. That led to the idea of a reservoir (Lake Lanier) and dam (the Buford Dam) on the Chattahoochee above Atlanta. App. 5a-6a.

Congress approved the reservoir plan, among hundreds of other reservoir projects, in omnibus authorizing legislation in 1945 and 1946. The second of those acts, the 1946 Rivers and Harbors Act ("RHA"), provided that the Buford project would be "prosecuted * * * in accordance with the report of the Chief of Engineers, dated May 13, 1946." Pub. L. No. 79-525, 60 Stat. 634, 635 (1946). That report, in turn, incorporated a Corps report by Brigadier Gen. James B. Newman Jr., known as the "Newman Report," that set out the details. App. 6a; *see* Docket No. 4 Exh. B, *Georgia* v. *U.S. Army Corps of Eng'rs*, No. 3:07-md-00252 (M.D. Fla. Apr. 12, 2007) (Newman Report's

text). The report observed that "[t]he principal value of the Chattahoochee River is as a source of power." App. 93a. It concluded that the Buford site was the best spot for "a large storage-power reservoir[.]" *Id.*

The report noted other "incidental" benefits of a reservoir, *id.*, including water supply for Atlanta. It observed that "[i]f the regulating storage reservoir * * * could be located above Atlanta, it would greatly increase the minimum flow in the river at Atlanta, thereby producing considerable incidental benefits by reinforcing and safeguarding the water supply[.]" App. 94a. Nothing in the report suggested that Congress or the Corps ever contemplated that water supply would be made available through direct withdrawals from storage at Lake Lanier.

3. Lake Lanier was completed in 1957. It had 692 miles of shoreline and conservation storage capacity[3] of 1,049,000 acre-feet—*i.e.*, enough to hold the quantity of water that would submerge 1,049,000 acres of land to a depth of one foot. App. 11a. None of that space was allocated to local water supply. App. 113a. On the contrary, as the District Court found, "both before and during construction of Buford Dam, the Corps consistently described the primary purposes of the project as flood control, navigation, and hydropower," and "the water-supply benefit discussed throughout the legislative history was the regulation of the river's flow." App. 113a, 163a.

B. The Water Supply Act.

In 1958, a year after Lanier was completed, Congress enacted the WSA. The Nation's federally-

[3] Lanier has *total* capacity of 2,554,000 acre-feet. The rest is for flood containment and so-called "inactive" storage.

owned reservoirs historically had not been used to store water for local supply; that was considered a parochial use, and the Corps did not think itself authorized to dedicate space in reservoirs for local use. *See* Docket No. 14-2 at 8 n.1, *In re Tri-State Water Rights Litigation*, No. 3:07-md-01 (M.D. Fla. June 6, 2007) ("*2002 Corps Memorandum*"). The WSA ushered in a sea change in federal water policy, authorizing the Corps to provide storage space for local water supply. 43 U.S.C. § 390(b). But Congress was careful not to give the Corps free rein. Instead, it required that the Corps obtain Congress's approval before agreeing to any storage plan that would effect "major * * * operational changes" at a reservoir:

> *Modifications of a reservoir project* heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section 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 as now provided by law. [*Id.* § 390b(d) (emphases added)].

C. The Shift To Direct Withdrawals at Lanier.

1. The Corps controls water-storage allocations at Lake Lanier, as it does at more than 500 reservoirs nationwide. *See* 33 C.F.R. § 222.5(o), & App. E (2011). The Corps' authority over storage allocations does not mean it owns the water or directly controls who can withdraw it downstream. It means, instead, that the Corps can assign reservoir space to given uses and operate the reservoir to support those uses—but only within limits specified by Congress.

Acting within those limits, the Corps retains or releases water according to plans designed to ensure that users with storage allocations will have water when they need it. App. 137a-138a.

2. For years (and with minor exceptions not relevant here),[4] none of Lake Lanier's storage capacity was dedicated to water supply. App. 113a. Indeed, the Corps explicitly recognized that no storage could be allocated to water supply under the RHA without "additional Congressional authorization." App. 145a. In 1955, for example, Gwinnett County, Georgia, a county northeast of Atlanta, asked permission to make withdrawals from Lanier. The Corps refused. Consistent with its longtime recognition that the intended water-supply benefit of Lanier was merely the regulation of the river's flow, App. 113a, the Corps concluded "that such withdrawals would affect the project's authorized purposes" and that the county "would have to seek permission from Congress for the withdrawals." App. 139a-140a.

Beginning in the 1970s, however, "the Corps's and the Georgia parties' definition of water supply in the Buford project changed considerably." App. 114a. Despite its previous acknowledgment that it could not do so, the Corps began making changes to storage at Lake Lanier, giving priority to local municipalities so they could make direct withdrawals from the lake and withdraw more water downstream. In 1973, the Corps agreed to let Gwinnett County withdraw up to 40 million gallons per day—an amount requiring about 40,000 acre-feet of storage—directly from Lake Lanier. App. 140a. The Corps

[4] Two cities were granted the right to withdraw comparatively small amounts from the lake because the reservoir inundated their existing water-intake facilities. App. 139a.

subsequently agreed to let two other Georgia cities, Cumming and Gainesville, withdraw 10 million and 20 million gallons per day, respectively. App. 141a-142a. And in the 1980s, the agency agreed to alter its operations so the Atlanta Regional Commission ("ARC") could withdraw 377 million gallons per day downstream. App. 141a. That contract was based on the Corps' determination that it could provide, incidental to power generation, 327 million gallons per day with no impact on hydropower. App. 170a-171a. The Corps agreed to provide releases sufficient to accommodate up to 50 million gallons per day *above* that threshold, thus effectively reallocating that amount from hydropower to water supply. *Id.* All of these contracts expired in 1989 but have continued as holdover arrangements. App. 142a.

Meanwhile, the Corps was studying how to meet Atlanta's growing water needs. In a 1989 report, the "draft PAC Report," it suggested formally allocating a massive amount of Lanier's storage—207,000 acre-feet—to local water supply. App. 136a. That would allow localities to withdraw 151 million gallons per day from the lake. It also would provide releases so that localities could withdraw 378 million gallons per day downstream. App. 175a-176a. The report noted the Corps' authority under the WSA, but stated that approval from Congress might be required because the allocation exceeded 50,000 acre-feet. App. 18a. The Corps intended to submit the report to Congress for approval under the WSA. App. 135a.

The draft PAC Report included a water-control plan that illustrates the practical effect of such a dramatic storage reallocation. The plan divided Lake Lanier's conservation storage pool into four levels, or "zones," by depth. App. 138a. In the zone

corresponding to the lowest lake levels—*i.e.,* drought periods—local water supply would be the dominant purpose, while hydropower was relegated to a "minimum level." *Id.* In other words, at the very times when water flow was most critical for downstream users, the Corps would be operating the reservoir to benefit Atlanta-area localities instead—a 180-degree change from Lanier's original operations.

D. The D.C. Circuit's Decision in *Geren*.

In 1990, Alabama filed suit in the Northern District of Alabama to challenge the draft PAC Report and Georgia localities' use of Lanier's storage. App. 143a. More litigation followed. In 2000, a group of federal power customers filed suit in Washington, D.C., alleging that the Corps had wrongfully diverted storage from hydropower generation. App. 145a. In 2001, Georgia sued the Corps in the Northern District of Georgia, seeking to compel the agency to agree to an even larger reallocation than that in the draft PAC Report. *Id.* And in 2008, the City of Apalachicola sued the Corps in the Northern District of Florida, alleging that the Corps' allocation changes were reducing flows into Florida and damaging Apalachicola Bay. App. 148a.

The D.C. Circuit's decision in *Geren* arose out of the federal power customers' lawsuit in D.C. federal court. In 2003, the Corps, the power customers, Georgia, and parties aligned with Georgia reached a proposed settlement in that case. App. 145a-146a. The settlement would have formally allocated storage in Lake Lanier for Gwinnett County, Gainesville, and ARC. App. 146a. Under its terms, those three entities would purchase some 240,000 acre-feet of storage, some for withdrawals directly from the lake

and some to enable downstream withdrawals in amounts greater than those incident to hydropower generation. *Id.* The settling parties relied on the WSA for authority, arguing that the WSA authorized reallocation for water supply storage and that the proposed reallocation neither "seriously affect[ed] the purposes for which the project was authorized" nor amounted to a "major * * * operational change[.]" 43 U.S.C. § 390b(d); *see* App. 24a. The D.C. District Court approved the settlement in 2004 over Florida and Alabama's vehement objections. App. 147a.

The D.C. Circuit reversed. *Geren*, 514 F.3d 1316; App. 190a-212a. The court observed that the settlement required the Corps to allocate up to "240,858 acre-feet of Lake Lanier's water storage" to local use. App. 194a. That was a reallocation of 22 percent if the water-storage baseline was zero—which the court concluded it was, given that zero was the amount allocated to water supply when the lake began operation—or 9 percent if the baseline was the existing withdrawals under holdover arrangements. App. 202a-203a. Either way, such a large reallocation was a "major * * * operational change" requiring Congressional approval. *Id.* The court wrote that "the WSA plainly states that a major operational change to a project falling within its scope requires prior Congressional approval." App. 200a-201a. And it concluded that "[o]n its face," reallocating more than 22 percent of storage "constitutes the type of major operational change referenced by the WSA[.]" App. 202a. The same conclusion would obtain if the reallocation amounted to 9 percent. App. 203a.

The D.C. Circuit reached this conclusion at Chevron step 1, based on the statute's plain terms, but it also cited other data points to confirm its holding.

First, the Corps had acknowledged at oral argument that a 22 percent reallocation "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval." App. 203a. Second, the Corps itself repeatedly had cast doubt on, or flatly rejected, the notion that it could make such massive reallocations without Congressional approval. The Corps acknowledged in the draft PAC Report, for example, "that Congressional approval might be required for reallocation of 207,000 acre-feet"—a smaller reallocation than the one proposed in the settlement. App. 201a. And in 2002, "the Corps rejected Georgia's request" that about 34 percent of Lanier's storage be reallocated to local use, concluding that "Georgia's request was of a magnitude that would 'involve * * * major operational changes' and therefore required prior Congressional approval." *Id.*; *see 2002 Corps Memorandum* at 1. That conclusion, the *Geren* court found, was "consistent with th[e] plain text" of the WSA. *Id.* The court concluded:

> [R]eallocation of over twenty-two percent (22%) of Lake Lanier's storage space * * * is large enough to unambiguously constitute the type of major operational change for which section 301(d) of the WSA requires prior Congressional approval. The same conclusion applies to a reallocation of approximately nine percent (9%) of Lake Lanier's storage space, for it too presents no ambiguity. [App. 205a].

Judge Silberman concurred. He would have found that the baseline water storage amount was 13.9 percent—*i.e.*, the amount Atlanta-area localities had been withdrawing under the holdover arrangements. App. 211a. He nonetheless found, as the majority

did in the alternative, that a 9 percent reallocation was a major operational change. App. 212a.

Georgia sought certiorari, arguing that the D.C. Circuit had made inappropriate factual findings. The Corps opposed, pointing out that the D.C. Circuit's "interpretation of the Water Supply Act does not conflict with any decision of * * * any other court of appeals." Br. for the Federal Respondents in Opposition, No. 08-199 (Nov. 17, 2008), 2008 WL 4918013, at *5. Certiorari was denied.

E. The Decision Below.

Meanwhile, the three other Lanier-related lawsuits were transferred to the Middle District of Florida by the Judicial Panel on Multi-District Litigation. App. 24a. Following the D.C. Circuit's remand in *Geren*, that action was consolidated with the others.

One of the issues before the District Court was Georgia's challenge to a related Corps decision involving Lake Lanier water storage. Georgia's governor asked the Corps in 2000, while two of the four Lanier-related lawsuits were pending, to reallocate 34 percent of Lanier's storage to local water supply—a much larger reallocation than the one the D.C. Circuit rejected in *Geren*. App. 178a. The Corps denied the request. *Id.*; *see 2002 Corps Memorandum* at 1. It found that Congress did not include water supply as an authorized purpose at Lanier, and that "Corps analysis of Georgia's request indicates that granting it would seriously affect the purposes for which the project was authorized and would involve major operational changes." App. 25a; *2002 Corps Memorandum* at 2. It accordingly could not "be accommodated without additional Congressional authorization." App. 145a.

The District Court approved the Corps' decision. As it explained, the "fundamental question" was whether a unilateral Corps decision granting Georgia's request would have violated the WSA. App. 89a. The court concluded that it would. After a detailed analysis of the legislative history, the court agreed that Congress did not include water supply as an authorized purpose at Lake Lanier. App. 168a. It also concluded that *Geren* was entitled to collateral estoppel effect as to what constituted a "major operational change": Because the D.C. Circuit had held that a 22 percent reallocation would violate the WSA without Congressional approval, it followed *a fortiori* that a 34 percent reallocation required Congressional approval too. App. 174a-175a.

The Eleventh Circuit reversed. The panel concluded that the Newman Report and similar documents contemplate that Lanier would be used for water supply, and that the amount of water supply might need to be adjusted over time. App. 45a-57a. From that premise, the panel concluded that Brigadier General Newman "intended for water supply to be an authorized, rather than incidental, use of the water stored in Lake Lanier." App. 51a. And because Lake Lanier's authorizing statute—the RHA—referred to a Corps report, and the Corps report in turn incorporated the Newman Report, the panel concluded that Congress shared Brigadier General Newman's intent. App. 47a. Indeed, the panel referred to the Newman Report *itself* as the "statutory language" governing Lake Lanier's operations. App. 50a.

The Eleventh Circuit then took the leap that set it at odds with *Geren*. While *Geren* had held that the WSA requires Congressional approval for "major operational changes," regardless of the Corps' under-

lying authority to adjust allocations, *see* App. 202a-203a & n.4, the Eleventh Circuit held just the opposite: that to the extent the Corps had underlying authority to adjust allocations, those changes would not count as "changes" at all—much less major operational changes requiring Congressional approval. App. 65a-67a, 76a-80a. Thus, for example, the panel wrote that the Corps erred in rejecting Georgia's request for a 34 percent reallocation because "[i]t failed to recognize that the [RHA] * * * explicitly contemplated that the Corps was authorized to increase water supply usage over time as the Atlanta area grew *and that this increase would not be a change from Congressionally contemplated operations at all*." App. 65a (emphasis added). And it wrote that the Corps should consider only reallocations made "pursuant solely to the WSA"—not reallocations made using the Corps' purported RHA authority—in deciding whether a change constituted a "major operational change." App. 76a n.35. The panel so concluded based on its view that the WSA merely "constitutes a supplement to any authority granted by the 1946 RHA." App. 13a.

According to the Eleventh Circuit panel, then, the WSA—and its mandates, such as the Congressional approval requirement—are a mere second layer of authority; to the extent the Corps may make operational changes at Lanier under the RHA, the WSA is never triggered. Indeed, the panel attempted to distinguish *Geren* on that very basis. It wrote that *Geren*'s 22-percent-reallocation holding was not entitled to collateral-estoppel effect because *Geren* did not consider the extent of the Corps' authority under the RHA. App. 79a. According to the Eleventh Circuit, "this difference means that any water

the Corps finds it is authorized to supply pursuant to the RHA is separate from the water it is authorized to supply pursuant to the WSA, *and that this RHA-authorized water supply would not count against the Geren court's 22% limit*." *Id.* (emphasis added).

The Eleventh Circuit remanded to the Corps for a determination of precisely how much reallocation authority the agency has when its purported RHA authority is added to its "supplemental" WSA authority. App. 83a-84a. The court ordered the agency to make that decision within one year. App. 85a.

REASONS FOR GRANTING THE PETITION

1. The Court should grant the writ, and reverse the erroneous decision below, because the Eleventh Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"—indeed, a decision with respect to the same body of water. S. Ct. R. 10(a). The Eleventh Circuit's decision cannot be reconciled with the D.C. Circuit's decision in *Geren*. It is in conflict with this Court's cases. And the divide between the circuits is one that time alone will not repair; the conflict will percolate no further because all cases regarding Lanier have been consolidated in the Eleventh Circuit. Instead, without this Court exercising its jurisdiction, the conflict between three sovereign states as to this body of water will fester.

2. Review also is warranted because the issue on which the circuits have divided is an important question of first impression for this Court. The WSA is of national importance: It fundamentally changed the way federal reservoirs are used, and the Corps relies on it to justify water allocations across the nation. This Court has never construed the WSA.

And the Eleventh Circuit has now inappropriately limited it, truncating a provision designed to maintain Congressional control over an important national resource and handing that control to the Corps. This Court's guidance is needed.

3. Nor can there be any doubt that this case carries public ramifications sufficiently important to warrant the exercise of certiorari jurisdiction. The case has driven a wedge between three states. As the court below recognized, "[t]he stakes are extremely high" and the case "is of the utmost importance to the millions of power customers and water users that are affected by the operations of the project." App. 84a. Indeed, if the decision below stands, it will have a profound effect on the ACF Basin because water reserved for direct withdrawal is not available for release to support downstream hydropower, navigation, and ecologies. The writ should be granted.

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND CANNOT BE RECONCILED WITH THIS COURT'S CASES.

A. The Decision Below Conflicts With *Geren*.

1. Certiorari review is warranted here "to resolve a conflict among the Circuits." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011); S. Ct. R. 10(a). *Geren* and the decision below addressed the same question—namely, the extent of the Corps' authority to unilaterally alter Lake Lanier's storage to provide more water supply for Georgia residents. And they reached diametrically opposed conclusions:

- The D.C. Circuit held that WSA Section 301(d) requires the Corps to obtain Congressional approval for a "major * * * operational change[ ]" in-

volving water supply, regardless of the Corps' authority to adjust water storage allocations as a general matter. App. 201a-203a. The Eleventh Circuit, in direct contrast, held that WSA Section 301(d) imposes no such requirement where the Corps has some independent measure of authority to adjust storage allocations. App. 75a-76a, 79a.

- The D.C. Circuit held that the WSA restricts the Corps' authority to make significant changes from a reservoir's original storage allocation without Congressional approval. App. 201a-203a. The Eleventh Circuit, in direct contrast, held that the WSA is nothing more than a source of "supplemental" authority for the Corps to take such actions. App. 64a, 83a.

- The D.C. Circuit found that the Corps correctly concluded that the WSA required it to obtain Congressional approval before reallocating 34 percent of the lake's storage. App. 201a-202a. The Eleventh Circuit held that the Corps was wrong to so conclude. App. 63a-65a. Indeed, the D.C. Circuit accepted as a correct understanding of the WSA the very Corps analysis—the 2002 Army memorandum—that the Eleventh Circuit *rejected and vacated* in the decision below. *Compare* App. 201a-202a (*Geren*) *with* App. 63a-65a (opinion below).

That is a "direct conflict." *Stern & Gressman* 242. And it has important implications for the division of authority between Congress and an agency, as we discuss *infra* at 25. That sort of disagreement among the circuits about the distribution of federal authority warrants this Court's review.

2. The Eleventh Circuit attempted to distinguish *Geren*, asserting that "a different issue" was presented in that case because "the *Geren* court considered only the Corps' authority under the WSA, not its authority under the RHA." App. 79a. The panel misunderstood the D.C. Circuit's opinion. *Geren* recognized that the Corps might be able to muster authority to make some limited water storage reallocations, but it explicitly declined to consider the question, explaining that it "ha[d] no occasion to opine whether the Corps' previous storage reallocations were unlawful." App. 203a & n.4. Whether the Corps enjoyed such authority was irrelevant because, regardless, the WSA was clear: If the Corps desired to make a *major* operational change, it needed Congressional approval. App. 200a-203a. The D.C. Circuit's conclusion is quite correct, as we discuss *infra* at 21. More important for present purposes, the D.C. Circuit's analysis is squarely at odds with the Eleventh Circuit's holding that the WSA's "major operational change" provision is not implicated to the extent that the Corps has a separate source of authority for water reallocation. Under the Eleventh Circuit's decision, the D.C. Circuit engaged in a pointless exercise in rejecting the far smaller 2004 proposed water reallocation.

3. Review of this circuit split is warranted now because it is already fully articulated and is unlikely to deepen or disappear. This is not a situation where similar cases are working their way through the Courts of Appeals, making it worthwhile for this Court to await " 'further study' " by those intermediate tribunals. *Stern & Gressman* 246 (quoting *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.)). On the contrary, all cases relating to the

Corps' WSA authority over Lake Lanier—including the case on remand from the D.C. Circuit's decision in *Geren*—have been consolidated in the Eleventh Circuit. App. 26a. That court is the one that created the circuit split, and it has denied a petition for rehearing en banc. The divide between the circuits on the WSA's scope—and accordingly on the degree of control Congress can exercise over federally operated waters—will not be resolved unless this Court resolves it.[5]

B. The Decision Below Is Incorrect And In Conflict With This Court's Cases.

1. Certiorari review is particularly appropriate here because the decision below is incorrect and in conflict with this Court's teachings. The WSA provides that storage-related reservoir modifications for water supply "which would involve major * * * operational changes shall be made *only* upon the approval of Congress as now provided by law." 43 U.S.C. § 390b(d) (emphasis added). That command is simple and broad, as the D.C. Circuit recognized: Any time a storage reallocation to water supply involves "major operational changes," the Corps must obtain Congressional approval, full stop. App. 200a-203a. But the Eleventh Circuit held that the WSA merely "supplement[s]" purported pre-existing Corps authority to allocate reservoir storage for local water supply, and that any changes the Corps was authorized to make under that pre-existing authority

[5] Nor could the issue disappear on remand from the Eleventh Circuit to the Corps. The Corps has been instructed that it possesses the authority to allocate water under the RHA, potentially unconstrained by the WHA's "major operational change" limitation. That instruction renders whatever the agency may do on remand necessarily deficient.

"would not count" in determining whether a major operational change occurred. App. 79a, 83a. It held, in other words, that the Corps must seek Congressional approval for a subset of major operational changes, but not for all of them.

That was error. It is, of course, a "settled principle[ ] of statutory construction" that if "statutory text is plain and unambiguous," courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Thus where "[n]othing in the statutory context requires a narrowing construction," none is appropriate; the courts "must give effect to the text congress enacted." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008). Here the WSA requires Congressional approval for "major * * * operational changes" involving local water-supply storage. 43 U.S.C. § 390b(d). That means *all* major operational changes, not some. As this Court said in *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980): "The question before us is whether the phrase * * * means what it says, or whether it should be limited to some subset[.] * * * Given that Congress attached no modifiers to the phrase, the plain language of the statute" must govern.

2. The Eleventh Circuit's contrary conclusion rests on the notion that if the Corps enjoys authority to change water allocation to some extent, then any change it chooses to make using that authority cannot be "major," and does not count toward any calculus of whether a larger change is "major." App. 65a, 79a; *see supra* at 15-17. That is simply not so. As the D.C. Circuit recognized in *Geren*, whether a change is "major" is a matter of degree having nothing to do with whether some quantum of change was *authorized*. App. 200a-203a.

The Eleventh Circuit also went further, asserting that if the RHA authorizes the Corps to reallocate some storage to water supply, then "such reallocations to water supply *arguably do not actually constitute a 'change' of operations at all*." App. 80a (emphasis added); *see also* App. 65a (asserting that the RHA "explicitly contemplated" that Corps increases to water-supply storage at Lake Lanier "would not be a change from Congressionally contemplated operations at all"). But a change is a change. If the Corps alters the allocation of storage in a reservoir, that is a "change," even if the Corps enjoyed authority under a pre-WSA statute to order it. The Eleventh Circuit's attempt to conflate change with authority is nonsensical. Under the court's reasoning, someone who changes his name has not actually "changed" it, so long as he received prior permission to do so.

The Eleventh Circuit thought its truncated reading of the WSA appropriate because—according to that court—the WSA merely provides additional reallocation authority on top of that provided by the RHA. App. 13a, 68a. The Eleventh Circuit was incorrect about the reallocation authority provided by the RHA, as we discuss below. But assuming *arguendo* that the RHA *did* provide the Corps with reallocation authority, the Eleventh Circuit's conclusion still would not follow. Imagine that the RHA were far more explicit than it actually is about the Corps' authority—that it provided, for example, that "the Corps is authorized to allocate storage to water supply at Lake Lanier." In that scenario the Corps might not need Congressional approval to make operational changes, but it still would need Congressional approval for "*major* * * * operational changes." 43 U.S.C. § 390b(d) (emphasis added). The code

could be read to "give effect to both provisions," and accordingly it *must* be so read. *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2674 (2009); *accord Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective."). The Eleventh Circuit's contrary conclusion was error.

3. The opinion below also is erroneous for a second reason: The RHA does not confer on the Corps the authority to reallocate Lake Lanier's storage for water supply, as the District Court correctly recognized. In an exercise of legislative history run riot, the Eleventh Circuit plucked snippets from various Army Corps reports—which it referred to, inaccurately, as the "statutory language"—and concluded that local water supply was an "authorized * * * use of the water stored in Lake Lanier." App. 50a-51a. But even if the Eleventh Circuit were correct about that—which it was not—it would not follow that the RHA provides the Corps the authority to reallocate water storage for that use. In fact, as the District Court found, a fair reading of the contemporaneous Corps documents reveals that "the water-supply benefit discussed throughout the legislative history" is merely "*the regulation of the river's flow*." App. 113a (emphasis added). The RHA, in other words, contemplated that Atlanta would receive a more regular supply of water from the Chattahoochee River due to the Corps' regular releases from Buford Dam for electrical power generation. That is a far cry from providing the Corps authority to alter storage allocations and to thereby enable massive withdrawals of reservoir water for local water-supply uses. The RHA and the reports to which it refers say nothing about storage for water supply, as the Corps

itself consistently recognized in the decades after the RHA's enactment. *See supra* at 9.

II. THE QUESTION PRESENTED IS AN ISSUE OF FIRST IMPRESSION INVOLVING AN IMPORTANT FEDERAL STATUTE.

Certiorari review is appropriate to resolve "important" statutory questions "of first impression in this Court," *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968)—especially when the lower court's decision bears directly on "the scope of the [agency's] authority," *Hodgson* v. *Local Union 6799*, 403 U.S. 333, 336 (1971), and runs counter to the agency's long-held view of its statutory powers. *See*, *e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 202 (1974) (granting certiorari "because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established [agency] policy").

This case meets that description in full. The WSA is an important statute—it ushered in a fundamental change in federal water-supply policy, and the Corps has relied on it to reallocate storage at nearly four dozen reservoirs[6]—and yet this Court has never construed it. And the decision below certainly bears on "the scope of the [Corps'] authority" under the WSA. *Hodgson*, 403 U.S. at 336. Indeed, it dramatically expands that authority, altering the balance of power between Congress and a federal agency. Under the WSA as written, Congress must ensure that storage reallocations that constitute a "major operational change" always meet with its approval—a sensible approach, given the sweeping significance

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[6] Congressional Research Serv., *Using Army Corps of Engineers Reservoirs for Municipal & Industrial Water Supply: Current Issues* 2 (Jan. 4, 2010).

of water-storage policies, the intricate balancing that must take place between a variety of interests, and the impacts on downstream states. But under the Eleventh Circuit's novel interpretation, there will be a subset of reallocations that work a "major operational change" under the plain meaning of that term—and yet Congress will have no opportunity to sign off. That approach allows "the administrative agency [to] usurp[ ] the legislative function" by arrogating to itself a decision-making role Congress explicitly chose *not* to delegate. *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

Finally, the judgment of the Court of Appeals is "inconsistent with long-established [agency] policy." *Morton*, 415 U.S. at 202. For more than four decades, the Corps consistently explained that a reallocation to local water supply at Lake Lanier—and especially a reallocation of the magnitude sought by Georgia here—"would require Congress's approval" under the WSA. App. 166a; *see also* App. 140a. It reiterated that conclusion in the 2002 memorandum rejecting Georgia's request. App. 25a. The Eleventh Circuit's decision is manifestly at odds with that longtime agency understanding of its own authority. And the court's novel approach has the potential to upset settled expectations across the country: If the Corps can rely on snippets from yellowed engineering reports to blow past the WSA's limits, then it can fundamentally alter storage allocations at reservoirs nationwide without seeking Congress's imprimatur. That is not what Congress envisioned when it carefully calibrated how reservoirs were to be used and placed a hard cap on the Corps' authority to make unilateral changes.

III. THE COURT SHOULD RESOLVE THIS MASSIVE CROSS-BORDER DISPUTE INVOLVING THREE SOVEREIGN STATES AND MILLIONS OF WATER USERS.

Even aside from the stark—and static—conflict between two appellate courts over the extent of the Corps' authority to reallocate water storage, this case is sufficiently important to warrant the Court's exercise of certiorari jurisdiction. Three states have been fighting over a critical resource for decades, billions of dollars are at stake, and there is no end in sight. The Court's guidance is necessary here, just as it is in original-jurisdiction cases involving water rights, to resolve a "controvers[y] between sovereigns which involve[s] issues of high public importance." *United States* v. *Texas*, 339 U.S. 707, 715 (1950).

1. This Court often grants certiorari where the case presents a dispute of public importance. *Pharmaceutical Research & Mfrs.* v. *Walsh*, 538 U.S. 644, 650 (2003); *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220 (1957). Specifically, the Court has long recognized that cases involving allocation of natural resources, including land and water, merit its careful review. *United States* v. *Coleman*, 390 U.S. 599, 601 (1968).

This is such a case. Millions of people rely on the water flowing from Lake Lanier. That water is "critically important to communities throughout the region as a primary source of drinking water, hydroelectric power, and local impoundment, as well as industrial transportation, recreation and many other uses." Stephenson, *supra*, at 84. It presently provides the primary water source for metro Atlanta's 4.5 million people. *See supra* at 5. It is a crucial resource for southeastern Alabama. *See supra* at 6.

And in Florida, it is the lifeblood of the highly productive Apalachicola River and Apalachicola Bay.

The Apalachicola River requires vigorous flows to support a diverse array of wildlife, including commercially important fish populations and a number of endangered and threatened species. *See* Docket No. 193 Exh. 2 at 4-8, *In re MDL-1824 Tri-State Water Rights Litigation*, No. 3:07-md-01 (M.D. Fla. Jan. 23, 2009) ("*Light Declaration*"). The Bay, for its part, "is an exceptionally important nursery area for the Gulf of Mexico." Florida Dep't of Envtl. Protection, *About the Apalachicola National Estuarine Research Reserve & Associated Sites*.[7] "Over 95% of all species harvested commercially and 85% of all species harvested recreationally in the open Gulf have to spend a portion of their life in estuarine waters." *Id.* And that productivity "is dependent on the Apalachicola River to carry fresh water and essential nutrients downstream to feed estuarine organisms." Apalachicola Riverkeeper, *Apalachicola River & Bay Facts*.[8] As one commentator observed, "the recreational fishing industry in the eastern Gulf, which accounts for an economy of several billion dollars annually, owes much of its success" to the conditions created by the Apalachicola's flows. J.B. Ruhl, *Water Wars, Eastern Style: Divvying Up the Apalachicola-Chattahoochee-Flint River Basin*, J. Contemp. Water Res. & Educ. (June 2005), at 47. That is why Florida has invested hundreds of millions of dollars to protect the ecological integrity of the River and Bay. *See*, Docket No. 193 Exh. 3 at 3-

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[7] *Available at* http://www.dep.state.fl.us/coastal/sites/ apalachicola/info.htm.

[8] *Available at* http://www.apalachicolariverkeeper.org/ Apalachicola%20River%20and%20Bay%20Facts.pdf.

4, *In re MDL-1824 Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla. Jan. 23, 2009).

The reallocation requested by Georgia would severely strain these resources and undermine Florida's investment. The Eleventh Circuit itself has recognized that much of the "water released for municipal purposes is consumed and not discharged into the river," and that such withdrawals "have a practical effect" upon flows at points south. *Georgia*, 302 F.3d at 1251-52. The District Court in this case found that "low flows in the Apalachicola River are at least to some extent caused by the Corps's operations in the [river] basin" and that "those low flows cause harm to the creatures that call the Apalachicola home." App. 157a. Indeed, those low flows "harm not only wildlife," but also "navigation, recreation, water supply, water quality, and industrial and power uses downstream." *Id.*

It also is not simply Georgia's *use* of Lake Lanier's reallocated water that causes ill effects downstream; it is the storage reallocation itself. When the Corps structures its operations to retain water in Lake Lanier and release it for local water supply instead of for hydropower, that affects how much water flows downstream, and at what intervals. The resulting low-flow conditions lead to devastating consequences for the ecology and species of the Apalachicola River and Bay. Among other things, they eliminate those water bodies' hydrologic connections to stream and marshland habitats—thus cutting many species of fish off from habitats they must access to survive—and increase salinity in the Bay and portions of the River. *Light Declaration* at 4-7.

2. These sorts of impacts explain why all parties agree this is a singularly important case. Respondent Georgia told this Court, in the course of seeking review in *Geren*, that "[h]ow the storage capacity of Lake Lanier is to be allocated between conflicting interests is an issue of vital importance to the State of Georgia, the Water Supply Providers, the Power Customers, and the Corps." Pet. for a Writ of Certiorari, No. 08-199 (Aug. 13, 2008), 2008 WL 3833287, at *16. Georgia told the court below that "a failure to allocate storage in Lake Lanier to water supply would cost Georgia 680,000 jobs, $127 billion in wages, and $8.2 billion in state revenues." Br. for Appellants 81, *In re: MDL-1824 Tri-State Water Rights Litigation*, Nos. 09-14657-G *et seq.* (11th Cir. Mar. 31, 2010). And Georgia asserted that any ruling requiring the Corps to go to Congress for reallocation approval would impose "massive," "devastating," "staggering," and "crippling" harm on the Georgia parties. *Id.* at 77-78. Respondents thus can hardly deny that this case has "importance warranting certiorari review." *Stern & Gressman* 268.

* * *

This is a momentous case for all concerned. If it involved a direct contest among the three States for equitable allocation, there is little doubt that the Court would view it as justifying invocation of this Court's original jurisdiction, for it is "a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 869 (2010) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983)). The same rationale militates in favor of certiorari review here.

CONCLUSION

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

Respectfully submitted,

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APPENDIX A

In the

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14657

In Re:

MDL-1824 TRI-STATE WATER RIGHTS LITIGATION.

Appeals from the United States District Court
For the Middle District of Florida

(June 28, 2011)

Before MARCUS and ANDERSON, Circuit Judges, and MILLS,* District Judge.

PER CURIAM:

The Georgia Parties,[1] Gwinnett County, Georgia, and the United States Army Corps of Engineers ("the Corps") appeal from the Middle District of Florida's grant of summary judgment in this consolidated suit. The appeal arises from more than 20 years of litigation involving the above parties as well as the States of Alabama and Florida, Alabama Power Company,

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

[1] The designation "Georgia Parties" refers to the State of Georgia, the City of Atlanta, Fulton County, DeKalb County, the Cobb County-Marietta Water Authority, the City of Gainesville, the Atlanta Regional Commission, and the Lake Lanier Association. Gwinnett County, Georgia appeals separately and is not included in this denomination.

the City of Apalachicola, Florida, and Southeastern Federal Power Customers, Inc. ("SeFPC"), a consortium of companies that purchase power from the federal government. All of the underlying cases[2] relate to the Corps' authority to operate the Buford Dam and Lake Lanier, the reservoir it created, for local water supply. In its order, the district court found that the Corps' current operation of the Buford Project—Buford Dam and Lake Lanier collectively—had allocated more than 21% of Lake Lanier's storage space to water supply. The court determined that such an allocation exceeded the Corps' statutory authority and ordered the Corps to drastically reduce the quantity of water that it made available for water supply. The court's summary judgment order also affirmed the Corps' rejection of Georgia's 2000 request for additional water supply allocations to meet the needs of the localities through 2030. The court stayed its order for three years to give the parties time to reach a settlement or to approach Congress for additional water supply authority.

On appeal, the parties argue several jurisdictional matters. Alabama and Florida[3] contend that this Court does not have appellate jurisdiction to hear the

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[2] The four underlying cases are *Alabama v. United States Army Corps of Engineers*; *Southeastern Federal Power Customers, Inc. v. Caldera*; *Georgia v. United States Army Corps of Engineers*; and *City of Apalachicola v. United States Army Corps of Engineers*.

[3] The State of Alabama, the State of Florida, Alabama Power Company, and the City of Apalachicola have written a joint brief in this case. The designation "Alabama and Florida" refers to all four parties. The designation "Appellees" in this opinion refers to these four parties and SeFPC. The Corps is also an appellee in *Georgia,* but for the sake of clarity it will always be referred to by name.

appeal of three of the four underlying cases because there is no final judgment in the cases and pendent jurisdiction is inappropriate. The Georgia Parties and the Corps argue that the district court lacked jurisdiction over these three matters because there was no final agency action, and, therefore, the Administrative Procedures Act ("APA") did not provide for judicial intervention at this juncture.

The parties also assert a number of substantive claims. The Georgia Parties argue that the district court erred by concluding that the Corps lacked authority to allocate substantial quantities of storage in Lake Lanier to water supply on the basis of the legislation that authorized the creation of the Buford Project, the 1946 Rivers and Harbors Act ("RHA"), Pub. L. No. 79-525, 60 Stat. 634 (1946). Although not in agreement with the Georgia Parties that water supply for the Atlanta area is an authorized project purpose under the RHA, the Corps does argue that the district court underestimated its authority to accommodate the water supply needs of the Atlanta area. The Georgia Parties and the Corps both assert that the district court erred by misinterpreting the scope of the Corps' authority under the 1958 Water Supply Act. The Georgia Parties and the Corps urge this Court to remand the case to the agency to make, in the first instance, a final determination of its water supply authority. Gwinnett County also individually asserts statutory, constitutional, and contractual claims relating to authority granted to it for its current withdrawals from Lake Lanier.

For the reasons explained below, we hold: First, the district court erred in finding that it had jurisdiction to hear Alabama, SeFPC, and Apalachicola because the Corps has not taken final agency action. The

three cases therefore must be remanded to the Corps in order to take a final agency action. Second, the district court and the Corps erred in concluding that water supply was not an authorized purpose of the Buford Project under the RHA. The Corps' denial of Georgia's 2000 water-supply request is therefore not entitled to Chevron deference, and the request must be remanded to the Corps for reconsideration. Third, the district court erred in finding that the 1956 Act, which authorized the Corps to contract with Gwinnett County to withdraw 10 million gallons of water per day, expired after 50 years. Gwinnett County's contractual and just-compensation claims are without merit. Fourth, we also provide certain instructions to the Corps on remand. And finally, the Corps shall have one year to make a final determination of its authority to operate the Buford Project under the RHA and WSA. Our opinion is organized as follows:

FACTS AND PROCEDURAL HISTORY

The facts of this appeal are intertwined with the history of Buford Dam and Lake Lanier. Buford Dam sits on the Chattahoochee River, approximately forty miles upstream of Atlanta. The Chattahoochee's headwaters are in Northeastern Georgia in the Blue Ridge Mountains. The river flows southwest to Columbus and then along much of the length of the Georgia–Alabama border and into the Florida Panhandle, where it combines with the Flint River to form the Apalachicola River. The Chattahoochee, Flint, and Apalachicola Rivers together are referred to as the ACF Basin.

The Corps first began surveying the ACF Basin for suitable sites for hydroelectric facilities at the request of Congress in 1925. River and Harbor Act of 1925, Pub.L. No. 68–585, ch. 467, 43 Stat. 1186, 1194 (Mar. 3, 1925). As a result of this survey, the Corps produced a report in 1939. *See* H.R. Doc. No. 76–342 (1939) [hereinafter "Park Report"]. The Park Report analyzed eleven projects at various stages of development in the ACF basin, including one at Roswell, Georgia, sixteen miles north of Atlanta. *Id.* ¶ 196. District Engineer Colonel R. Park, the report's author, referred to transportation, hydroelectric power, national defense, commercial value of ripari-

an lands, recreation, and industrial and municipal water supply as "principal direct benefits" of the various projects under consideration. Park Report ¶ 243. Col. Park noted that at the time the Atlanta area had no immediate need for increased water supply, though such a future need was "not improbable." Park Report ¶ 260. He stated that a large reservoir might have value as "an assured continuous water supply" due to the "continued rapid growth of the area." *Id.* Though he assigned the other direct benefits a monetary value, he declined to do so for water supply, presumably because the benefit of this purpose, unlike all of the others, could only accrue in the future, rendering any valuation at that time speculative. Congress adopted the Corps' proposals in the Park Report in full in its 1945 RHA. Pub.L. No. 79–14, 59 Stat. 10, 17 (1945).

In 1946, the Corps, in its "Newman Report," recommended certain amendments and revisions to the original plan for the ACF system, including combining several of the hydroelectric sites near Atlanta into one large reservoir at Buford, Georgia to increase power generation and to better regulate flows downstream. H.R. Doc. No. 80–300, ¶ 69 (1947) [hereinafter "Newman Report"]. Division Engineer Brigadier General James B. Newman noted that the Chattahoochee River would be an excellent source of hydropower. Newman Report ¶ 7. According to Newman, a large reservoir—what would become Lake Lanier—was needed to make the locks and dams downstream more effective. The Newman Report noted that the proposed dam at Buford would be valuable for the purpose of flood control because of the frequent flooding in the basin and the severe damage that previous floods had caused. The report

also explained that the various dams in the proposal would help keep flows continuous. These continuous flows would benefit navigation because they would allow barges to travel from Atlanta to Columbus and beyond, and they would assure a source of water supply for the City of Atlanta. Just as the Park Report had done before it, the Newman Report attempted to quantify the value of the benefits of the project. Only three value-calculated benefits were listed: power, navigation, and flood control. *Id.* ¶ 98, Table 10. It is probable that Newman, like Park, deemed there to be no immediate benefit from water supply, rendering any benefit purely prospective and any valuation of this benefit entirely speculative.

The Newman Report, at several junctures, spoke of the benefit that the dam would provide for water supply. The report concluded that the project would "greatly increase the minimum flow in the river at Atlanta," which would safeguard the city's water supply during dry periods. *Id.* ¶68. In discussing the operation of the dam, the Newman Report noted that releases of 600 cubic feet per second ("cfs") should be made during off-peak hours[4] in order to ensure a continuous flow of the river at Atlanta of not less than 650 cfs, even though this flow would have a slight detrimental effect on power generation. The report noted that this "minimum release may have to be increased somewhat as the area develops." *Id.* ¶ 80. The Report expected that any decrease in power value would be marginal and outweighed by the

[4] Off-peak hours are those time periods when the demand for power is relatively low. Hydroelectric plants attempt to minimize the amount of water released during off-peak hours so that power generation can operate at maximum levels during peak hours when the demand for power is high.

benefits of an "assured" water supply for the City of Atlanta. *Id.* The 1946 RHA stated that the project would be "prosecuted * * * in accordance with the report of the Chief of Engineers, dated May 13, 1946," Pub.L. No. 79–525, 60 Stat. 634, 635 (1946). Because that report incorporated the Newman Report in full, the Newman Report became part of the authorizing legislation for the project.

Congress continued to consider the purposes of the Buford Dam in debates about appropriations bills for the project's funding. The purposes mentioned most frequently in Congressional hearings were power, navigation, and flood control, but water supply was also discussed with some frequency. Then-mayor of Atlanta, William Hartsfield testified before a Senate subcommittee that water from the Chattahoochee was "necessary" but that Atlanta did not immediately need the water in the same manner as cities in more arid locations. *Civil Functions, Dep't of the Army Appropriation Bill 1949: Hearing Before the Subcomm. of the S. Comm. on Appropriations,* 80th Cong. 644 (statement of William B. Hartsfield, Mayor, Atlanta, Georgia). Congress debated whether Atlanta should be asked to contribute part of the cost of building the Buford Dam. Corps officer Colonel Potter testified that the Corps was not recommending that Atlanta be asked to pay because the services that would be provided in the field of water supply were all incidental to the purposes of hydropower and flood control and would "not cost the Federal Government 1 cent to supply." *Civil Functions, Dep't of the Army Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 82d Cong. 121–122 (1951) (exchange between Rep. Gerald Ford, Member, H. Comm. on Appropriations,

and Col. Potter, Corps officer). Congressman Gerald Ford presciently asked Colonel Potter whether it was foreseeable that one day in the future Atlanta would begin to request greater amounts of water from the project. *Id.* at 122. Col. Potter responded that the Corps would have to study the effect that such a request would have on power production. He said that the Corps would have to obtain additional water supply authorization if a request amounted to "a major diversion of water." *Id.* Ultimately, Atlanta was never asked to, and did not, contribute to the construction costs.

The Corps released its "Definite Project Report" for the project in 1949. The report provided a detailed discussion of the plans for the Buford Project and its operations. The report referred to flood control, hydroelectric power, navigation, and an increased water supply for Atlanta as "the primary purposes of the Buford project." U.S. Army Corps of Eng'rs: Mobile District, *Definite Project Report on Buford Dam Chattahoochee River, Georgia,* ¶ 48 (1949) [hereinafter "Definite Project Report"]. A later passage in the report referred to flood control, power generation, navigation, and water supply as "principle purposes of the Buford project." *Id.* ¶ 115. The report concluded by calculating and explaining the benefits of the various project purposes. As to water supply, it explained that the project would result in "[a] real benefit," but it did not estimate the monetary value because "definite evaluation of this benefit cannot be made at this time." *Id.* ¶ 124.

Buford Dam was constructed from 1950 to 1957, creating the reservoir known today as Lake Sidney Lanier. The Southeastern Power Administration ("SEPA"), the federal government agency from which

SeFPC purchases the power generated at the dam, paid approximately $30 million of the $47 million of construction costs. The creation of Lake Lanier inundated the water intake structures of the Cities of Buford, Georgia and Gainesville, Georgia. As a method of compensation, the Corps signed relocation agreements with the two municipalities authorizing water withdrawals directly from the reservoir—these agreements allowed Gainesville to withdraw 8 million gallons per day ("mgd")[5] and Buford 2 mgd.[6] Although no storage[7] was specifically allocated for water supply, the fact that the dam operated during "off-peak" hours, to the detriment of power generation, demonstrated that downstream water supply was a consideration. In accordance with the recommendations of the Newman Report, the Corps maintained the necessary minimum river flow at Atlanta by making off-peak releases of 600 cfs during these hours of the week.

During construction of the dam, Gwinnett County requested permission from the Corps to withdraw 10 mgd directly from Lake Lanier. The Corps denied the request, explaining that the approval of Congress was required for it to meet such a request. In 1955, the Corps stated to Congress that the proposed withdrawals would be in the public interest and

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[5] A contract to this effect was entered into on June 22, 1953. Contract Between the United States of America and City of Gainesville, Georgia for Withdrawal from Lake Sidney Lanier.

[6] A contract to this effect was entered into on December 19, 1955. Contract Between the United States of America and City of Buford, Georgia for Withdrawal from Lake Sidney Lanier.

[7] Storage refers to the amount of space in Lake Lanier dedicated to a particular project purpose. Lake Lanier is the reservoir for the Buford Project and provides space sufficient to store approximately 2.5 million gallons of water.

would not have a materially adverse effect on downstream interests or power output. F.G. Turner, Ass't Chief, Eng'g Div., U.S. Army Corps of Eng'rs: Mobile District, *Report on Withdrawal of Domestic Water Supply from Buford Reservoir* ¶ 1 (1955). The following year, Congress passed a law that granted the Corps authority to enter into a contract with Gwinnett County for the allocation of 11,200 acre-feet of storage for regulated water supply and granted the county an easement across government property for the construction and maintenance of a pumping station and pipelines. Pub. L. No. 84–841, 70 Stat. 725 (1956).

Construction was completed in 1957. Lake Lanier covers 38,000 acres and has 692 miles of shoreline. The large size of the lake allows for a substantial benefit in the form of recreation.

Lake Lanier is divided into three tiers, or pools, divided by elevation. The first tier extends from the bottom of the lake, at an elevation of 919 feet above sea level, to an elevation of 1,035 feet. This tier holds 867,600 acre-feet of "inactive" storage. The inactive pool is generally left untouched and saved for instances of severe drought. The next tier extends from an elevation of 1,035 feet to an elevation of 1,070 feet (1,071 feet in the summer) and contains 1,049,000 acre-feet (1,087,600 acre-feet in the summer) of conservation storage. The conservation pool generally provides the water that is used for all downstream purposes. The Newman Report contemplated that conservation storage would be used primarily for hydropower and repeatedly referred to it as storage for power. The final tier extends from an elevation of 1,070 feet (1,071 feet in the summer) to an elevation of 1085 feet. This tier provides 598,800 acre-feet of

flood storage. The flood pool is generally left empty so that it can accommodate excess water during flood conditions.

Buford Dam was constructed to release water from Lake Lanier through a powerhouse that generates hydropower. The powerhouse contains three turbines. Two of the turbines are large and release about 5,000 cfs when running. These two turbines operate during peak hours, when energy consumption is at its greatest. They are the most efficient source of power generation—generating 40,000 kilowatt hours ("kwh") originally and 60,000 kwh after improvements in 2004—and would be the only turbines used if a minimum off-peak flow at Atlanta were not a project concern. To accommodate this concern, the powerhouse also contains a third, smaller turbine which releases 600 cfs, generating approximately 7,000 kwh. At peak performance, the dam releases approximately 11,000 cfs of water into the river. However, when energy demand is low—so-called off-peak hours—only the small turbine is operated, allowing the dam to produce some energy while providing for a minimal continuous flow. The Corps can also release water through a small sluice gate, but this is typically done only when the small turbine is shut down for repairs or in cases of an emergency. In this manner, Buford Dam was designed to generate maximum power while also ensuring a minimum continuous flow of water downstream to accommodate water supply.

In 1958, Congress passed the Water Supply Act ("WSA"). The statute was designed to allocate some storage in multi-purpose projects like Buford to water supply. The policy underlying the statute was:

> to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

43 U.S.C. § 390b(a) (2011). To further that policy, Congress authorized the Corps to allocate storage in federal reservoirs for water supply, provided that the localities paid for the allocated storage. *Id.* § 390b(b). However, Congress placed the following limitation on its authorization:

> Modifications of a reservoir project heretofore athorized, surveyed, planned, or constructed to include storage as provided by subsection (b) of this section 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 as now provided by law.

Id. § 390b(d) (emphasis added). The policy of subsection (a) indicates that Congress aimed only to expand water supply allocations, not contract them by limiting previous authorizations. The articulation of the bounds of the statute's authorization makes no mention of a limit on previously granted water supply authorization. In the case of Buford, the WSA's grant of authority for water supply constitutes a supplement to any authority granted by the 1946 RHA.

In 1959, the Corps issued its Reservoir Regulation Manual for Buford Dam ("Buford Manual") as an appendix to the Corps' 1958 manual for the entire river basin. U.S. Army Corps of Eng'rs: Mobile District, *Apalachicola River Basin Reservoir Regulation Manual,* Appendix B (1959). The Buford Manual has not been updated and remains in effect today. The manual describes the technical features of the dam, including a description of the three tiers and their storage capacities, the size of Lake Lanier, and the general operation of the plant. It states that the project will be run to maximize releases of water during peak hours but will also utilize off-peak releases in order to maintain a minimum flow of 650 cfs at Atlanta.[8] *Id.* at B–13. The manual makes multiple mentions of regulations that are designed to ensure this minimum flow. *Id.* at B–18–19, B–22.

There was very little change in water supply operations at the Buford Project between 1960 and 1973. Only Gainesville and Buford withdrew water directly from Lake Lanier. Gwinnett, with which the Corps was authorized to contract, did not withdraw water directly from the reservoir. In the meantime, the City of Atlanta and DeKalb County withdrew water from the river downstream from the dam but made no recorded requests that the schedule of releases be altered to accommodate their needs. The Atlanta metropolitan area increased its water use from the Chattahoochee by 37% (from 117 mgd to 160 mgd) between 1960 and 1968. U.S. Army Corps of Eng'rs: Mobile District, *Final Environmental Impact Statement: Buford Dam and Lake Sidney Lanier, Georgia*

[8] The Manual categorizes 7 a.m.–11 p.m. on weekdays, 7 a.m.–10 p.m. on Saturday, and 9 a.m.–2 p.m. on Sunday as peak hours (for a total of 100 peak hours per week).

(Flood Control, Navigation and Power), Statement of Findings 14 (1974). This amount was still well below the amount released by the Corps to maintain a minimum off-peak flow. Moreover, between 1956 and 1969, the number of residences within two and a quarter miles of the reservoir doubled. *Id.* at 15. The growing water needs of Atlanta came to the attention of the Senate, which in 1973 commissioned the Metropolitan Atlanta Area Water Resources Management Study ("MAAWRMS") to develop a plan for the long-term needs of the Atlanta area. The study was conducted by the Corps, the Atlanta Regional Commission ("ARC"), the State of Georgia, and the U.S. Environmental Protection Agency in combination.

By the 1970s, it became clear that area localities desired greater access to water in Lake Lanier. The Corps determined that it could not grant permanent water allocation rights to the localities before the completion of the MAAWRMS. While the study was being performed, the Corps entered into a number of interim contracts for water withdrawal. The first water supply contract was given to Gwinnett County and allowed for the withdrawal of up to 40 mgd directly from Lake Lanier during the course of the study. Contract of July 2, 1973, Gwinnett Record Excerpts vol. 1, ACF004024. The contract cited the WSA for authority and was based on findings of the Corps' District Engineer that the proposed withdrawals would not have significant adverse affects on the other authorized purposes of the project. No mention was made of the 1956 Act, possibly because the Act authorized only 10 mgd and thus would not have been sufficient authority for the Corps' actions. In 1975, the county informed its bond investors that

the construction costs alone for its water supply facilities would be $28 million.

In 1975, the Corps concluded, and SEPA agreed, that the Buford Project could supply an annual average of 230 mgd of water for downstream withdrawal (with a maximum of 327 mgd in the summer) without significantly affecting hydropower generation. The Corps revised this number in 1979, concluding that by scheduling additional peak weekend releases it could raise the annual average to 266 mgd as an incident of power generation. In 1986, the Corps would again raise the figure for available water supply downstream incident to power generation, concluding that it could guarantee an annual average of 327 mgd by implementing a new water management system that had been proposed in the MAAWRMS.

The final report of the MAAWRMS was issued in September 1981. The report evaluated three alternative plans for dealing with Atlanta's increasing long-term water supply needs. The first alternative was to build a reregulation dam 6.3 miles below the Buford Dam. This new dam would store outflows released from Buford during peak operations and release them as needed for water supply. The study found that this alternative had the highest estimated ratio of benefits to costs. This alternative received the most support from federal and state agencies, and the study concluded it was best. The second alternative was to reallocate storage space in Lake Lanier for water supply. According to the study, in 1980, 10,512 acre-feet had been allocated to water supply, amounting to 14.6 mgd withdrawn directly from Lake Lanier. This alternative called for an increase of allocated storage space to 141,685 acre-feet by the

year 2010, allowing for a total withdrawal of 53 mgd from the lake. The final alternative was to dredge the Morgan Falls Reservoir, which lies downstream from Buford, and also reallocate 48,550 acre-feet of storage space in Lake Lanier for water supply by 2010.

In 1986, Congress, in the Water Resources Development Act, authorized the construction of a reregulation dam, the MAAWRMS' favored first alternative. Pub.L. No. 99–662, § 601(a)(1), 100 Stat. 4137, 4140–41. However, the project had previously not received approval from the Office of Management and Budget, which said that state and local money should be used to construct such a project, and Congress did not appropriate any funding towards the construction of the proposed reregulation dam. Shortly thereafter, the Corps determined that the second alternative of the MAAWRMS—reallocating storage in Lake Lanier instead of constructing a new dam—would be more economical. The change was based, at least in part, on an environmental study generated by new computer models that concluded that the costs of acquiring the land flooded by the reregulation dam could rise and make the first alternative less economical than originally thought. U.S. Army Corps of Eng'rs: Mobile District, *Additional Information, Lake Lanier Reregulation Dam* 2 (1988).

In the late 1980s, the Corps began to prepare a Post–Authorization Change Notification Report ("PAC Report") suggesting that the authorization for the new reregulation dam be set aside in favor of the reallocation of storage alternative. A draft of the PAC Report was completed in 1989. The draft recommended that 207,000 acre-feet be allocated to

water supply, allowing for 151 mgd to be withdrawn directly from Lake Lanier and 378 mgd (51 mgd more than the 327 mgd that the Corps determined was available as an incident of power supply) from the river downstream. This represented a significant increase from the 142,000 acre-feet of storage recommended by the second alternative of the MAAWRMS. The draft PAC Report also included a draft Water Control Manual that would have replaced the manual from 1958 and governed the Corps' water operations in the ACF basin. In this appeal, the Corps claims that the PAC Report's recommendations would have been made pursuant to authority from the WSA. The draft report itself noted the Corps' authority under the statute but stated that approval from Congress might be required due to the fact that the allocation exceeded 50,000 acre-feet.[9] The draft report estimated that the purchased

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[9] Internal policies require the Corps to obtain the approval of the Secretary of the Army for all storage allocations exceeding 15% of total storage capacity or 50,000 acre-feet, whichever is less. The parties have not made this Court aware of any internal regulations that set a threshold for allocations above which Congressional approval is required. However, the Corps had warned the preceding year that such a reallocation of storage might require Congressional approval:

> The Chief of Engineers has the discretionary authority to approve reallocation of storage if the amount does not exceed 50,000 acre-feet, or 15 percent of total usable storage, whichever is lower, and if the reallocation would not have a significant impact on authorized project purposes. [The reallocation contemplated in the MAAWRMS] would require the reallocation of 202,000 acre-feet of storage to meet the year 2010 peak demand of 103 mgd from the lake and 510 mgd from the river* * *. Therefore, the required reallocation is not within the discretionary authority of the Chief of Engineers to approve. It can only be approved by the [Assistant Secretary of the Army for Civil Works] if impacts are determined to be insignificant. We believe the power losses are significant and

storage in Lake Lanier would cost $49,360,600. The final PAC Report was never completed due to resistance and the initiation of a lawsuit by the State of Alabama.

The Corps followed the recommendation of the MAAWRMS to make water available for water supply in the interim before a long-term solution was reached, as it had done while the study was being completed, and it entered into a temporary water supply contract with the ARC. The contract was based on the Corps' revised determination that it could provide, incidentally to power generation, 327 mgd as a year-round average with no impact on hydropower. The Corps agreed to provide releases sufficient to accommodate up to 50 mgd in withdrawals above this 327 mgd threshold, for which the ARC would pay. The contract was renewed in 1989 but expired in 1990. Since then, the ARC has continued to withdraw water from the Chattahoochee on roughly the same basis as that specified in the contract, though it has generally not needed to withdraw more than 327 mgd.

The Corps signed several other water supply contracts in the 1970s and 1980s, all of which expired in 1990, but which roughly dictate the terms under which the localities have continued to withdraw water from the Buford Project. In 1978, the Corps agreed to terms with the City of Cumming, Georgia for the paid withdrawal of 2.5 mgd. In 1985, the amount was raised to 5 mgd, and in 1987 it was

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expect that Congressional approval would be required for the reallocation.

Letter from C.E. Edgar III, Major Gen., U.S. Army Corps of Eng'rs, to Harry West, Exec. Dir., ARC 5 (Apr. 15, 1988).

raised to 10 mgd. In 1987, the Corps signed a contract with the City of Gainesville, allowing the city to withdraw up to 20 mgd, up from the 8 mgd authorized in 1953 as just compensation. The contract required Gainesville to pay for the water that it withdrew in excess of 8 mgd. In 1988, the 1973 contract with Gwinnett County was supplemented, expanding the cap on withdrawals from 40 mgd to 53 mgd. All of the contracts signed in the 1980s specifically stated that they were interim contracts to satisfy water supply needs while the Corps was studying the issue and determining a permanent plan. As a component of their interim nature, the contracts explicitly stated that they did not create any permanent rights to storage space in Lake Lanier. The Corps originally cited the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701, as authority for these contracts, but it later deemed the statute to be ineffective in authorizing such transactions. Later contracts cited the Water Supply Act for authority.

On January 1, 1990, all of the interim contracts expired. The only remaining water supply allocations were the combined 10 mgd granted to Buford and Gainesville in the 1950s by the Corps as just compensation. However, the Corps continued to permit the localities to withdraw water from the Buford Project for water supply. Appellees refer to these water withdrawals as pursuant to "holdover" contracts.

In June, 1990, Alabama filed suit against the Corps in the Northern District of Alabama to challenge a section of the draft PAC Report and the continued withdrawal of water from the Buford Project by the Georgia Parties, which Appellees characterize as a

de facto reallocation of storage. This suit is the first of the four currently on appeal. In September of 1990, Alabama and the Corps moved jointly for a stay of proceedings, which was granted, to negotiate a settlement agreement. Florida and Georgia later intervened as plaintiff and defendant, respectively. The stay order at issue in *Alabama v. United States Army Corps of Engineers,* 357 F.Supp.2d 1313 (N.D.Ala.2005), required the Corps not to "execute any contracts or agreements which are the subject of the complaint in this action unless expressly agreed to, in writing, by [Alabama] and Florida." *Id.* at 1316. The stay provided that either side could terminate it at will. It did not discuss the continued water withdrawals of the Georgia Parties.

In 1992, Alabama, Florida, Georgia, and the Corps entered into a Memorandum of Agreement ("MOA") authorizing a comprehensive study of the water supply question and requiring the Corps to withdraw the draft PAC Report along with its accompanying Water Supply Reallocation Reports and Environmental Assessments. The MOA contained a "live and let live" provision that allowed the Georgia Parties to continue to withdraw water from the Buford Project at the level of their withdrawals in 1990, with reasonable increases over time. The provision made clear that it did not grant any permanent rights to the water being consumed. The MOA was originally set to last for three years but was extended several times.

In 1997, after the completion of a comprehensive study, the parties entered into the Apalachicola–Chattahoochee–Flint River Basin Compact ("ACF Compact"), which was ratified by Congress and the three states and replaced the MOA. Pub.L. No. 105–

104, 111 Stat. 2219 (1997). The ACF Compact included a provision allowing continued withdrawals similar to the live and let live provision in the MOA. The Compact created an "ACF Basin Commission" composed of the governors of the three states and a non-voting representative of the federal government, to be appointed by the President. The commission was charged with establishing "an allocation formula for apportioning the surface waters of the ACF Basin among the states of Alabama, Florida, and Georgia." *Id.* art. VI(q)(12), 111 Stat. at 2222. Under the Compact, existing water supply contracts would be honored, and water-supply providers could increase their withdrawals "to satisfy reasonable increases in the demand" for water. *Id.* art. VII(c), 111 Stat. 2223–24. The Compact initially was scheduled to expire December 31, 1998, but it was extended several times; it ultimately expired on August 31, 2003, when the Commission failed to agree on a water allocation formula. The stay of the *Alabama* case remained in effect through the duration of the Compact. In the meantime, the Corps continued to allow the Georgia Parties to withdraw water from the Buford Project. Because there were no contracts in place, the Corps froze the rates that it charged for water and continued to proceed on the basis of the prices that were set in the interim contracts of the 1980s. This rate scheme angered hydropower customers who purchased power produced by the project directly or indirectly from SEPA.

In December 2000, SeFPC filed suit under the APA against the Corps in the United States District Court for the District of Columbia, the second of the four suits currently on appeal. SeFPC alleged that the agency had wrongfully diverted water from hydro-

power generation to water supply, thereby causing SeFPC's members to pay unfairly high rates for their power. SeFPC sought a judicial declaration of the Buford Project's authorized purposes as well as compensation. In March 2001, the district court referred the parties to mediation, and Georgia was joined. In January 2003, SeFPC, the Corps, and the Georgia Parties agreed to a settlement in the case, which called for an allocation of 240,858 acre-feet (estimated to be 22% of conservation storage) to water supply for once-renewable 10–year interim contracts that could be converted into permanent storage if approved by Congress (or if a court deemed Congressional approval unnecessary). In exchange, the Georgia Parties agreed to pay higher rates for water, with the income being applied as a credit against the rates charged to SeFPC's members. The D.C. district court then allowed Alabama and Florida to intervene.

In October 2003, the *Alabama* court enjoined the filing of the settlement agreement in the D.C. case, finding that the agreement violated the stay in its case because the approval of Alabama and Florida was not obtained. The district court in the District of Columbia approved the Agreement in February 2004, contingent upon the dissolution of the Alabama court's injunction, rejecting Alabama and Florida's argument that the Agreement exceeded the Corps' authority conferred by Congress. *SeFPC v. Caldera,* 301 F.Supp.2d 26, 35 (D.D.C.2004). In April 2004, a panel of this Court stayed an appeal of the Alabama court's injunction to allow the Alabama district court to decide whether to dissolve or modify the injunction in light of the D.C. district court's order approving the Agreement. In the meantime, an initial appeal of

the D.C. district court's order in *SeFPC* by Alabama and Florida was denied by the D.C. Circuit Court of Appeals for lack of a final judgment. The Alabama district court denied a motion to dissolve the preliminary injunction, *Alabama,* 357 F.Supp.2d at 1320–21, but in September 2005, a panel of this Court held that the district court abused its discretion in granting the injunction and vacated the injunction. *Alabama v. U.S. Army Corps of Engineers,* 424 F.3d 1117, 1133 (11th Cir. 2005). Once this Court dissolved the injunction over the implementation of the Agreement, the D.C. district court in March 2006 entered a final judgment in *SeFPC,* and Alabama and Florida again appealed to the D.C. Circuit.

In *Southeastern Federal Power Customers, Inc. v. Geren,* 514 F.3d 1316, 1324 (D.C.Cir. 2008), the D.C. Circuit held that the settlement agreement exceeded the Corps' authority under the WSA. The parties to the settlement agreement argued that the Corps was authorized to enter into the settlement on the basis of its WSA authority alone, so the court specifically refrained from making any holdings on the basis of the RHA. *Id.* at 1324 n.4. The court found that "[o]n it's 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 WSA." *Id.* at 1324. After the circuit court's remand, the Judicial Panel on Multidistrict Litigation transferred the case, along with *Alabama* and several others, to the Middle District of Florida.

Meanwhile, in 2000, the State of Georgia submitted a formal request to the Corps to modify its operation of the Buford Project in order to meet the Georgia Parties' water supply needs through 2030. The

request was to withdraw 408 mgd from the river and 297 mgd directly from the lake, which, combined, required approximately 370,930 acre-feet of storage. In February 2001, nine months after the request was sent to the Corps and without a response from the Corps, the State of Georgia filed suit in the United States District Court for the Northern District of Georgia seeking to compel the Corps to grant its request, beginning the third of the four underlying cases. The Corps responded in April 2002 with a letter denying the request and an accompanying legal memorandum. Memorandum from Earl Stockdale, Deputy General Counsel, Department of the Army, to Acting Assistant Secretary of the Army for Civil Works: Georgia Request for Water Supply from Lake Lanier 1 (Apr. 15, 2002) [hereinafter "2002 Stockdale Memo"]. The 2002 Stockdale Memo concluded that the Corps lacked the authority to grant Georgia's request without legislative approval. The memo stated that water supply was not an authorized purpose of the Buford Project under the RHA. Further, it stated that even if water supply was authorized, the Corps would still lack the authority to make a storage allocation of the size requested because the reallocation "would involve substantial effects on project purposes and major operational changes." *Id.* The district court denied Florida's and SeFPC's motions to intervene in the case, but this Court reversed the denial and remanded for further proceedings. *Georgia v. U.S. Army Corps of Eng'rs,* 302 F.3d 1242, 1260 (11th Cir. 2002). On remand, Florida moved to dismiss or abate the proceedings; Alabama, Gwinnett County, the City of Gainesville, and the ARC moved to intervene; and Alabama moved to abate or transfer the proceedings. The

district court allowed Alabama to intervene as of right and the local governments to intervene permissively, and it held that the case would be abated pending the resolution of the *Alabama* case. *Georgia v. U.S. Army Corps of Engineers,* 223 F.R.D. 691, 699 (N.D.Ga.2004). On appeal, a panel of this Court in an unpublished decision affirmed the district court's decision to abate the case. *Georgia v. U.S. Army Corps of Engineers,* 144 Fed.Appx. 850 (11th Cir. 2005). The case was then consolidated into the multidistrict litigation in the Middle District of Florida.

In January 2008, the City of Apalachicola sued the Corps in the federal district court for the Northern District of Florida. This is the last of the four cases being considered as part of this appeal. This case was also consolidated into the multidistrict litigation.

While the litigation was pending, the Corps began an update of its plans and operations in the ACF Basin with a focus on whether it could continue to meet the current water supply needs of the localities. In order to answer these questions, specifically in light of the D.C. Circuit's *Geren* opinion, the Corps released a new legal memorandum by Earl Stockdale. Memorandum from Earl Stockdale, Chief Counsel, Department of the Army, to the Chief of Engineers: Authority to Reallocate Storage for Municipal & Industrial Water Supply Under the Water Supply Act of 1958, 43 U.S.C. § 390b 1 (Jan. 9, 2009) [hereinafter "2009 Stockdale Memo"]. In this memorandum, the Corps determined that the current water supply withdrawal under the "interim contracts" could be accommodated by a permanent reallocation of approximately 11.7% of the conservation storage in Lake Lanier. The Corps concluded

that such a permanent reallocation would not constitute a major operational change, and it would not seriously affect any project purposes.

The Middle District of Florida, in its consideration of the multidistrict litigation, divided the trial into two phases. Phase One, which is at issue here, pertained to the Corps' authority for its operations of the project. The plaintiffs in the four underlying cases moved for summary judgment, and the Corps filed an opposition and cross-motion for summary judgement in each case. On July 17, 2009, the court granted partial summary judgment to the plaintiffs in *Alabama*, *Apalachicola*, and *SeFPC* and to the Corps in *Georgia,* and it denied summary judgment to the Georgia Parties.

The court's order concluded that the Corps had exceeded its authority in its "de facto" reallocation of storage to accommodate current water supply withdrawals. *In re Tri–State Water Rights Litig.,* 639 F.Supp.2d 1308, 1350 (M.D.Fla.2009). The court first held that only two conclusions of the D.C. Circuit had preclusive effect on its judgment under the principle of collateral estoppel: (1) that the WSA applied to interim reallocations of storage; and (2) that a reallocation of 22% of Lake Lanier's total conservation storage was a major operational change under the WSA. *Id.* at 1343. Next, the district court concluded that there was virtually no authorization for the reallocation of water supply storage in the RHA and that the Corps' sole source of authority to allocate storage for water supply was the WSA.

The court went on to hold that the 2009 Stockdale Memo was a litigation document with post hoc analysis that was not part of the administrative record. *Id.* at 1347. Without the memo, the district

court concluded that the record contained insufficient support for the Corps' calculations of the amount of storage required for the water supply withdrawals as of 2006. The court attempted its own calculation of this figure and determined that the allocation was for 226,600 acre-feet or 21.5% of Lake Lanier's total conservation storage. *Id.* at 1350. In reaching its conclusion on the amount of storage necessary for the project's current operations, the court rejected several key figures that the Corps had used in making previous calculations, most notably rejecting the Corps' figure for the amount of water available for downstream withdrawal as a byproduct of hydropower operations. The district court held that the 21.5% allocation was a major operational change that exceeded the Corps' WSA authority. The court also concluded that the Corps' current operations exceeded the WSA because they seriously affected the authorized purpose of hydropower generation. Because the Georgia request represented an even larger water supply storage allocation than the current operations, the court also found that it exceeded the Corps' authority.

The district court directed the Corps to limit releases from the Buford Project to 600 cfs during off-peak hours and to discontinue all water supply withdrawals being made directly from Lake Lanier, except for the 10 mgd that Gainesville and Buford had been permitted to withdraw in their 1950s reallocation agreements.[10] The court stayed its order

[10] The district court failed to state its reasoning for choosing 600 cfs as the level for off-peak releases. Six hundred cfs was the rate of off-peak releases in the 1950s when the plant opened. The Newman Report explicitly contemplated raising off-peak releases so as to provide for a minimum flow of the river at Atlanta of 800 cfs by 1965. Newman Report ¶ 79. The

for three years, until July 17, 2012, to give the parties an opportunity to settle or to seek Congressional approval. In the meantime, the court allowed current withdrawals to continue but forbade any increases without the consent of all of the parties.

DISCUSSION

This opinion will begin by examining threshold jurisdictional questions, then will analyze the primary substantive matters involved, and finally will provide some guidance and instruction for the Corps pertaining to its analysis of its water supply authority on remand.

Part I. *Jurisdictional Matters*

A. Appellate Jurisdiction Over *Alabama*, *SeFPC*, and *Apalachicola*

Alabama and Florida argue that this court lacks appellate jurisdiction over the appeals in *Alabama, SeFPC*, and *Apalachicola*. They note that the district court did not render a final judgment in the cases, as the summary judgment order on the Phase One claims did not resolve the Phase Two claims in those cases. Appellees concede that this court has jurisdiction over the appeal in the *Georgia* case because the district court's order did amount to a final judgment in that case. However, Alabama and Florida argue that the claims in the cases are sufficiently distinct that extending pendent jurisdiction from *Georgia*

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district court fails to explain why it mandated that the level of off-peak releases not be raised from where it stood at the time of the Buford Project's construction in spite of the fact that the RHA explicitly contemplated such a raise and in spite of the additional water supply authority granted to the Corps by the WSA. As our discussion below will make apparent, the district court committed obvious error in this regard. *See infra,* note 19.

over the *Alabama*, *SeFPC*, and *Apalachicola* claims would be inappropriate.[11] We disagree. Issues in the three contested cases and the *Georgia* case are inextricably intertwined, rendering pendent jurisdiction proper. Even if this Court did not have pendent jurisdiction over these claims, this Court would still have jurisdiction because the district court's order amounted to an injunction.

"Pendent appellate jurisdiction is present when a nonappealable decision is inextricably intertwined with the appealable decision or when review of the former decision is necessary to ensure meaningful review of the latter." *King v. Cessna Aircraft Co.,* 562 F.3d 1374, 1379 (11th Cir. 2009) (internal quotation marks omitted). The exercise of such jurisdiction is only appropriate in "rare circumstances" so only "limited factual scenarios" will qualify. *Id.* at 1379–80. Thus, the critical inquiry is whether the appealable issue can be resolved without reaching the merits of the nonappealable issues. *Thomas v. Blue Cross & Blue Shield Ass'n,* 594 F.3d 814, 821 (11th Cir. 2010).

Alabama and Florida argue that the appeal of *Georgia* can be resolved without addressing the issues in the other cases. They argue that the district court found that Georgia's request for a reallocation of 34% of the available storage exceeded the Corps' authority because the argument was simply foreclosed by collateral estoppel and the preclusive

[11] A panel of this court rejected this argument in a January 20, 2010 order accepting pendent jurisdiction over the district court's entire order because "all issues raised by the appellants are inextricably intertwined." Order of Jan. 20, 2010 at 5. (Citing *Sierra Club v. Van Antwerp,* 526 F.3d 1353, 1359 (11th Cir. 2008); *Summit Med. Assocs., P.C. v. Pryor,* 180 F.3d 1326, 1335 (11th Cir. 1999)). We agree with the findings of the panel on this matter.

effects of the D.C. Circuit's *Geren* decision. Thus, they argue that the merits of the *Georgia* appeal can be determined without considering the underlying issues in the other cases.

Alabama and Florida misread both the district court's opinion and the opinion in *Geren.* The district court did not, and could not, simply dismiss the *Georgia* case on the basis of collateral estoppel. The Corps' authority to allocate storage for water supply depends on an analysis of both the RHA *and* the WSA. As noted above, the district court held that only two issues were precluded, and neither of them were the authority of the Corps under the RHA. In fact, the D.C. Circuit clearly stated that the issue of water supply authority in the RHA was not before it. *See Geren,* 514 F.3d at 1324 n. 4 ("The court, in responding to the Corps' defense of its approval of the Agreement, has no occasion to opine whether the Corps' previous storage reallocations were unlawful."). Thus, it is clear that the holding in *Geren*—i.e. that a 22% reallocation of storage to water supply constitutes a "major operational change" under the WSA—cannot operate as collateral estoppel with respect to the issue of the Corps' combined authority under the RHA *and* the WSA.[12]

Thus, the district court did not apply collateral estoppel in granting summary judgment against the Georgia Parties and holding that Georgia's 2000 request exceeded the Corps' authority. Rather, the district court came to an independent conclusion on this matter and found that water supply was not an authorized purpose under the RHA. *Tri–State,* 639

[12] Our complete discussion of the collateral estoppel effects of *Geren* can be found *infra* at Part VI.

F.Supp.2d at 1347. This finding was central to the court's holding in all four cases. Ultimately, it is impossible for this Court to rule on the merits of the appeal in *Georgia* without determining whether water supply was an authorized purpose of the Buford Project under the RHA. Thus, the issues raised in the various appeals are inextricably intertwined and pendent jurisdiction is proper in *Alabama*, *SeFPC*, and *Apalachicola*.

As an alternative basis for jurisdiction in the three cases (other than the *Georgia* case), this Court also has appellate jurisdiction over all of the underlying claims because the district court's order was an injunction. The order very clearly directs the parties to act, imposing a set of directives that, if disobeyed, could subject the parties to contempt proceedings. We are granted jurisdiction to review injunctions (or denials thereof) by 28 U.S.C. § 1292(a)(1). Alabama and Florida argue that this statute does not apply in this case because the district court's order is not an injunction. Instead, they argue, the district court merely set aside the Corps' actions because they were not in accordance with the law, and therefore in violation of the APA. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413–14, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) *overruled on unrelated grounds by Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). This argument is unpersuasive.

The district court's order is "a clearly defined and understandable directive by the court to act or to refrain from a particular action." *Alabama,* 424 F.3d at 1128. The district court mandated the return of operations to the levels of the mid–1970s by 2012, meaning that the Corps was required to set off-peak

flows to 600 cfs and only Buford and Gainesville were allowed to withdraw any water directly from Lake Lanier (in the amounts established in their 1950s contracts). *Tri–State,* 639 F.Supp.2d at 1355. The court gave the Corps explicit instruction on how it was to act in the future. The Corps was also prohibited from entering into any new water supply contracts and therefore stripped of any discretion on how to allocate storage space for water supply. The district court did not refer to its order as an injunction, but the district court's intention in this regard is irrelevant. *See Sierra Club v. Van Antwerp,* 526 F.3d 1353, 1358–59 (11th Cir. 2008) (utilizing a functional analysis to determine that the district court order was an injunction in spite of the district court's specific denial in this regard); *United States v. Gila Valley Irrigation Dist.,* 31 F.3d 1428, 1441 (9th Cir. 1994) ("In determining whether or not an order is appealable under § 1292(a)(1), the courts do not look to the terminology of the order but to its substantial effect.") (citation omitted).

The district court's order was also sufficiently definite to be enforced via contempt proceedings. *See Alabama,* 424 F.3d at 1128. Federal Rule of Civil Procedure 65(d) requires that an injunctive order "state its terms specifically" and "describe in reasonable detail * * * the act or acts restrained or required." Alabama and Florida do not question the definitive nature of the order in 2012. Rather, they focus on the court's directives in the interim period: "the parties may continue to operate at current water-supply withdrawal levels but should not increase those withdrawals absent the agreement of all other parties to this matter." *Tri–State,* 639 F.Supp.2d at 1355. Alabama and Florida argue that

the order does not state with specificity the amount of water that each of the localities may withdraw. However, this is of no moment because no party would dare risk being held in contempt for violating the court's order by exploiting any of these ambiguities. The practical effect of this order makes it such that none of the localities would withdraw any more water than they did before the order was issued. Furthermore, it is irrelevant whether this injunction was defective under Rule 65(d) because this Court could still exercise jurisdiction under § 1291(a)(1) over a defective injunction. *See Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n,* 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). The proper remedy in such a case would be to vacate the injunction and remand the case to the district court.[13] Because pendent jurisdiction is proper in this case and because the district court order is an injunction, this Court possesses appellate jurisdiction and will consider the merits of the issues raised by the parties.

B. Final Agency Action in *Alabama, SeFPC,* and *Apalachicola*

The Corps and the Georgia Parties argue that the district court did not have jurisdiction to hear the

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[13] Alabama and Florida also argue that the district court order is not appealable because it is conditional. As a factual matter, this position is incorrect. The court's order, though stayed for three years, does not depend on the happening of a specific event to go into operation. Just the opposite; the injunction was final when issued and would take effect without the occurrence of any contingency whatsoever. Moreover, a portion of the order forbids the parties from increasing withdrawals and the Corps from entering into new contracts without the consent of all of the parties to the litigation. This is a negative injunction which was not stayed until 2012 and took effect immediately.

Alabama case, the *SeFPC* case, and the *Apalachicola* case because the Corps had not taken a final agency action, as required by the APA for judicial review. *See* 5 U.S.C. § 704. In these three cases, Appellees challenge what they have characterized as the "de facto reallocations"—the temporary water withdrawals the Corps has allowed and continues to allow. The Corps argues that it never made a formal reallocation of storage in the reservoir. Instead, it argues that it accommodated water supply under ad hoc arrangements with the localities and a series of agreements among all three States, while launching multiple, ultimately futile, attempts to reach a long-term solution to the issue. The parties all concede that the denial of Georgia's water supply request was a final agency action and that the district court possessed jurisdiction over the *Georgia* case. With respect to the other three cases, we conclude that there was no final agency action, and the district court therefore lacked jurisdiction to review the claims.

The APA states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The APA defines "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Because the definition of action under the APA is so broad, the critical inquiry is whether the action is final. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 478, 121 S.Ct. 903, 915, 149 L.Ed.2d 1 (2001) ("The bite in the phrase 'final action' * * * is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power* * *. It is

rather in the word 'final'* * *.") (citations omitted). The test for finality involves two steps:

> First, the action must mark the "consummation" of the agency's decisionmaking process * * *—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997) (internal quotation marks and citations omitted).

We analyze whether the Corps' actions were final by using the two-step *Bennett* test. The Corps contends that it has not consummated its decisionmaking process because it has not made any final decisions on how to allocate water storage at Buford. The Corps notes that it never made any permanent water supply storage allocations and has not published any implementation guidelines. As evidence that no decisionmaking process has been consummated, the Corps notes that it has not performed the cost analyses or prepared the written reports required by the WSA, the Corps' internal guidelines, and the National Environmental Policy Act to make permanent reallocations. The Corps asserts that it attempted to start the decisionmaking process in 1989 with its draft PAC Report, which included a draft manual for operations in the ACF basin, but that the report was abandoned prior to its completion as part of the negotiations in the *Alabama* litigation.

The "de facto reallocations" do not meet the first prong of the *Bennett* test. They are based on contracts that have all expired and water withdrawals that have been extended on the basis of multi-party

agreements and court orders. The various contracts that the Corps entered into with Gwinnett, the ARC, and the Cities of Gainesville and Cumming all specified their interim nature, expired in 1990, and did not purport to provide any permanent right to storage in Lake Lanier. As the Corps notes, these contracts are long expired now and are not themselves being challenged in this litigation.

What is being challenged is the continuous withdrawal of water from the Buford Project over the last forty years. Appellees assert that the Corps has utilized a practice of entering into temporary agreements in order to avoid the appearance of consummating its decisionmaking process. "[A]s a general matter, * * * an administrative agency cannot legitimately evade judicial review forever by continually postponing any consequence-laden action and then challenging federal jurisdiction on 'final agency action' grounds." *Nat'l Parks Conservation Ass'n v. Norton,* 324 F.3d 1229, 1239 (11th Cir. 2003) (citing *Cobell v. Norton,* 240 F.3d 1081, 1095 (D.C.Cir. 2001)). The record in this case demonstrates that the Corps has not acted to avoid judicial review. Rather, the factual history of this case indicates that the Corps has made sincere efforts to effectuate permanent water supply allocations but has been thwarted by the litigation process.

The Corps has been attempting to reach a final decision on water storage allocations in the Buford Project since at least the mid–1980s, when it became aware that a permanent determination of water supply needs was vital. The agency concluded at the time that it was best to wait until the MAAWRMS was complete before making such a determination and to enter into interim contracts that would expire

in 1990. Once the study was complete, the Corps embarked on the process of issuing the PAC Report and permanently reallocating certain amounts of storage to water supply—after first proposing and receiving Congressional authorization (but not funding) to build a reregulation dam. However, the Corps' plan to issue the PAC was derailed by developments in the *Alabama* case.

In 1992, the parties agreed to a stay and entered into a Memorandum of Agreement, which required that the Corps withdraw the PAC and prohibited it from entering into any new contracts. Memorandum of Agreement By, Between, and Among the State of Alabama, the State of Florida, the State of Georgia, and the United States Department of the Army 2 (Jan. 3, 1992). The Corps retained permission to continue to accommodate current withdrawal levels. In the memorandum, the parties agreed to conduct a Comprehensive Study, stating that "during the term of the Comprehensive Study, it is premature for the Army to commit, grant or approve any reallocation, allocation, or apportionment of water resources to service long-term future water supply." *Id.* Thus, during the duration of the term of the Memorandum of Agreement, the Corps was restricted from moving toward taking final agency action due to the terms agreed upon by the parties.

The same held true during the period of enforcement of the ACF Compact, the joint resolution that the three states agreed to and Congress ratified in 1997, which replaced the Memorandum of Agreement. The ACF Compact created an ACF Basin Commission charged with the power "to establish and modify an allocation formula for apportioning the surface waters of the ACF Basin among the

states of Alabama, Florida and Georgia." 111 Stat. at 2222. The Compact specified that parties could continue withdrawing water but that no vested rights would be granted until the Commission adopted an allocation formula. *Id.* at 2223–24. The Compact provided that the Army Corps of Engineers "shall cooperate with the ACF Basin Commission in accomplishing the purposes of the Compact and fulfilling the obligations of each of the parties to the Compact regarding the allocation formula." *Id.* at 2225. Much like the Memorandum of Agreement before it, the ACF Compact, which remained in effect until 2003, restricted the Corps' ability to consummate a decisionmaking process on its water allocation policy. Thus, from 1992 to 2003, the Corps was operating under agreements signed by all three states that denied it the ability to make any permanent water supply allocations.

By the time the negotiations in the *Alabama* case fell apart in 2003, the Georgia Parties, the Corps, and SeFPC had entered into a settlement agreement in *SeFPC*. In pertinent part, the agreement set forth a process for entering into water supply contracts that could become permanent reallocations of storage. Evaluation of the legality of the settlement agreement in the D.C. district and circuit courts was delayed for several years by a preliminary injunction entered by the Northern District of Alabama. In March 2005, while the injunction was still in effect, the Corps filed a notice in the *Alabama* litigation that it intended to proceed with updating the water control plans and manuals for the ACF Basin. In response, Alabama's Congressional delegation sent a letter to the Corps stating its opposition to such actions during the pendency of the litigation, and the

Corps abandoned its plans.

This Court vacated the *Alabama* court's injunction in late 2005 and the Corps informed the states that it considered the "relevant litigation" concluded and would proceed to update the water control manuals for the ACF Basin. However, on remand, the *Alabama* district court sent the parties into settlement negotiations, and the Corps again agreed to delay the update.

The *SeFPC* settlement was struck down in 2008 and never took effect. The Corps argues that it began the process of updating its operating manuals for the ACF basin almost immediately after the settlement agreement was invalidated. The Corps also issued a legal memorandum on its authority to allocate water storage at Buford, the 2009 Stockdale Memorandum. However, the district court deemed the 2009 Stockdale Memo to be a litigation document and not part of the administrative record. The district court issued its summary judgment order in this case on July 17, 2009, and the Corps asserts that this order once again thwarted it in its attempts to consummate the decisionmaking process. The Corps states that "every single day since 1990 the Corps was either operating under an agreement that barred it from formally taking any steps to reallocate storage, or was actively engaged in a process that could have led to a final agency action reallocating storage." The historical sequence of events supports the veracity of this claim.

This Court has accepted legal and practical barriers to administrative action as legitimate explana-

tions for agency inaction.[14] *See Nat'l Parks,* 324 F.3d at 1238, 1239 (holding that the National Parks Service's delay in implementing a management plan was excusable in part because a judicial order and a legislative mandate had prevented it from taking action). The courts have expressed a legitimate concern for agency avoidance of judicial review through intentional inaction. *Id.* at 1239. In this case, however, the lack of a definitive allocation of storage for water supply is explained by factors beyond the agency's control, rather than the Corps' inaction.

Appellees argue that the Corps has attempted to avoid judicial review of its management of the Buford Project, but they offer almost no evidence to support this contention. Alabama and Florida point out that the Corps, though required by court order not to enter into any new contracts, was not required

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[14] The Corps cites *Home Builders Ass'n of Greater Chicago v. United States Army Corps of Engineers,* 335 F.3d 607, 616 (7th Cir. 2003), for the proposition that the circuits have reached a consensus that agency delay must be "egregious" for it to be considered the consummation of the decisionmaking process. This proposition is not entirely accurate. *Home Builders* was evaluating the second prong of the *Bennett* test, not the first, when it made this statement. Thus, the Seventh Circuit was referring to the manner in which agency inaction determines the rights or obligations of the parties, not whether agency inaction constitutes the consummation of the decisionmaking process. The cases from other circuits cited by that court also deal with the manner in which agency action affects the rights of the parties. There may be some overlap between the two prongs of the analysis, but we need not decide whether the *Home Builders* "egregious" threshold applies also to evaluating delays with respect to the first prong. In this case, the Corps is able to demonstrate that its actions were not only not egregious but also understandable due to the circumstances in this case. Thus, its argument that the first prong of *Bennett* was not met is persuasive even without support from *Home Builders.*

to continue to allow the parties to withdraw water from the project. This argument misses the point. That the Corps chose to continue to permit water supply withdrawals sanctioned by the multi-party agreements does not demonstrate that the Corps effectuated a policy in regard to water supply and was attempting to avoid a judicial review of this policy. The states also note that the Corps had seven years since the time of the expiration of the agreements in 2003 to undertake a formal action. As stated above, the Corps attempted on multiple occasions after 2003 to begin the process of making final decisions on water allocations, but it was consistently thwarted by the litigation process. The Corps' two statements to the parties in 2005 that it intended to move forward with updating the water control manuals, the settlement agreement in *SeFPC*, which was struck down in 2008, and the 2009 Stockdale Memorandum, demonstrate that the Corps intended to move forward in consummating a decisionmaking process after 2003 but could not. Appellees point to no specific final actions on the part of the Corps and there is insufficient evidence to conclude that the agency has attempted to avoid judicial review via incremental changes in operational policy. Thus, Appellees are unable to meet the first prong of the *Bennett* analysis.

The Corps' current operations of the Buford Project also do not meet the second prong of the *Bennett* test because the Corps' alleged "de facto allocations" are not actions "by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 178, 117 S.Ct. at 1168 (internal quotation marks omitted). Current water supply withdrawals have taken place under the "live and let

live" and other similar provisions in the stays, the Memorandum of Agreement, and the ACF Compact. These provisions, like the interim contracts that preceded them, have clearly stated the temporary nature of the allocations being made. As outlined above, the Corps has not had the opportunity to engage in a determination of rights or obligations due to the constraints imposed on it by the specific circumstances of the ongoing litigation. While it is true that access to water has been affected by the Corps' water supply allocations, as Appellees argue, that fact does not demonstrate that any future rights have been determined.[15] Appellees are simply unable to produce evidence of such a determination.

Because there has been no final agency action in the *Alabama*, *SeFPC*, and *Apalachicola* actions, the district court lacked jurisdiction over these claims. Therefore, we vacate the district court's rulings in this regard and remand to the Corps to make final determinations pertaining to its current policy for water supply storage allocation.[16]

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[15] Even if the past withdrawals of water could be deemed sufficient to satisfy the second prong (notwithstanding the absence of any determination of future rights or obligations)—a matter we need not decide—there would still be no final agency action because Appellees have failed to satisfy *Bennett*'s first prong.

[16] Alabama and Florida argue that this issue was decided by this Court and that collateral estoppel bars the Corps and the Georgia Parties from making this claim. In our consideration of the appeal in *Alabama,* we indicated in a footnote that some of the Corps' storage allocations were final agency actions under the APA. 424 F.3d at 1131 & n. 19. However, this issue lacks preclusive effect because it was not actually litigated in *Alabama. See In re Held,* 734 F.2d 628, 629 (11th Cir. 1984).

In *Alabama,* the Georgia Parties argued that the complaint was moot as a result of the fact that Alabama challenged the

PAC Report, a report which had long since been withdrawn by the Corps. We dismissed the mootness argument by noting that Alabama was challenging other Corps actions, namely the ongoing reallocations of storage capacity. With respect to such other Corps actions, this court in footnote 19 commented that Alabama had identified such actions as final agency actions. It is possible that this footnote was not merely a comment on what Alabama had said, but an implied acknowledgment that on-going reallocations of storage capacity were indeed final agency actions. Even if the latter, this court's statement was a passing, bald statement with no discussion at all, and was not the product of an actually litigated issue. Accordingly, the statement does not have collateral estoppel effect. *See id.* The parties did not brief the issue and there is no evidence that the question of final agency action was litigated at all. The matter was addressed as an afterthought to the rejection of a wholly separate, tangential argument. Having heard full and thorough argument on the matter by the parties, we conclude that the action alleged in these appeals was not final.

Even if collateral estoppel did apply and the district court did have jurisdiction, we would still be required to vacate the order and remand the case to the Corps, because of the numerous errors of the district court. Although we need not enumerate each error, we note the overarching error in conducting *de novo* factfinding of issues that must be considered by the Corps in the first instance. In an administrative case, the Supreme Court has said, "[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985). The wisdom of that decree is apparent in this case. The Corps has yet to undertake any final, well-reasoned actions in regard to current water supply withdrawals at the Buford Project. As a result, the judicial record in this case is incomplete. Because this record is incomplete, the district court undertook on its own to perform calculations to determine the percentage of Lake Lanier's storage space currently being allocated to water supply. As part of this determination, the court substituted its judgment for that of the Corps on a number of highly technical matters better left to the expertise of the agency. First and foremost, the court rejected several determinations by the Corps of the baseline amount of water available for downstream water withdrawal as a byproduct of power generation. Second, it used data from expired contracts even though there were no

Part II. *Georgia's 2000 Request: The Corps' Water Supply Authority Under the RHA*

With respect to the merits, we turn first to the appeal in the *Georgia* case. This Court previously summarized Georgia's 2000 request of the Corps as follows:

> 1. Allow municipal and industrial withdrawals from Lake Lanier to increase as necessary to the projected annual need of 297 mgd in 2030;
>
> 2. Increase the water released from the Buford Dam sufficiently to permit municipal and industrial withdrawals in the Chattahoochee River south of the dam to be increased as necessary to the projected annual need of 408 mgd in 2030;
>
> 3. Enter into long-term contracts with Georgia or municipal and industrial water users in order to provide certainty for the requested releases;
>
> 4. Ensure that sufficient flow is maintained south

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binding commitments, rather than using figures of actual water withdrawals, allegedly compounding this mistake by double-counting the City of Gainesville's withdrawals. Finally, the court took no account of return flows even though the return of those flows directly to the lake would offset the effect on the power interest. The expertise of the Corps renders it better equipped to handle such questions than a court. The district court should not have usurped the agency's fact-finding role. Without identifying each error of the district court, suffice it to say that the district court's overarching error in engaging in *de novo* fact-finding would have required remand even if there had been final agency actions.

Moreover, the district court also erred in failing to recognize that water supply for the Atlanta area was an authorized purpose of the RHA. *See* Part II, *infra.* The fact that water supply is an authorized purpose of the Project has the potential to cause significant changes in the relevant calculations, and thus constitutes an independent basis for requiring a remand to the Corps for *de novo* reconsideration.

of the Buford Dam to provide the requisite environmental quality—that is, assimilate discharged wastewater; and

5. Assess fees on the municipal and industrial water users in order to recoup any losses incurred by a reduction in the amount of hydropower generated by the dam as a result of the increased withdrawals or releases.

Georgia, 302 F.3d at 1247–48.

The parties agree that the Corps' rejection of Georgia's 2000 request constituted a final agency action, of which both the district court and this Court have jurisdiction to review. Central to the Corps' rejection was the Corps' conclusion that water supply was not an authorized purpose of the Buford Project. We now hold that the Corps erred in drawing this conclusion. The text of the 1946 Rivers and Harbors Act—specifically, the Newman Report, whose language is incorporated into the statute—clearly indicates Congress' intent to include water supply as an authorized purpose in the Buford Project.

The 1945 and 1946 Rivers and Harbors Acts authorized the building of the Buford Project and serve as the baseline for the Corps' authority to operate the dam.[17] The Georgia Parties contend that the district court seriously erred in its interpretation of the scope of its authority under the Act and neglected to note the specific authorization for water supply

[17] The 1945 RHA is less pertinent to the analysis than the 1946 Act because the final plans for the Buford Project, most notably its location and size, were not determined until the writing of the Newman Report, which post-dated the 1945 statute. Therefore, the majority of the discussion in this opinion centers on the 1946 RHA and any mention of the RHA without a specific year is a reference to the 1946 statute.

in the statute. The district court rejected this argument and held that water supply was only intended to be an incidental benefit of other operations and that the RHA did not authorize any storage for water supply in Lake Lanier.

The RHA authorized the development of the ACF Basin "in accordance with the report of the Chief of Engineers, dated May 13, 1946." 60 Stat. at 635. The Chief of Engineers Report incorporated the Division Engineer's Report—i.e. the Newman Report. Thus, the statute fully incorporated the terms of the Newman Report. The Newman Report specifically modified the recommendations of the Park Report—the foundational report for the 1945 RHA—by proposing the building of a single multi-purpose reservoir upstream of Atlanta instead of three separate reservoirs. One advantage of such a move was that the new dam could more easily accommodate water supply needs.

As the Newman Report made clear, the dam was designed with water supply specifically in mind. At times, water supply was even to be accommodated at the expense of optimal hydropower generation. The Newman Report explained:

> If operated at 100–percent load factor, the Buford development would provide a minimum continuous flow of 1,634 second-feet,[18] more than sufficient for the water needs of the Atlanta area. However, if the plant were operated on peak loads, as it should be for maximum power value, it would be shut down during week ends and week-day off-peak periods; as a result of those shut-downs, the minimum flow at Atlanta from the area below Buford

[18] "Second-feet" is another way of saying cfs.

> Dam would be only about 50 second-feet. Under the same conditions of operation, the maximum flow at Atlanta at the daily peak of the load would be over 3,000 second-feet. In order to meet the estimated present needs of the city, and to prevent damage to fish, riparian owners, and other interests by complete shutdowns of the Buford plant during the daily and week-end off-peak periods, varying flows up to a maximum of 600 second-feet should be released from Buford so as to insure at all times a flow at Atlanta not less than 650 second-feet. This flow could be used to operate a small generator to generate off-peak power as secondary energy, reserving the remaining storage for peak operation. This minimum release may have to be increased somewhat as the area develops. This release at Buford would not materially reduce the power returns from the plant, and would not affect the power benefits from plants downstream; the benefits to the Atlanta area from an assured water supply for the city and Georgia Power Co.'s steam plant would outweigh any slight decrease in system power value.
>
> Newman Report ¶ 80.

There are several critical provisions in this paragraph of the report. First, Congress contemplated that "the estimated present needs of the city" for water supply would be met by the initial Project by "insur[ing] at all times a flow at Atlanta not less than 650 second-feet." *Id.* Indeed, Congress provided in the construction of the project that, in addition to the two large turbines, there would be "a small generator to generate off-peak power as secondary energy, reserving the remaining storage for peak operation." *Id.* This small turbine was constructed

for the sole purpose of providing off-peak releases of 600 cfs (without completely losing the value of these releases for power generation). If operated for maximum power value, the dam would be shut down during off-peak hours and would release no water, limiting water flow at Atlanta to a rate of 50 cfs. Such an operational scheme would not require a small turbine at all. Thus, the design of the project and the operational scheme were influenced by water supply concerns.

Second, the minimum flow was provided for notwithstanding the clear Congressional intent that it would be at the expense of "maximum power value." *Id.* Congress recognized that shutting down all water releases during off-peak hours would create an insufficient flow in the river downstream at Atlanta to meet the city's water supply needs. Therefore, even though Congress recognized that there would be some detriment to power generation, it nevertheless provided for a minimum flow of 650 cfs at Atlanta. The Newman Report, and thus the authorizing legislation itself, explicitly stated as much. The legislation provided, in connection with the initial minimum release requirement and the contemplated increases thereof, that "the benefits to the Atlanta area from an assured water supply for the city * * * would outweigh any slight decrease in system power value." *Id.*

Third, Congress recognized that "[t]his minimum release may have to be increased somewhat as the area develops." *Id.* Indeed, in the immediately preceding paragraph, the authorizing legislation considered the growing need for water supply to the metropolitan area over a future 19–year period and spoke of increasing off-peak releases to accommodate the

water supply needs of the Atlanta area in 1965. That future water supply need was estimated to require a river flow at Atlanta of 800 cfs. *Id.* ¶ 79. Thus, the original authorizing legislation expressly contemplated a very substantial increase in the operation of the Buford Project to satisfy the water supply needs of the Atlanta area (i.e., from 650 cfs to 800 cfs in the river flow at Atlanta).[19]

In light of the foregoing statutory language, and particularly Congress' intent that the Corps should have authority to accommodate the Atlanta area's water supply needs at the expense of some detriment to "system power value," we cannot conclude that

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[19] The language of the paragraph reads:

> Local interests state that, in 1941, 70 second-feet of water were required for domestic and industrial purposes at Atlanta, and 415 second-feet for condensing water at the Atkinson steam-electric plant of the Georgia Power Co. on the river bank near mile 299.5; that an additional unit since installed has raised the total requirement of the steam plant to 565 second-feet; and that the total requirement for the Atlanta area for 1965, based on a population of 600,000 at that time, will be 600 second-feet for condensing water, 120 second-feet for municipal supply, and 80 second-feet of raw water for industries—a total of 800 second-feet.

Newman Report ¶ 79. Thus, as of the time of the 1946 statute, it seems that domestic and industrial water supply needs at Atlanta required a minimum river flow at Atlanta of 635 cfs (70 + 565). And the authorizing legislation contemplated that 19 years hence, in 1965, that requirement would increase to 800 cfs, a substantial increase. In evaluating the extent of the Corps' authority to satisfy the water supply needs of the Atlanta area, it is clearly relevant that Congress explicitly contemplated this substantial increase in water supply. The district court's injunction, limiting off-peak releases to 600 cfs, is obviously inconsistent with this contemplated increase in water supply. The 600 cfs level was the initial mandate in the authorizing legislation, *id.* ¶ 80, and Congress explicitly contemplated substantial increases. *Id.* ¶¶ 79, 80; *see also, supra,* note 10.

Congress intended for water supply to be a mere incidental benefit. By definition, one purpose that is to be accomplished to the detriment of another cannot be incidental.[20] Thus, the language of Sections 79 and 80 clearly indicates that Congress intended for water supply to be an authorized, rather than incidental, use of the water stored in Lake Lanier.[21]

Appellees argue that the Newman Report's references to water supply as "incidental" demonstrates

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[20] The adjectival forms of the term "incident" can mean "subordinate to something of greater importance; having a minor role" or "dependent upon, subordinate to, arising out of, or otherwise connected with." Black's Law Dictionary 830 (9th ed.2009). The superiority of water supply to hydropower in certain instances demonstrates that it could not have been a purely subordinate purpose. Likewise, the superiority of water supply under certain circumstances demonstrates that it was not meant to be fully dependent upon hydropower.

[21] In *Alabama,* we stated, "Lake Lanier was created for the explicitly authorized purposes of flood control, navigation, and electric power generation." 424 F.3d at 1122. We went on to say, "the Corps has historically maintained that water supply use is an 'incidental benefit' flowing from the creation of the reservoir." *Id.* These statements were mere dicta. The issue on appeal in *Alabama* was whether the district court's enjoining of the proceedings in the D.C. District Court (halting the finalization of the settlement agreement in *SeFPC*) was proper. The parties did not brief the issue of the Corps' water supply authority and this Court gave the topic no discussion, save for that quoted above. Thus, these statements were not the product of actual litigation, were not a "critical and necessary part of the judgment," and have no preclusive effect on the decision in this case. *See Christo v. Padgett,* 223 F.3d 1324, 1339 (11th Cir. 2000) (quotation omitted). The current appeal has allowed the Court to scrutinize more closely the Corps' water supply authority. After a full analysis of the language and legislative history of the RHA and consideration of the arguments of the parties, we conclude that Congress intended for water supply to be included as an authorized purpose of the Buford Project.

that water supply was not an authorized purpose of the Buford Project. This is an attractive proposition due to its simplicity, but the context of these references undermines this claim. The language in question is as follows:

> The city of Atlanta and other local interests in that area have strongly urged that the Roswell development, 16 miles upstream of Atlanta, or one or more other reservoirs above Atlanta, be provided first, in order to meet a threatened shortage of water, during low-flow periods, for municipal and industrial purposes. If the regulation storage reservoir required for the economical operation of the proposed developments below Columbus could be located above Atlanta, it would greatly increase the minimum flow in the river at Atlanta, thereby producing considerable *incidental benefits* by reinforcing and safeguarding the water supply of the metropolitan area.

Newman Report ¶ 68 (emphasis added). We conclude that this single reference to water supply as an "incidental benefit" was an explanation for why the dam would be built above Atlanta and was not meant to confer a subordinate status.

The Corps in the Park Report proposed the construction of three dams at Cedar Creek, Lanier, and Roswell. *Id.* The Corps subsequently determined in the Newman Report that the system of dams in the ACF Basin would operate substantially more efficiently if one large dam was built instead. The agency decided to locate the dam at Buford, approximately 47 miles upstream of Atlanta. Paragraph 68 was an explanation for why the Corps deemed it beneficial to build the dam at this location; the explanation: water supply. An upstream location would allow

the Corps to secure Atlanta's water supply as an incident of the other authorized purposes. That is to say that the aim of benefitting water supply could be accomplished without any significant detriment to hydropower, navigation, or flood control. The report stated that the revised location and size of the dam and reservoir would result in "greatly increase[d] * * * minimum flow in the river at Atlanta, thereby * * * reinforcing and safeguarding the water supply of the metropolitan area." *Id.* This benefit would be incidental to power generation because the water constituting the river flow at Atlanta would have generated power as it passed through the generators. There is no indication that the use of the word "incidental" in Paragraph 68 was meant to describe the importance of water supply to the project or even the importance of water supply vis-a-vis the other project purposes.

This reading is further supported by the phrase "safeguarding the water supply of the metropolitan area." *Id.* The fact that references to incidental benefits and the safeguarding of water supply were made in the same breath demonstrates that the Newman Report did not use the term as an indication of a subordination of the importance of water supply. Instead, the "safeguarding" language of Paragraph 68 indicates the critical nature of the water supply purpose to the project. In fact, the Newman Report went on to describe the importance of the Buford Project for the protection and assurance of Atlanta's water supply on at least four other occasions. *Id.* ¶¶ 73 ("would ensure an adequate water supply for the rapidly growing Atlanta metropolitan area"), 80 ("insure at all times a flow at Atlanta") ("the benefits to the Atlanta area of an

assured water supply for the city"), 100 ("would ensure an adequate municipal and industrial water supply for the Atlanta area"). Congress' focus on the need to ensure the Atlanta area's water supply serves as strong evidence of the primary role given to water supply in the project.

The only other reference in the authorizing legislation to water supply as incidental appears in the Newman Report at Paragraph 100.[22] There, the final sentence of the paragraph begins with the word "incidentally" and lists several project benefits that would not significantly harm other project purposes. One of the listed benefits is flood control, which

[22] The language of this paragraph reads:

> The foregoing results cannot be secured by the plants below Columbus proposed herein unless a considerable storage be provided upstream to increase the minimum regulated flow and the firm capacities at those plants; without such upstream storage, the developments would not be economically justified. The best development for that purpose is that at Buford proposed herein. Provision of that development as part of the system would increase the minimum monthly flow at the Upper Columbia site from about 1,300 second-feet to 6,040 second-feet, with a corresponding increase at the Junction site. It would greatly increase both the quality and quantity of the energy output at existing plants above Columbus. It would simplify the reregulation of flows at Junction to provide a more adequate continuous flow at all times in the Apalachicola River for navigation. Without Buford, about 4,000,000 cubic yards of excavation would be required in the Apalachicola River below Junction to provide a channel 9 feet deep; with Buford, the excavation required would be reduced to about one-half that amount. *Incidentally,* it would ensure an adequate municipal and industrial water supply for the Atlanta area, would produce large benefits in the way of recreation, fish and wildlife conservation, and similar matters, and would, with the added flood-control storage proposed herein, contribute to the reduction of floods and flood damages in the basin below.
>
> *Id.* ¶ 100 (emphasis added).

Appellees concede is an authorized purpose. This use of the term "incidentally" cannot be construed to mean that water supply was intended to be a subordinate use because flood control is referred to in the same manner in the sentence. This fact is further illustrated by yet another reference to the protection of water supply in the same sentence—"would ensure an adequate municipal and industrial water supply for the Atlanta area." *Id.* ¶ 100. Again, as in Paragraph 68, the meaning conveyed in Paragraph 100 is a description of how the several authorized purposes could be accomplished harmoniously and the manner in which all were better served by locating the project at Buford. For these reasons, and especially because of the clear language in Paragraphs 79 and 80 of the authorizing legislation, we do not read the sparse use of the term "incidental" as indicative of the status of water supply as an authorized use *vel non*.

Appellees argue that the original project did not contemplate storage in Lake Lanier for water supply and that this is an indication that Congress did not intend for water supply to be an authorized purpose. We disagree. The lack of storage allocation for water supply sheds no light on the intentions of Congress. No storage allocation was specified for navigation in the Newman Report even though navigation is universally accepted as an authorized purpose of the Buford Project. *See* H.R. Doc. No. 80–300, Letter from Lieutenant General R.A. Wheeler, Chief of Engineers, ¶ 11(d). Furthermore, no storage was needed at the time for water supply. Almost all of the Atlanta area's water supply requirements could be met at the time as an incident to, or byproduct of, the generation of power. Thus, the lack of initially allo-

cated storage for water supply is not at all inconsistent with the Congressional intent that water supply was an authorized purpose.

For the same reason, we believe that the fact that the localities were not asked initially to contribute to the costs of the project is of no moment in determining Congress' intent with respect to water supply authorization. Georgia, in 1946, did not require a significant amount of water beyond that which was provided by normal project operations for power generation, so a request for state contribution to the project would not have made sense. It would have meant asking the state to pay for a service that the Corps could provide essentially without cost. Moreover, at that time, Atlanta's current water supply usage required a flow of the river at Atlanta of 635 cfs.[23] Even "[d]uring the extremely low-flow month of October 1941, the average flow for the month was 493 second-feet, and the minimum daily flow [was] 422 second-feet." *Id.* ¶ 79. In other words, before the Buford Dam was built, the river was providing the water supply needs of the Atlanta area. The requirement in the legislation that the Corps make releases "so as to [e]nsure at all times a flow at Atlanta not less than 650 second-feet," *id.* ¶ 80, merely provided water supply roughly commensurate to that which the river was already providing. It is not likely that the Corps or Congress would have thought it appropriate to charge Atlanta for con-

[23] *See* Newman Report ¶ 79 ("70 second-feet of water were required for domestic and industrial purposes at Atlanta." In addition, the Atkinson steam-electric plant had recently installed an "additional unit * * * [that] raised the total requirement of the steam plant to 565 second-feet." The two requirements total 635 cfs.).

struction costs of a project that merely replaced its currently available water supply.

The Corps could potentially have asked Georgia to pay on the basis of future water supply needs that would affect project operations, but it was not at all clear how much water would be needed in the future.[24] After all, it would be almost 30 years after the Newman Report before the Corps would sign its first water supply contract—excluding the small relocation contracts made as compensation for inundating the intakes of Gainesville and Buford. Divining the value of water supply to the localities in the future would have resulted in speculative and potentially misleading results.[25] Similarly, the fact that in its cost-benefit analysis, the Newman Report did not assign a particular dollar amount to water supply is

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[24] In 1949, the Corps stated that the Buford Project's assurance of Atlanta's water supply would be a "real benefit" but that it was premature to attempt a specific calculation of that benefit. Definite Project Report ¶ 124.

[25] The 1937 Flood Control Act ("FCA") allowed states and localities to request that the Corps, prior to construction of a flood control project based on a given set of plans, modify those plans for the inclusion of storage for water supply. The act required that localities pay the full cost of such increased storage capacity. Alabama and Florida argue that it is inconceivable, in light of the framework of the FCA, the only general statutory grant of water supply authority to the Corps in 1946, that Congress would authorize water supply storage in Lake Lanier without requiring contribution from the localities. The FCA itself is not applicable to this project because Buford was designed to be a multi-purpose project, and not merely a flood control project. Furthermore, it was not inconsistent for Congress to request contribution for projects that had to be altered to accommodate water supply, but not to request contribution for projects which merely replaced water supply already provided by the river, which water supply could be provided by the project as a by-product of power generation and with little detriment to other project purposes.

not an indication that it was not authorized because the benefits of water supply were indeterminate at the time.[26]

One final point merits mentioning. Before the Dam was built, or even planned, the Chattahoochee provided almost all of the City of Atlanta's water supply. The building of the dam could have been a potential threat to the city's ability to withdraw water from the river because the Corps had an incentive—optimal power generation—to shut off all water flow in the river for long stretches of time. Congress responded to this concern by establishing a minimum flow requirement and noting that this requirement might have to be increased over time. Congress also clearly indicated that the Buford Project was intended to benefit the Atlanta area's needs by assuring the water supply. If water supply had been deemed a subordinate purpose by Congress, the Buford Project would have been detrimental, rather than beneficial, to the Atlanta area's water supply needs. That is to say, if the only water being supplied was to be a subordinate byproduct of power generation, then the City of Atlanta would have eventually found itself able to withdraw less water from the river than it would have been had no dam been built at all. In light of the repeated references in the authorizing legislation to safeguarding and ensuring an adequate water supply for Atlanta, Congress very clearly did not intend the dam to harm the city's water supply.

The language of the RHA clearly indicates that water supply was an authorized purpose of the

[26] It bears noting that the Corps was not required to conduct cost-benefit analyses on all project purposes until 1952. *See* Bureau of Budget, Executive Office of the President, Budget Circular A–47 (Dec. 31, 1952).

Buford Project. Appellees' arguments to the contrary are unconvincing for all of the reasons mentioned above. Thus, we conclude that water supply was an authorized purpose of the RHA and that the RHA authorized the Corps to allocate storage in Lake Lanier for water supply.

Part III. *Georgia's 2000 Request Must be Remanded to the Corps*

The Corps argues that its interpretation of the RHA in the 2002 Stockdale Memo, which supplied the legal reasoning for the denial of Georgia's water supply request, is entitled to deference from this Court. The RHA authorized the Corps to build the Buford Project in accordance with the Corps' plans and "with such changes therein as in the discretion of the Secretary of War and the Chief of Engineers may be advisable." H.R. Doc. No. 80–300, Letter from Lieutenant General R.A. Wheeler, Chief of Engineers ¶ 16. The Corps asserts that this gives the agency wide latitude in its interpretive authority. Additionally, the Corps argues that because it prepared the reports which comprise the language of the RHA, its "interpretation of the statute merits greater than normal weight because it was the [Corps] that drafted the legislation and steered it through Congress with little debate." *Howe v. Smith,* 452 U.S. 473, 485, 101 S.Ct. 2468, 2476, 69 L.Ed.2d 171 (1981). Despite the high level of respect owed to the Corps' interpretations with regard to the RHA due to its unique role in shaping the statute, we cannot defer to the Corp's interpretation of its water supply authorization in this instance. Even heightened deference cannot lead this Court to ignore the plain and express will of Congress, especially where, as here, the Corps' interpretation has not been consistent.

Under the APA, reviewing courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The denial of Georgia's request was based on a clear error of law—the Corps' misinterpretation of the RHA. Therefore, the Corps' interpretation cannot be granted deference, in spite of the agency's role in drafting the language of the legislation.

The seminal case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–44, 104 S.Ct. 2778, 2781–82, 81 L.Ed.2d 694 (1984), set up a two-step framework for evaluating whether a court must defer to an agency's construction of a statute it is charged with administering. Deference from the court is due if (1) Congress has not spoken directly on the precise question at issue and its intent is unclear, and (2) the agency's interpretation is based on a permissible construction of the statute. *Id.* The argument for *Chevron* deference in this case fails at both steps because Congress made clear its intention that water supply was an authorized purpose of the Buford Project. As discussed above, the Newman Report repeatedly stated that the Buford project would protect and assure the water supply of the Atlanta metropolitan area. Furthermore, the Report authorized the use of water for water supply at the expense of maximum hydropower generation. Congress' acknowledgment that water supply, in certain instances, was to be provided at the expense of maximum power generation necessitates the conclusion that water supply was not to be subordinate to other project purposes and was instead an authorized purpose in its own right. The Corps' interpretation that the RHA relegated water

supply to incidental status cannot be reconciled with the plain language of the statute. The clear Congressional intent in the 1946 RHA was that water supply was to be an authorized purpose, and the Corps' contrary interpretation is erroneous and cannot be accepted by this Court.[27]

A significant fact undermining any deference to the Corps on this issue is the fact that the Corps has also been inconsistent in its statements about whether water supply was an authorized purpose. The 2002 Stockdale Memo concluded (incorrectly) that water supply was not an authorized purpose, but this is not consistent with previous Corps statements on the matter. In the Corps' 1949 Definite Project Report, the Corps referred to water supply as one of the "primary purposes" and one of "the princip[al] purposes of the Buford Project." ¶¶ 48, 115. This 1949 Report was a formal pronouncement on the issue, and the one most nearly contemporaneous to the actual enactment. In a 1987 regulation, 33 C.F.R. §

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[27] The Corps concedes that the 2002 Stockdale Memo might not be entitled to *Chevron* deference because it may be deemed an internal guidance document that does not decide legal rights. *See Christensen v. Harris Cnty.,* 529 U.S. 576, 587, 120 S.Ct. 1655, 1662–63, 146 L.Ed.2d 621 (2000). If this is the case, then the Corps' legal interpretations in the document deserve *Skidmore* deference, meaning that the interpretations are "entitled to respect * * * but only to the extent that those interpretations have the power to persuade." *Id.* (internal quotation marks and citations omitted). Because the clear intent of the RHA forecloses the higher *Chevron* level of deference, it follows that *Skidmore* deference is also not applicable to the facts of this case. In light of Congress' intent to include water supply as an authorized purpose, the Corps' contrary determination is not at all persuasive. Since neither type of deference can be given to the Corps' legal determinations, we need not decide whether the *Skidmore* or *Chevron* framework is applicable on the instant facts.

222.5, App'x E, the Corps listed water supply as a project purpose for Buford. In the Corps' comprehensive 1994 report to Congress, which listed the authorized purposes for Corps projects across the country, water supply was included as an authorized purpose of Buford under the RHA.[28] U.S. Army Corps of Eng'rs: Hydrologic Engineering Center, Authorized and Operating Purposes of Corps of Engineers Reservoirs E–94 (1994). That report also defined the term "incidental benefits" and stated that incidental benefits, though they were important, were not the subject of the report and would not be listed. *Id.* at 3–4. The Corps and the Appellees offer no explanation for why the Corps indicated that water supply was an authorized purpose in 1949, 1987, and 1994 but took a contrary position in 2002.[29]

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[28] Recreation and fish and wildlife are also listed as authorized purposes in the report. However, the authorizing statute listed in the report for water supply is the RHA. Recreation and fish and wildlife are listed as being authorized by statutes not at issue in this case.

[29] The Corps argues that any inconsistency in its interpretation is irrelevant to the deference analysis, citing *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 981, 125 S.Ct. 2688, 2699–2700, 162 L.Ed.2d 820 (2005). However, the holding of *Brand X* does not go quite this far. The case merely states that *Chevron may* be applicable to instances in which the agency has changed its position "if the agency adequately explains the reasons for a reversal of policy." *Id.* at 981, 125 S.Ct. at 2699. This Court has also noted that an agency must be allowed to shift its position over time and that such shifts should even be accorded deference by reviewing courts. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1219 (11th Cir. 2009). But in this case, the Corps has given no explanation for the reasoning behind any changes in policy. Also, the Corps' position has not merely changed; rather, it has been in such a constant state of flux that it appears to have not yet fully formed. In any event, the authorizing legislation itself is sufficiently clear; water

The Corps argues that even if it erred in its interpretation of the RHA, its rejection of Georgia's water supply request should be allowed to stand. The Corps suggests that it accounted for the possibility that water supply was an authorized purpose of the Buford Project and still concluded that the request exceeded its authority. In support of this contention, the Corps points to the following language in the Stockdale Memo: "Even if water supply were a specifically authorized purpose of the reservoir (and the 1958 Act did not apply), the state's request would require substantial changes in the relative sizes of project purposes. This would represent a material alteration of the project, which would require congressional action." 2002 Stockdale Memo at 11 (internal quotation marks omitted).

The Corps argues that this constitutes an alternative conclusion and that there is no reason to believe that it is incapable of considering a legal hypothetical. It argues that remanding the case for a consideration that it already gave would be duplicative. However, an administrative agency's alternative explanation for denying a state's request is "arbitrary, capricious * * * or otherwise not in accordance with law" if it is based on an impermissible reading of the authorizing statute or statutes. *See Massachusetts v. Envtl. Prot. Agency,* 549 U.S. 497, 532–34, 127 S.Ct. 1438, 1462–63, 167 L.Ed.2d 248 (2007) (holding that the EPA's reading of a statutory phrase in its alternative explanation for why it did not regulate greenhouse gas emissions was not in conformity with the statute, and thus remanding to the EPA). The Corps' hypothetical, which is reiterated

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supply is an authorized purpose.

almost verbatim in the conclusion of the memo, 2002 Stockdale Memo at 13, rests squarely on an erroneous legal proposition. In this alternative hypothetical, the Corps mistakenly assumes that the WSA would not apply to the agency's determination of its authority to grant the Georgia request if water supply were authorized by the RHA. This assumption has no foundation in law. The WSA nowhere indicates that it is superceded by, or supercedes, original authorizations for water supply. The Act was merely intended to offer greater water supply authority in federal water projects than had previously existed. For that authority to be supplemental to authority already extant in a given project is perfectly consistent with the language and purpose of the statute. To assume, as the Corps has in its alternative conclusion, that the WSA does not apply to the Buford Project merely because the authorizing statute included water supply as an authorized purpose is not supported by the language of the WSA or by its intended aim of increasing water supply authority in federal projects. The Corps' holding in the alternative must be rejected because it misinterprets the scope of the WSA.

The Corps' alternative conclusion is also undermined because, despite the Corps' contentions otherwise, its misinterpretation of the RHA was essential to its conclusion that it lacked authority to grant Georgia's request. The majority of the memorandum is devoted to the potential effects of granting the request and whether these effects would be consistent with the Corps' authority under the WSA. The discussion of the agency's authority under the WSA is predicated on the assumption that the baseline level of authorization from the RHA is zero and

that no storage may be allocated to water supply pursuant to the RHA. It is only at the very end of the discussion of the Corps' authority that the agency considers *arguendo* the possibility that the RHA authorized water supply. Its brief discussion of this alternative is flawed in two respects. First, as noted above, the Corps erroneously assumes that if the RHA included water supply as an authorized purpose, the WSA would not be applicable at all. Second, although purporting to assume water supply was an authorized purpose of the RHA, the Corps nevertheless underestimated its RHA authority. It failed to recognize that the authorizing legislation in 1946 not only included water supply as an authorized purpose but explicitly contemplated that the Corps was authorized to increase water supply usage over time as the Atlanta area grew and that this increase would not be a change from Congressionally contemplated operations at all. Thus, the Corps never considered its authority under the RHA to substantially increase its provision of water supply and reallocate storage therefor—authority which we hold today was granted by the RHA. And the Corps never considered its WSA authority to provide water supply as an addition to (or as supplementing) its RHA authority. The failure of the Corps in these respects renders its alternative reason for denying Georgia's request arbitrary, capricious, or otherwise not in accordance with the law.[30]

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[30] For example, in the portion of the 2002 Stockdale Memo dealing with the alternative rationale, Stockdale 2002 at 11, the Corps spoke of the general limitation on its discretionary authority to make post-authorization changes in projects without seeking additional Congressional authority—i.e., the Corps' lack of authority to make substantial changes in the relative sizes of project purposes—without any recognition of

Several other factors also indicate that the Corps' rejection of the water supply request should be remanded for further consideration. First, attached to the 2002 Memo is a "preliminary analysis of the impacts of Georgia's water supply request on authorized project purposes and operations." The Corps' analysis on the effects of the Georgia request was thus incomplete. Because the Corps' authority to grant the request may be dependant on the precise size and effect of the request, it is crucial that the Corps complete its evaluation of the request. The need for further study recommends remand to the Corps.

Second, it is also apparent that the Corps' views regarding its authority to allocate storage in Lake Lanier to water supply are evolving and that it has not come to a final, determinative decision regarding the issues underlying this authority. There are several pieces of evidence for this. In 2002, the Corps rejected the Georgia request, asserting that it did not have sufficient authority to reallocate 34% of conservation storage. However, in 2004, it agreed to settle the *Geren* case, in part by reallocating what the settling parties determined at that time to be 22% of the conservation storage. The Corps determined that it could make such a reallocation on the basis of its WSA authority alone. Though these decisions are not directly conflicting, the Corps never explained why it believed that the 12% storage allocation difference

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the fact that the authorizing legislation here already gave the Corps authority to increase the water supply purpose at the expense of the hydropower purpose and without recognition of the fact that the legislation explicitly contemplated a considerable such increase to meet the water supply needs estimated 19 years in the future. *See* Newman Report ¶¶ 79, 80.

between the two caused it to exceed its authority. If the RHA authorizes some storage reallocation to water supply, as we hold today that it does, then the Corps should explain why this difference in allocated storage between the Georgia request and the settlement agreement pushed it beyond the boundaries of its authority. Additionally, the Corps has revised its figures for how much storage must be allocated to accommodate current levels of water supply withdrawal. In the 2002 memo, the Corps asserted that current withdrawals required a 13% reallocation of conservation storage. On appeal, the Corps claims that the current withdrawal levels are only 11.7%. It appears that the Corps may no longer conclude that Georgia's request would require an allocation as large as 34%. Any such decrease in the Corps' projection of the amount of storage it deems required for water withdrawals could also affect its determination of its authority over the Georgia request.[31]

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[31] The Corps' position in this appeal seems to favor evaluating water supply authority via an analysis of the detrimental effect of increased water supply on the production of hydropower as an alternative to an analysis predicated solely on the percentage of conservation storage being reallocated. *See* Brief of U.S. Army Corps of Eng'rs, et al. at 99–100, Tri–State Water Rights Litigation, No. 09–14657 (11th Cir. May 3, 2010) (explaining that the "de facto" reallocations of storage to account for current water supply uses causes a systemwide reduction of hydropower of only 1%). The present discussion of percentage allocations is not meant to be an endorsement of this method of evaluating the Corps' authority. It is merely meant to describe the evolving nature of the Corps' stated reasoning for its conclusions with respect to the bounds of its authority. In fact, the Corps' former reliance on percentage-based allocations and its seeming current reliance on effects on project purposes may also represent a shift in policy. We conclude that the D.C. Circuit's *Geren* opinion does not foreclose the Corps from fully exploring this issue. *See infra,* Part VI. On remand, the Corps should determine the optimal methodology for measuring its authority over water supply allocations.

Finally, because the other matters in this appeal must be remanded to the Corps, it is sensible and efficient for the agency to consider the overlapping issues that are common to *Georgia* and the other cases together as part of a comprehensive decision about the Corps' future water supply operations. The conclusions that the Corps reaches with respect to the questions at issue in the other cases will provide it with a more complete analysis of the issues in *Georgia,* as well. For example, the Corps' determinations of its authorization over current water supply withdrawals will necessitate a thorough study of the amount of storage required for water supply. Also, this appeal represents the first opportunity for a court to consider the Corps' authority under both the RHA and the WSA. Our holding—that water supply is an authorized purpose under the RHA, that the Corps does have some authority under the RHA to balance as among the authorized uses and increase the water supply purpose at the expense of the power purpose and to reallocate storage therefor, and that the Corps' authority under the WSA is in addition to its authority under the RHA—constitutes a clarifica-

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A companion consideration in the Corps' WSA analysis is the concept of compensating the power users for the detrimental effects of water supply on the power purpose. The Corps accepted the notion of such compensation in the proposed settlement in *Geren,* though the record shows no preceding endorsement of this concept. Because the RHA authorized the accommodation of some water supply needs at the expense of the power purpose, the Corps must determine the proper balance between water supply and power. Consequently, the Corps must analyze whether compensation is a factor in determining the extent of the Corps' authority under the RHA, whether under the WSA a reallocation of storage is an operational change, and whether such a change is major. *See infra,* Part VI, note 41, indicating that *Geren*'s comments on the compensation concept have no collateral estoppel effect.

tion of the legal environment which will aid the Corps in its analysis on remand. For these reasons, we conclude that the Corps must reexamine the request in light of its combined authority under the RHA and WSA.[32]

Part IV. *Gwinnett County's Claims Not Involving Authorization Under the RHA and WSA.*

Gwinnett County asserts three claims that are distinct from the claims of the Georgia Parties and the Corps. First, the county asserts that a 1956 Act of Congress authorized the Corps to contract with it for 10 mgd for water supply. Second, Gwinnett asserts that the Corps contracted with it to provide permanent storage for roughly 40 mgd. Finally, the county asserts that the Buford Project rendered its intake facility at Duluth, Georgia inoperable and that it is therefore entitled to water withdrawal rights as just compensation. We find merit in the first of these claims but reject the final two.

A. The Expiration of the 1956 Act

In 1956, Congress passed an act, in part, stating the following:

> [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

[32] It should also be noted that the Corps was granted additional water supply authority in the 1956 Act. *See infra,* Part IV Section A. References in this opinion to the Corps' authority under the RHA and the WSA are not to be construed as negating its additional authority under the 1956 Act.

> an amount not to exceed eleven thousand two hundred acre-feet of water annually* * *.

Pub.L. No. 84–841, 70 Stat. 725. The district court noted in a footnote that Gwinnett had not contracted with the Corps pursuant to this authorization and held that the authorization "expired in 2006." *Tri–State,* 639 F.Supp.2d at 1350 n. 24. The district court has misread the plain language of the statute. The fifty-year limitation in the Act refers to the duration of any contract with Gwinnett, not to the expiration of the Act itself. The phrase "not to exceed fifty years" immediately follows the words "contract * * * upon such terms and for such period" and there is no grammatical cue that it should not be read as modifying this phrase. The district court offers no explanation for its unnatural reading of the statute and none is evident to this Court. Moreover, the Act also authorized the Corps to enter into a perpetual easement with Gwinnett, authorizing Gwinnett to build the necessary facilities to withdraw water directly from Lake Lanier on the Corps' land. 70 Stat. at 725. It would be illogical for Congress to give Gwinnett a perpetual easement to implement an authorization that would expire in fifty years. The district court's interpretation of the Act, which is espoused by Appellees in this appeal, is inconsistent with the Act's language and its grant of an easement in perpetuity.

To date there has not been a single contract between the Corps and Gwinnett predicated on the authority of the 1956 Act. Such a contract in the future would not be a reallocation of storage under the WSA or the RHA because it is directly authorized by Congress.

B. Forty mgd from the 1974 Supplemental Agreement to the Corps' Contract

Gwinnett argues that in 1974 the Corps granted the county the right to 38,100 acre-feet of permanent storage so that it could withdraw roughly 40 mgd directly from Lake Lanier. In 1973, Gwinnett and the Corps entered into an interim water contract for 40 mgd. The following year, the parties revised Article 9 of the contract to provide:

> Upon expiration of the period of contract * * * the User shall have the right to acquire from the Government * * * the right to utilize storage space in the project containing at least 38,100 acre feet (which is estimated to be adequate to yield approximately 40 MGD of water).

Supplemental Agreement No.1 to Contract No. DACW01–9–73–624 Between United States and Gwinnett County, Georgia for Withdrawal of Water from Lake Sidney Lanier (Apr. 29, 1974). The contract stated that this revision was being made "in order to facilitate the sale of bonds to finance [Gwinnett's] proposed water works facilities." *Id.* Subsequent supplemental agreements extended the life of the contract until it was finally allowed to expire in 1990.

The contract gave Gwinnett the "right to acquire" the storage space at the time of the expiration of the contract. Thus, Gwinnett possessed an option (an offer) to purchase storage space at the time of the contract's expiration, which the parties agree occurred in 1990. "If no time is prescribed for accepting an offer, it must be done within a reasonable time." *Wilkins v. Butler,* 187 Ga.App. 84, 369 S.E.2d 267, 268 (1988) (quotation omitted); *see Home Ins. Co. v.*

Swann, 34 Ga.App. 19, 128 S.E. 70, 72 (1925); Restatement (Second) of Contracts § 41 (1981). Gwinnett has not demonstrated that it exercised its acceptance of the option in 1990 or at any time since then. More than twenty years have elapsed since the time that the option became available, and the right to accept the Corps' offer to acquire the 38,100 acre-feet of storage clearly has lapsed.[33]

C. Just Compensation for Relocation of the Duluth Intake

On appeal, Gwinnett argues that it should have been compensated because the creation of the Buford Project led to contamination of its intake structure at Duluth, which had to be abandoned in the early 1970s. Gwinnett failed to make this argument before the district court. We generally do not consider arguments raised for the first time on appeal and need not do so here. *Peek–A–Boo Lounge of Bradenton, Inc. v. Manatee Cnty.,* 630 F.3d 1346, 1358 (11th Cir. 2011).

In any event, this argument is meritless. Gwinnett fails to discuss the rights of the federal government to make alterations to navigable waters. The federal government possesses what is known as a navigational servitude, "the privilege to appropriate without compensation which attaches to the exercise of

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[33] Gwinnett argues that any challenges to its right to storage under the 1974 supplement are barred by the six-year statute of limitations for actions against the United States. 28 U.S.C. § 2401(a). Though the statute has been extended to suits under the APA, it is clearly inapplicable here. Appellees, and/or the Corps, have nothing to challenge here, and consequently nothing that they are barred from challenging, because the Corps merely granted Gwinnett an unexercised option. No permanent storage rights were ever conferred on Gwinnett by the Corps.

the power of the government to control and regulate navigable waters in the interest of commerce." *United States v. Va. Elec. & Power Co.,* 365 U.S. 624, 627, 81 S.Ct. 784, 787–88, 5 L.Ed.2d 838 (1961) (internal quotation marks omitted). The navigational servitude is a dominant servitude, trumping all competing and conflicting rights to the waterway. *Id.* This servitude extends to the entire river and the riverbed lying below the high-water mark. *United States v. Rands,* 389 U.S. 121, 123, 88 S.Ct. 265, 267, 19 L.Ed.2d 329 (1967). It is anchored in Congress' commerce clause power. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. For this purpose they are public property of the nation, and subject to all the requisite legislation by Congress." *Id.* at 122–23, 88 S.Ct. at 266–67 (alteration omitted) (internal quotation marks omitted).

The federal government does not execute a taking of riparian interests by altering rivers for navigational purposes. The government's dominant right to make use of these waterways means that its actions do not amount to an appropriation. This premise has been explicitly stated several times in the context of hydropower interests: The federal government is not required to give compensation for water power when it takes riparian lands in accordance with the navigational servitude. *E.g., Va. Elec.,* 365 U.S. at 629, 81 S.Ct. at 788; *United States v. Twin City Power Co.,* 350 U.S. 222, 226–27, 76 S.Ct. 259, 262, 100 L.Ed. 240 (1956); *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 424, 61 S.Ct. 291, 307, 85 L.Ed. 243 (1940); *United States v. Chandler–Dunbar Water Power Co.,* 229 U.S. 53, 73–74, 33 S.Ct. 667, 676, 57

L.Ed. 1063 (1913). Gwinnett offers no explanation for why this principle should not be applied to the riparian interest in water supply.

Because of the federal government's dominant right to make alterations in the river, the effect on Gwinnett's riparian interests is not a taking. Thus, even if Gwinnett had not abandoned its claim, the claim would not be compensable.

Part V. *Remand Instructions to the Corps*

On remand, the Corps is to reconsider Georgia's request, as well as its authority with respect to the current provisions for water supply, in light of its authority under the RHA as well as the WSA and the 1956 Act. In particular, it should consider several important factors with respect to the Newman Report (i.e., the RHA). First, the Corps should take into consideration that water supply for the Atlanta metropolitan area was an authorized purpose of the Buford Project as well as hydroelectric power, flood control, and navigation. Second, Congress contemplated that the Corps would be authorized to calibrate operations to balance between the water supply use and the power use. Third, because Congress explicitly provided that the "estimated present needs" of the Atlanta area for water supply be satisfied at the expense of "maximum power value," Newman Report ¶ 80, we know that the water supply use is not subordinate to the power use. Fourth, from Paragraphs 79 and 80 of the Newman Report, we know that Congress contemplated that water supply may have to be increased over time as the Atlanta area grows.

However, the authorizing legislation is ambiguous with respect to the extent of the Corps' balancing

authority—i.e., the extent of the Corps' authority under the RHA to provide water supply for the Atlanta area. On the one hand, the authorizing legislation recognized that the Chattahoochee River was the source of the water supply for the Atlanta area, and the legislation repeatedly referred to safeguarding or assuring the water supply of the metropolitan area. *See* Newman Report ¶¶ 79 and 80. It also recognized that the minimum releases initially provided by the legislation to satisfy the present water needs "may have to be increased somewhat as the area develops." *Id.* ¶ 80. On the other hand, the legislation also contemplates that assuring such water supply for the Atlanta area can be done with a "slight decrease in system power value." *Id.*[34] We conclude that the Corps, the agency authorized by Congress to implement and enforce this legislation, should, in the first instance, evaluate precisely what this balance should be.[35]

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[34] Adding to the possible ambiguity, the quoted phrase from Paragraph 80 refers to a "slight decrease in system power value," but Congress contemplated, in the preceding Paragraph 79, a considerable increase in the river flow at Atlanta during off-peak hours in order to provide for Atlanta's water supply needs nineteen years in the future. Paragraph 79 contemplated increasing the river flow at Atlanta from 650 cfs to 800 cfs.

[35] The Georgia Parties specifically assert that the Corps has authority under the RHA to increase releases from the dam in order to provide water supply to downstream users, and to reallocate storage for this purpose, an assertion with which we agree today. However, The Georgia Parties do not specifically assert that, in addition to the foregoing authority, the RHA also gives the Corps authority to make direct withdrawals from Lake Lanier for water supply. Although the authorizing legislation recognized that the Chattahoochee River was the source of water supply for the Atlanta area, and although Congress specifically contemplated ensuring and safeguarding the area's water supply, the only way that the RHA mentions for ensuring the water supply of the Atlanta area is by means of

Once the Corps has determined the extent of its authority under the RHA, it should then determine its authority pursuant to the WSA. The authority under the WSA will be in addition to the Corps' authority under the RHA and the 1956 Act.

It is apparent from the record and the evolving position of the Corps that the Corps has not arrived at a final, definitive determination of the scope of its authority to allocate storage to water supply. For example, it is not clear whether the Corps has arrived at a firm calculation of how many gallons per day can be provided for the Atlanta area's water

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increasing releases from the dam for the purpose of downstream withdrawals. It also appears that the Corps' position has been more consistent with respect to its lack of authority under the RHA to provide direct withdrawals than it has in other regards. *See* F.G. Turner, U.S. Army Corps of Eng'rs: Mobile Division, *Report on Withdrawal of Domestic Water Supply from Buford Reservoir* (1955) (stating that the Corps advised Gwinnett County that it did not have the authority at that time—i.e., before the 1958 WSA—to grant a request for direct withdrawals for water supply and recommending that Congress provide the Corps with the additional authority necessary to grant this request). Finally, because it is unclear at this point precisely how much of the Atlanta area's water supply the Corps will determine on remand it can provide pursuant to its clear RHA authority to increase releases for downstream water supply, because the 1956 Act clearly gives the Corps authority for a specific amount of direct withdrawals for Gwinnett County, and because the WSA clearly provides the Corps authority for direct withdrawals from the Lake (as long as the cumulative exercise of such Corps authority pursuant solely to the WSA does not constitute a "major operational change" or "seriously affect the purposes for which the project was authorized"), it is not clear that the issue of RHA authority for direct withdrawals is a live issue in this case. For all of the foregoing reasons, we express no opinion on whether the RHA could be construed to provide authorization for the Corps to satisfy the authorized water supply purpose, not only by increasing releases for downstream withdrawal but also by direct withdrawals from the reservoir.

supply needs as a mere incident to, or byproduct of, power generation. The Corps' latest figure, developed in 1986, in this regard has been 327 mgd; however, at oral argument the Corps asserted that the calculation was not definitive and deserved more study. Also, it is apparent that the Corps has not arrived at a definitive, final determination of whether, and to what extent, storage reallocation would be necessary for RHA-authorized releases from the dam primarily for water supply purposes (and how to factor in the fact that these releases will still generate some power, though not of peak value). It is also unclear whether the Corps has arrived at a final determination of the appropriate measure for determining under the RHA what the impact of increased water supply use on power is, or the appropriate measure for determining under the WSA what constitutes a "major operational change."[36] Finally, the Corps has not yet articulated a policy on whether to account for return flows, and if so, how to differentiate between flows returned directly to the lake and flows returned downstream from the dam. These are some of the questions that the Corps should answer on remand, although we make no attempt to be exhaustive in that regard.

As part of the final, definitive statement of the Corps' water supply analysis, if the agency ultimately concludes that it does not have the authority to grant the Georgia request, it nevertheless should

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[36] In this regard, for example, the Corps should consider whether, and to what extent, considerations such as the following are relevant: percentage reallocation of conservation and/or other storage, measurements of decreases in systemwide power, and compensation to power customers. *See also supra,* note 31.

indicate the scope of the authority it thinks it does have, under the RHA, the WSA, and the 1956 Act. This way, the parties will have some further instruction, based on sophisticated analysis, of what the Corps believes to be the limitations on its power.

Part VI. *Collateral Estoppel Effects on Remand Instructions*

To assist the Corps in making these determinations on remand, we address here whether certain statements from this Court's decision in *Alabama* or the D.C. Circuit's decision in *Geren* carry the force of collateral estoppel. Specifically, we discuss whether either of the two claims found to have preclusive force by the district court in the instant case is binding on the Corps and whether any of Alabama and Florida's additional collateral estoppel arguments have merit. At the outset, we note that collateral estoppel applies only if (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue was critical and necessary to the earlier judgment; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Christo v. Padgett,* 223 F.3d 1324, 1339 (11th Cir. 2000).

The district court found collateral estoppel, preclusive effect in the D.C. Circuit's conclusion that the WSA applied to interim reallocations of storage. *Tri–State,* 639 F.Supp.2d at 1343. We take no issue with this application of collateral estoppel. On remand, the Corps will determine the extent of its authority to supply the current water supply needs of the Atlanta area, combining its authority under the 1956 Act, the RHA, and the WSA. The Corps' authority

under the WSA (as well as the statutory limits thereto) are applicable to the Corps' determination of its authority to supply current water supply needs, whether by force of collateral estoppel or clear statutory meaning or both.

The district court also found preclusive effect in the D.C. Circuit's holding that the reallocation of 22% of Lake Lanier's conservation storage is a major operational change on its face. *Id.* Several aspects of this holding merit discussion. First, and foremost, the *Geren* court considered only the Corps' authority under the WSA, not its authority under the RHA.[37] Accordingly, a different issue is presented here. At the very least, this difference means that any water the Corps finds it is authorized to supply pursuant to the RHA is separate from the water it is authorized to supply pursuant to the WSA, and that this RHA-authorized water supply would not count against the *Geren* court's 22% limit.[38]

It is also possible that our reading of the authority provided by the RHA fundamentally changes the WSA analysis, given that the RHA congressionally authorizes the Corps to increase water supply in its

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[37] The settling parties—the Corps, SeFPC, and the Georgia Parties—did not make an issue of the Corps' authority under the RHA because they were not in full agreement on whether water supply was an authorized purpose of the Buford Project. As settling parties defending a settlement, they had no incentive to assert issues about which they disagreed.

[38] Of course, the authority granted under the 1956 Act for Gwinnett County also would not count against the *Geren* court's 22% limit. Likewise, the parties and the courts have consistently assumed, and so do we, that the 10 mgd in compensatory withdrawals by Buford and Gainesville do not affect the amount of water that the Corps is authorized to supply under the various statutory grants.

balancing of hydropower and water supply needs, meaning that such reallocations to water supply arguably do not actually constitute a "change" of operations at all, and that the issue is therefore entirely different than the one presented to the *Geren* court. In other words, it is possible that the 22% holding has no preclusive force at all. However, because it is not clear that the *Geren* court's 22% limit will be reached in this case,[39] we expressly decline to address the collateral estoppel effect of the *Geren* court's 22% limit.[40]

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[39] There are two reasons the 22% limit may not be reached. First, the Corps has yet to determine the extent of its authority to allocate water to water supply under the RHA. The 22% limit would not be reached unless the water allocated under the WSA represented at least a 22% reallocation above whatever allocation is authorized under the RHA. Second, as discussed in the two paragraphs immediately following this paragraph, percent reallocation of conservation storage may not be the correct or sole measure of operational change.

[40] We do, however, expressly address the collateral estoppel effect of *Geren*'s alternative holding—that even a 9% increase in storage for water supply is a major operational change. The district court did not find preclusive effect to this holding. Alabama and Florida do not argue in their briefs that this holding is entitled to collateral estoppel, and Alabama and Florida expressly abandoned any such claim at oral argument. Nonetheless, we consider this issue in order to provide complete remand instructions to the Corps. Because the issue arose in *Geren* for the first time at oral argument, the Corps and the Georgia Parties had no opportunity to brief the issue. This alternative, and secondary, holding therefore wholly fails the "actually litigated" requirement for collateral estoppel. *See Chi. Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.,* 125 F.3d 526, 530 (7th Cir. 1997) (expressing doubt that the issue of a regulation's validity was actually litigated when it emerged only at the reply brief stage and received little discussion in the opinion, notwithstanding the fact that the party against whom collateral estoppel was asserted had raised the application of the regulation in its earlier response to summary judgment).

Second, it is clear that the question of whether percent reallocation of storage is the correct or sole measure of operational change was not actually litigated. Examination of the parties' briefs in *Geren* makes clear that the parties assumed, but did not put at issue, the question of whether percent reallocation of storage is the correct or sole measure of operational change. Similarly, because the parties merely assumed that percent reallocation was the appropriate measure, the *Geren* court made the same assumption in its opinion, without any discussion of the issue. When an issue is merely assumed, it does not meet the actual litigation requirement for collateral estoppel. *See Fields v. Apfel,* 234 F.3d 379, 383 (8th Cir. 2000) (finding no issue preclusion with respect to whether a particular method for calculating disability benefits applied, because its applicability had merely been assumed by the court and both parties in a prior case and not placed at issue). The fact that the *Geren* court ruled "without thoroughly examining" the issue further undermines the preclusive effect of the ruling. *A.J. Taft Coal Co. v. Connors,* 829 F.2d 1577, 1581 (11th Cir. 1987) (declining to apply collateral estoppel where the issue was not fully litigated, which resulted in the prior court tendering a conclusion "without thoroughly examining" the issue). Moreover, in this case, the district court did not hold that percent reallocation of storage is, as a matter of collateral estoppel, the correct or sole measure, and Appellees do not argue on appeal that we are bound by collateral estoppel to hold that percent reallocation of storage is the only appropriate measure of operational change. We conclude, for the foregoing reasons, that collateral estoppel does not bar the Corps from determining the appropriate

measure of operational change on the basis of its own expertise. The Corps is free to consider on remand whether other measures, such as impact on hydropower,[41] should be considered instead of or in addi-

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[41] It may be that the percent impact on hydropower is significantly less than the percent of storage reallocated to water supply under a given allocation scheme. For example, the Corps' brief at 99–100 explained that the "de facto" reallocations of storage to account for current uses causes a systemwide reduction of hydropower of only 1%.

Another aspect of the evaluation of detriment to hydropower is whether compensation to power users can be considered to mitigate any detriment. Although the *Geren* court rejected the idea that compensation to hydropower users might be relevant under the WSA, *see Geren,* 514 F.3d at 1324, Alabama and Florida do not argue that this rejection gives rise to collateral estoppel. We consider the issue nonetheless in order to provide complete remand instructions to the Corps. For the following reasons, we conclude that collateral estoppel does not preclude the Corps from considering compensation to power users as a mitigating factor in its analysis of detriment to hydropower, if the Corps finds it appropriate to consider compensation for this purpose based on the exercise of its expertise. The concept of compensating power customers presents a different issue than the one considered in *Geren* because the D.C. Circuit failed to recognize the Corps' authority under the RHA. As we hold today, the RHA authorizes the Corps to increase water supply at the expense of hydropower, and it contemplates that, in balancing the water supply and hydropower interests, the Corps should consider the magnitude of the detriment to hydropower. Because the *Geren* court failed to recognize this authority, it treated the proposed change in storage, and flow through, as a major operational change without considering the magnitude of the effect on hydropower and without considering whether financial compensation is relevant to that inquiry. Accordingly, the *Geren* court did not face the same issue with respect to the effect of compensation on the Corps' authority as this Court. Because the issue is different, collateral estoppel does not apply. *See Christo,* 223 F.3d at 1339. The Corps on remand may therefore make a fresh determination regarding whether financial compensation to power customers is material for the purpose of evaluating the magnitude of the detriment to hydropower.

tion to percent reallocation of storage.

Third, examination of the briefs in *Geren* also shows that the parties merely assumed that conservation storage was the appropriate frame of reference against which percent reallocation should be calculated, and the court likewise made this assumption. Accordingly, the actual litigation requirement is not met and the Corps is free to consider on remand whether some other portion of the dam's capacity should also be considered. For instance, it may be that the flood control storage, which sometimes contains excess water that could be released to satisfy water supply needs, should be factored into the calculation.

Alabama and Florida advance two collateral estoppel arguments in addition to those already covered above. First, they argue that the *Geren* court decided that, for purposes of the WSA analysis, the baseline for storage against which major operational change should be measured is zero. They further argue that the decision has the effect of collateral estoppel. We disagree. As noted above, the *Geren* court expressly made no decision with respect to the Corps' authority to allocate storage to water supply under the RHA.[42] It addressed the issue of the appropriate baseline for the WSA analysis only in the context of rejecting the settling parties' argument that the interim reallocation level prior to the settlement was the correct

[42] Accordingly, Alabama and Florida are plainly wrong to the extent they argue that this aspect of *Geren* establishes collateral estoppel for purposes of finding that the RHA authorizes no storage for water supply. Likewise, Alabama and Florida are wrong to the extent that they argue that *Geren* establishes estoppel for the proposition that grants of authority under the RHA and WSA are not supplemental. *Geren* made no such holdings.

baseline. A wholly different issue is presented in this appeal, in which we are required to assess the Corps' authority under the RHA to reallocate storage or otherwise provide water supply, and to factor this authority into the WSA analysis. Thus, the *Geren* court's decision with respect to the baseline for storage reallocation has no collateral estoppel effect in this case.

Second, Appellees argue that this Court's earlier statement in *Alabama,* that water supply is not an authorized purpose of the Buford Project, is preclusive. As noted earlier in this opinion, this statement does not give rise to collateral estoppel because it was not actually litigated and it was mere dicta and therefore was not critical or necessary to the judgment. *See supra,* note 21. In conclusion, the Corps is not bound by collateral estoppel in making the aforementioned determinations and should make its decisions on remand on the basis of its own reasoned analysis.

Part VII. *One-Year Time Limitation on Remand.*

This controversy has lasted a very long time. Since 1990, litigation related to this controversy has taken place in the Northern District of Alabama, the District Court for the District of Columbia, the Northern District of Georgia, the Northern District of Florida, the Middle District of Florida, the District of Columbia Circuit, and now five times in the Eleventh Circuit, and various attempts at compromise have been initiated and abandoned. Progress towards a determination of the Buford Dam's future operations is of the utmost importance to the millions of power customers and water users that are affected by the operations of the project. The stakes are extremely high, and all parties are entitled to a prompt resolu-

tion. Accordingly, the process for arriving at a conclusion of the bounds of the Corps' authority should be as swift as possible without sacrificing thoroughness and thoughtfulness. Given the importance of this case, the length of time it has been bouncing around the federal courts, and the amount of resources the parties and the courts have already expended, we believe that one year is sufficient for the Corps to complete its analysis of its water supply authority and release its conclusions. This panel will retain limited jurisdiction to monitor compliance with this time frame. At the end of this one-year period, we expect the Corps to have arrived at a well-reasoned, definitive, and final judgment as to its authority under the RHA and the WSA.

Conclusion

The Corps' did not consummate its decision-making process in the *Alabama*, *Apalachicola*, and *SeFPC* cases. Therefore, the district court lacked jurisdiction to hear these claims. The Corps' denial of Georgia's 2000 water supply request did constitute final agency action, and the district court's conclusion that it had jurisdiction to hear the *Georgia* case was proper. However, the court erred in its analysis of the Corps' rejection of the request. The decisions of the District Court and the Corps were based on a clear error of law—the determination that water supply was not an authorized purpose of the RHA. Furthermore, the Corps failed to reach a final, determinative position about its water supply authority before rejecting the state's request. Consequently, we reverse the district court's order granting the Corps summary judgment, and conclude that the Corps' decision was arbitrary and capricious or not otherwise in accordance with the law. All four cases are remanded to the district

court with instructions to remand to the Corps for reconsideration. This panel will retain limited jurisdiction to monitor the one-year time limit.

Accordingly, the judgment of the district court is reversed, its findings of fact and conclusions of law in all four cases are vacated, and these cases are remanded to the district court with instructions to remand to the Corps for further proceedings not inconsistent with this opinion.

REVERSED, VACATED, AND REMANDED; LIMITED JURISDICTION RETAINED.

APPENDIX B

United States District Court,
Middle District of Florida

In re TRI-STATE WATER RIGHTS LITIGATION.

No 3:07-md-01 (PAM/JRK) | July 17, 2009

MEMORANDUM AND ORDER

PAUL A. MAGNUSON, District Judge.

In the Rivers and Harbors Acts of 1945 and 1946 ("1945 RHA" and "1946 RHA"), Pub.L. No. 79-14, 59 Stat. 10, 10-11 (1945 RHA); Pub.L. No. 79-595, 60 Stat. 634, 640 (1946 RHA), Congress authorized the United States Army Corps of Engineers (the "Corps") to begin construction of a dam and reservoir on the Chattahoochee River north of Atlanta, Georgia. Construction on the project finished in approximately 1960. The dam was christened the Buford Dam; the reservoir was named Lake Sidney Lanier.

At issue in this Multi-District Litigation ("MDL") is the Corps's operation of Buford Dam and Lake Lanier. The parties to the various member cases are the states of Alabama, Florida, and Georgia; the Southeastern Federal Power Customers ("SeFPC"); the cities of Apalachicola, Florida, and Atlanta, Columbus, and Gainesville, Georgia; the Georgia counties of Gwinnett, DeKalb, and Fulton; the Atlanta Regional Commission ("ARC"); the Cobb County-Marietta Water Authority; the Lake Lanier Association;[1] the Alabama Power Company ("APC"); the

[1] The Court will refer to Atlanta, Columbus, Gainesville, Gwinnett County, DeKalb County, Fulton County, the ARC, the Cobb County-Marietta Water Authority, and the Lake Lanier Association collectively as "the Georgia parties."

Columbus Water Works ("CWW"); the Middle Chattahoochee River Users; and the Corps and several Corps officers.[2]

After the cases were consolidated by the Judicial Panel on Multidistrict Litigation, the parties agreed that the Court should consider the claims in two phases. Because some of the claims were similar or identical to claims pending before the United States Court of Appeals for the District of Columbia Circuit, the Court scheduled the proceedings on those claims second, awaiting that court's resolution of the claims. Thus, the first scheduling orders in the MDL case contemplated that the Court would first entertain environmental claims, such as claims that the Corps's operations in the Apalachicola-Chattahoochee-Flint ("ACF") river basin violate the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.,* and other environmental laws and regulations. Left for phase two were the overarching claims of the Corps's authority (or lack thereof) for its operations in the basin in general, such as claims that the Corps is violating the Water Supply Act and the Flood Control Act.

The D.C. Circuit ruled on claims similar to the so-called "overarching" claims in 2008. Thereafter, the "overarching" claims became ripe for this Court's resolution, and the Court therefore ordered that the phases be "flipped" so that the parties would present the statutory authorization and related issues first.

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[2] The Court will refer to the Corps and the Corps's officers collectively as the "Federal Defendants." The United States Fish and Wildlife Service ("USFWS") and a USFWS official also are defendants in one of the member cases (3:07-250), but the claims against USFWS are not at issue in this phase of the litigation.

(Aug. 11, 2008, Order.) The issues for resolution in the new Phase One include: (1) whether the Corps's operations in the ACF basin, including the execution of water-supply contracts and installation of water intake structures in Lake Lanier, the alleged preference of water supply over other purposes, and the denial of Georgia's water-supply request violate the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.,* the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Flood Control Act ("FCA"), 33 U.S.C. § 708 *et seq.*; the Water Supply Act ("WSA"), 43 U.S.C. § 390 *et seq.*; the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; and other congressional enactments; and (2) whether the water control plans and manuals, reservoir regulation manuals, action zones, recreation impact levels, and the Upper Chattahoochee Management Plan/River Management System violate federal law.

The fundamental question in the case is whether, by taking or failing to take the actions complained of in the various lawsuits, the Corps violated § 301 of the WSA, which provides:

> 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* * *.

43 U.S.C. § 390b(d). In general, Florida, Alabama, APC, and the SeFPC contend that the Corps was obligated to seek Congressional approval for actions the Corps has taken with respect to water supply in

Lake Lanier, because those actions allegedly affect the purposes for which the Buford Dam project was authorized or constitute major structural or operational changes. The Georgia parties and the Corps argue that Congressional approval is not required because the project's purposes include water supply and because, in any event, the Corps's operations have not amounted to a major structural or operational change in the project. To resolve these differences, the Court must examine the history of the Buford Dam and Lake Lanier.

BACKGROUND

A. Legislative History

1. Authorization

Although the 1945 and 1946 RHAs officially authorized the construction of Buford Dam, the Corps had been examining the feasibility of such a project for many years prior to 1945. Indeed, as early as 1925,[3] Congress asked the Corps to work with the Federal Power Commission (the predecessor to the Federal Energy Regulatory Commission) to examine the development of hydroelectric facilities on waterways nationwide, including in the ACF basin. River & Harbor Act of 1925, Pub.L. No. 68-585, ch. 467, 43 Stat. 1186, 1186, 1194 (March 3, 1925). In 1938, in response to a House resolution regarding the ACF basin, a Corps district engineer, Colonel R. Park, prepared a report to Congress outlining in great detail the geography and history of the basin and

[3] Congressional inquiries into the uses for the Apalachicola and Chattahoochee Rivers began even earlier than 1925, but most of these inquiries sought only to examine the rivers' usefulness for navigation. *See* George W. Sherk, *Buford Dam and Lake Lanier: Statutory Perspectives and Limitations* 11-34 (2000) [hereinafter "Sherk, *Buford Dam* "].

making recommendations for potential improvements in the basin. *See* H.R. Doc. No. 76-342, at 9-87 (1939) [hereinafter "Park Report"] (ACF000126-65).[4] It was in the Park Report that the project as eventually completed began to take shape.

The Park Report discussed a multitude of options for the development of rivers in the ACF basin and detailed eleven sites that could support a dam project to benefit hydroelectric power plants and navigation on the rivers. One of the eleven sites was the "Roswell" site "located on the Chattahoochee River 16 miles north of Atlanta, Ga., and about 2.5 miles upstream from the highway bridge at Roswell." Park Report ¶ 196, at 66 (ACF000155). The Roswell site is approximately where Buford Dam was eventually located.

The Park Report detailed both the costs and benefits of each of the eleven sites. Colonel Park considered the following "direct benefits" for all of the proposed sites:

(a) Savings to the public in transportation charges.

(b) Value of hydroelectric power developed.

(c) Value as a facility for national defense.

(d) Increased commercial value of riparian lands.

(e) Recreational value.

(d) Value as a source of industrial and municipal water supply.

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[4] The voluminous administrative record in this matter is divided into the original record and the supplemental record. The Corps has consecutively stamped each portion of the record, with the original record bearing the prefix "ACF" and the supplemental record having the prefix "SUPPAR." When possible, the Court will endeavor to cite not only to the document itself, but to its place in the administrative record.

Id. ¶ 243, at 77 (ACF000160). The Park Report assigned an approximate dollar value to each "direct benefit." For example, in Colonel Park's estimation, the value of hydroelectric power if all eleven projects had been built would have been worth $6.5 million annually. *Id.* ¶ 247, at 78 (ACF000161). Similarly, Colonel Park assigned a value of $25,000 to national defense, and $50,000 as a two-reservoir system's recreational value. *Id.* ¶¶ 250-51, 259, at 79, 80 (ACF000161-62). For the proposed projects' value as a water-supply source, however, Colonel Park assigned no monetary value, noting that "[t]here is apparently no immediate necessity for increased water supply in this area though the prospect of a future demand is not improbable." *Id.* ¶ 260, at 80 (ACF000162). Water supply was the only potential benefit assigned no monetary value in the Park Report. *Id.* ¶ 261, at 81 (ACF000162).

After the Park Report was submitted to Congress, the Corps continued to evaluate the ACF basin for potential improvements. A so-called "interim" plan was submitted to the Chief of Engineers in December 1942, but was never submitted to Congress. *See* Sherk, *Buford Dam,* at 45 & n. 190 (noting that the interim report itself is not available, likely because it was withdrawn before being submitted to Congress). The interim report recommended two potential dam sites, including the Lanier site, " 'principally in the interest of hydropower.' " *Id.* at 45 (quoting Memorandum from P.A. Feringa, Colonel, Corps of Eng'rs, to Chief of Eng'rs (Oct. 28, 1943)). The Chief of Engineers sent the report back to the district engineer, asking him to revise the report to include an analysis of the benefits to navigation and flood control. *Id.*

The 1945 RHA stated specifically that the ACF project was authorized "in accordance with the plans" in the Park Report. 1945 RHA, ch. 19, 59 Stat. at 12, 17. Because the Park Report had not established where in the ACF basin the dam or dams would be built, the Corps continued to study the matter. The first result of this study was the report of Brigadier General James B. Newman, Jr., submitted to Congress in 1947. H.R. Doc. No. 80-300, at 10-40 (1947) [hereinafter "Newman Report"] (ACF000644-74).

General Newman noted that "[t]he principal value of the Chattahoochee River is as a source of power." *Id.* ¶ 7, at 13 (ACF000647). He described the Park Report as evaluating the rivers in the ACF basin "in the combined interest of navigation and power." *Id.* ¶ 47, at 22 (ACF000656). The majority of the Newman Report consists of detailed evaluations of the hydropower and navigation benefits of the alternatives discussed in the Park Report. General Newman concluded that the locks and dams proposed by the Park Report for the southern portion of the Chattahoochee, below Columbus, Georgia, would not be economically efficient unless a "considerable flow regulation were provided by a large storage-power reservoir upstream." *Id.* ¶ 67, at 27 (ACF000661). That reservoir would become Lake Lanier.

General Newman also noted other "incidental" benefits of a reservoir at the Lanier site.[5] He discussed Atlanta's urging that a reservoir north of Atlanta be constructed before other elements of the ACF basin project, "in order to meet a threatened

[5] The Newman Report also refers to the Lanier site as the Buford site. *See, e.g.,* Newman Report ¶ 69, at 27 (ACF000661).

shortage of water, during low-flow periods, for municipal and industrial purposes." *Id.* ¶ 68, at 27 (ACF000661). Specifically, "[i]f the regulating storage reservoir * * * could be located above Atlanta, it would greatly increase the minimum flow in the river at Atlanta, thereby producing considerable incidental benefits by reinforcing and safeguarding the water supply of the metropolitan area." *Id.* General Newman therefore concluded that the Lanier site should be developed as outlined in the Park Report and in his own report. He determined that the construction of a dam at the Lanier site, along with the proposed developments at Junction and Upper Columbia, would "create an effective and economical system for the production of power, in addition to providing * * * for navigation* * *. The system would also contribute to the reduction of floods and flood damages in the Chattahoochee River valley, and would ensure an adequate water supply for the rapidly growing Atlanta metropolitan area." *Id.* ¶ 73, at 28-29 (ACF000662-63). The Newman Report recognized that releases from the proposed dam for downstream water supply might have to be increased as the Atlanta area developed, although the Newman Report emphasized that such an increase "would not materially reduce the power returns from the plant." *Id.* ¶ 80, at 34 (ACF000688).

As with the Park Report, the Newman Report estimated the dollar value of the various annual benefits from the construction of a dam and reservoir at the Lanier site. The Newman Report, however, listed only three valuable benefits: power, navigation, and flood control. *Id.* ¶ 98, at 38 (ACF000672). The Newman Report also allocated the estimated costs of building the Buford project, a total of more than $17

million. Of this, $16 million was allocated to power, none to navigation, and the remainder to flood control. *Id.* ¶ 97, at 38 tbl. 9 (ACF000672). The Southeastern Power Administration ("SEPA"), from which the SeFPC purchases the power generated by the Buford Dam, ultimately paid approximately $30 million toward the total construction cost of $47 million for the dam. SeFPC Am. Compl. ¶ 32; *see also* U.S. Army Corps of Eng'rs, *Survey Report on Apalachicola, Chattahoochee and Flint Rivers, Alabama, Florida and Georgia* ¶ 49, at 15 (1973) (total cost of Buford Dam was $47,059,711) (ACF003968). The 1946 RHA adopted the Newman Report's recommendation that the project be limited to three dams, including the Buford dam. U.S. Army Corps of Eng'rs, *Definite Project Report on Buford Dam: Chattahoochee River, Georgia* ¶ 7, at 4 (1949) [hereinafter "*Definite Project Report* "] (ACF001449).

2. Planning

The initial authorization in the 1945 and 1946 RHAs did not end Congress's involvement in the Buford Dam project. The project required money, and that money had to be appropriated by Congress each year. Thus, once the project entered initial planning stages and during the construction of the project, Congress held yearly hearings on the progress of the project and on the Corps's use of funds. For fiscal year 1948, Congress considered the Corps's request for funding for the planning of the project. Georgia Representative James C. Davis asked the Appropriations Committee to recognize the "critical necessity" of the project, which he described as a "multi-purpose dam * * * for the purpose of generating power, flood control, and water supply for the city of Atlanta, as well as a regulated flow of water of the Chattahoo-

chee River* * *." *War Dep't Civil Functions Appropriation Bill 1948: Hearing on H.R. 4002 Before the Subcomm. of the S. Comm. on Appropriations,* 80th Cong. 697 (1947) (statement of Rep. James C. Davis, Georgia). In addition, Atlanta's Mayor William B. Hartsfield testified that the undependable nature of the flow in the Chattahoochee had likely already caused severe economic losses in the Atlanta area. *Id.* at 700 (statement of William B. Hartsfield, Mayor, Atlanta, Georgia). He asked that the Buford project be given priority over other dams proposed for the Chattahoochee. *Id.*

The following year, the House Subcommittee on Appropriations submitted a report about the funding the Corps had requested for that fiscal year, including funding for the Buford Dam project. *See* H.R.Rep. No. 80-1420, at 5-8 (1948). The report recommended reducing the Corps's request for plans for the Buford project by $67,000. According to the report:

> While the Buford Dam may be an important part of the comprehensive river system plan for the Apalachicola, Chattahoochee, and Flint Rivers its construction will provide a source of water for the city of Atlanta that witnesses from that part of the country indicate is greatly needed. The city of Atlanta is not, however, providing any contribution toward the construction of this dam and inasmuch as it stands to benefit to a great extent it appears that some substantial contribution should be made toward the ultimate cost of the dam, and in future planning it is suggested that this feature be given careful consideration and an opportunity be afforded the city of Atlanta to make a contribution comparable to the benefits to be received.

Id. at 8.

In January 1948, the House Subcommittee on Appropriations heard testimony from several members of Georgia's Congressional delegation about the various projects in the ACF basin. Representative Stephen Pace led the delegation and described the ACF projects as having three purposes: navigation, power, and flood control. *Civil Functions, Dep't of the Army Appropriation Bill for 1949: Hearing on H.R. 5524 Before the Subcomm. of the H. Comm. on Appropriations,* 80th Cong. 723 (1948) (statement of Rep. Stephen Pace, Georgia). Representative Pace also testified that the project had "two additional purposes": to "serve as a reservoir for the entire system in the event of dry spells and floods," which would "assure[ ] the navigability of the entire project"; and "to meet the very critical shortage of water in the city of Atlanta." *Id.* He also emphasized the area's "crying need for an abundance of hydroelectric power." *Id.* at 724.

Many of the witnesses testified about the navigation and transportation benefits of the projects proposed for the ACF basin. Among them was J.W. Woodruff, for whom the ACF's southernmost dam, the Jim Woodruff Dam, is named. He envisioned the navigation made possible by the projects in the ACF basin as an economic engine that would drive industrial and commercial development in the region, allowing goods to be shipped from the area around the world. *Id.* at 750-51 (statement of J.W. Woodruff, Atlanta, Georgia).

Other participants addressed their testimony specifically to the proposed Buford project. Representative John S. Wood of Georgia spoke about the need for flood control in an area that could receive more than eight inches of rain in a 24-hour period. *Id.* at

777 (statement of Rep. John S. Wood, Georgia). Both Mayor Hartsfield and Representative Davis again testified about the multi-purpose nature of the project, pointing out its benefits for power, navigation, flow regulation, and pollution control, and as a source of water supply for Atlanta. *Id.* at 778 (statement of Rep. James C. Davis, Georgia), 782 (statement of William B. Hartsfield, Mayor, Atlanta, Georgia). In his statement to the Senate Subcommittee on Appropriations, however, Mayor Hartsfield deemphasized Atlanta's need for water supply from the Chattahoochee. He characterized Atlanta's need for the water as "necessary" but stressed that Atlanta should not "be put in the category with such cities as are in arid places in the West or flat plain cities where there is one sole source of water * * *." *Civil Functions, Dep't of the Army Appropriation Bill 1949: Hearing Before the Subcomm. of the S. Comm. on Appropriations,* 80th Cong. 644 (statement of William B. Hartsfield, Mayor, Atlanta, Georgia). Mayor Hartsfield stated:

> We need flood control; we need the increased power; we need badly some sort of water recreation in that section. We need, of course, the promotion of navigation* * *.
>
> We need the promotion of regular flow not only for Atlanta's water supply, but to enable others, as I said, to use the river, industries to use it, which they are not now able to do.

Id. at 646.

As part of the record at the hearing, the Corps filed a report describing the Buford project:

> The Buford Reservoir will provide flood protection to the valley below it; provide a large block of pow-

> er to an area where there is a power shortage; provide an increased flow which is essential to provision of a 9-foot depth for navigation in the Apalachicola River; assure an adequate water supply for municipal and industrial purposes in the Atlanta metropolitan area; and provide recreational facilities for the area surrounding the reservoir.

Id. at 648 (report of P.A. Feringa, Colonel, Corps of Eng'rs).

At the end of February 1948, apparently in response to the questions raised about Atlanta's willingness to pay for part of the Buford project, Representative Davis wrote to Mayor Hartsfield. In this letter, Representative Davis stated that the Subcommittee's desire to have Atlanta fund some of the construction cost of the dam was not unprecedented, noting that the city of Dallas had recently contributed more than $2 million to a reservoir project in Texas. Letter from Rep. James C. Davis, Ga., to William B. Hartsfield, Mayor, Atlanta, Ga. (Feb. 27, 1948) (SUPPAR000420). Mayor Hartsfield responded negatively to the suggestion that Atlanta should bear some of the costs of the Buford Dam:

> Frankly, in our zeal I think we have just laid too much emphasis on the Chattahoochee as a water supply* * *.
>
> * * *.
>
> In our case the benefit so far as water supply is only incidental and in case of a prolonged drought. The City of Atlanta has many sources of potential water supply in north Georgia. Certainly a city which is only one hundred miles below one of the greatest rainfall areas in the nation will never find itself in the position of a city like Los Angeles* * *.

> * * *.
>
> [I]n view of other possible sources of Atlanta's future water we should not be asked to contribute to a dam which the Army Engineers have said is vitally necessary for navigation and flood control on the balance of the river.

Letter from William B. Hartsfield, Mayor, Atlanta, Ga., to Rep. James C. Davis, Ga. (Mar. 1, 1948) (SUPPAR001063). Atlanta did not contribute to the construction costs of the Buford Dam.

In preparation for the start of construction, the Corps prepared the Definite Project Report. (ACF001436). This report described the project's "principle purposes" as: "to provide flood control; to generate hydroelectric power; to increase the flow for open-river navigation in the Apalachicola River below Jim Woodruff dam; and to assure a sufficient and increased water supply for Atlanta." *Id.* ¶ 115, at 41 (ACF001486). The Definite Project Report addressed only one specific water-supply issue: the city of Gainesville's water-pumping station, located on the Chattahoochee. *Id.* ¶ 95, at 29 (ACF001474). The report noted that the entire station would require relocation, as it would be inundated on completion of the dam. *Id.* ¶ 96, at 29 (ACF001474). On June 22, 1953, the Corps and Gainesville executed a contract whereby the Corps paid Gainesville $300,000 for the land to be taken by the reservoir and Gainesville was given the right to withdraw eight million gallons per day from the reservoir. Contract between U.S. Army Corps of Eng'rs & City of Gainesville, Ga. (June 22, 1953) (ACF014457-63).[6]

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[6] The City of Buford executed a similar contract because its waterworks facilities were also inundated by the waters of Lake

In its discussion of reservoir regulation, the Definite Project Report noted that the power plant would operate as a "peaking plant to provide maximum possible power during the hours of greatest demand." *Definite Project Report* ¶ 120, at 42 (ACF001487). At off-peak times the plant would operate only a smaller generator, "to provide flow to meet municipal and industrial requirements at Atlanta." *Id.* When water levels in the reservoir fell below a certain level, however, "only prime power [would] be generated." *Id.*

The Definite Project Report estimated the total cost of the Buford project at $35.6 million. *See id.* ¶ 104, at 32-37 tbl. 1 (ACF001477-82). The "primary benefits" of the project were "flood control and production of hydroelectric power." *Id.* ¶ 123, at 44 (ACF001489). The report calculated the flood-control benefit as worth $163,000 annually. *Id.* Power benefits were valued at $1.7 million on site, with the potential for up to $3.2 million in power benefits if all downstream plants were modified as proposed. *Id.* ¶ 123, at 45 tbl. 3 (ACF001490). The report calculated the potential annual benefit to transportation at almost $1.4 million. *Id.* ¶ 124, at 45 (ACF001490). The benefit to recreation was calculated at $196,000 annually. *Id.* ¶ 125, at 46 (ACF001491). The Definite Project Report noted that a "real benefit will also result from assurance of sufficient water for municipal and industrial requirements at Atlanta" but it did not make any estimate of the value of that benefit. *Id.* ¶ 124, at 46 (ACF001490).

Lanier. *See* Contract between U.S. Army Corps of Eng'rs & City of Buford, Ga. (Dec. 19, 1955) (ACF014450-56) (allowing Buford to withdraw two million gallons per day from the reservoir).

The question of Atlanta's contribution to the costs of the Buford project surfaced again in the hearings on the 1952 Army Appropriation Bill, H.R. 4386. Corps officer Colonel Potter testified that "[t]he purpose of the project is flood control, water supply for the city of Atlanta, which is growing by leaps and bounds, and the production of power." *Civil Functions, Dep't of the Army Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 82d Cong. 118 (1951) (statement of Col. Potter, Corps officer) (SUPPAR026654). A member of the Subcommittee asked Colonel Potter if Atlanta was "cooperating in this project in any way." *Id.* at 120 (question of Rep. Davis) (SUPPAR026656). Colonel Potter responded:

> No, sir; because this is not a problem of furnishing water directly or furnishing storage for that purpose; it is the regulation of the river that gives [Atlanta] a constant supply over the up-and-down supply now existing during the year* * *. With this dam letting out a constant supply of water every day their water-supply problem is reduced immensely* * *.

Id. (statement of Col. Potter, Corps officer). Other committee members questioned Colonel Potter further on Atlanta's need for, and contribution to, the project:

> *Mr. Ford*: Where you have a project such as this particular project and water supply is part of the justification for a community, does not the community make any contribution to the project?
>
> *Col. Potter*: Yes, sir, normally, but not in this case* * *.
>
> This dam furnishes Atlanta with water due to the

> fact that it regulates the discharge of floods. When a flood comes, it comes down in a certain set period-say a week. We store that week's terrific runoff of water and then let it out gradually* * *. Hence we discharge that flood, we will say, for 3 months.
>
> Then, in the production of electricity, we can discharge somewhere in the neighborhood of 4,000 to 5,000 second-feet constantly. That [water] will always be flowing by Atlanta; so that now they won't have the river partially dry or full of mud in the summer, but they will have a more or less constant flow of the river past their door and will always be able to pull water out of it.
>
> It did not cost the Federal Government 1 cent to supply that service, because it was an adjunct to the power supply and flood control. Had we put in some storage purely for water supply, which they would tell us to release at certain intervals, we would then charge them for it, and they would have to pay for the difference of that construction cost.

Id. at 121-122 (exchange between Rep. Gerald Ford, Michigan, and Col. Potter, Corps officer) (SUPPAR026657-58).

In a prescient question, Representative Ford then asked, "Is it not conceivable in the future, though, when this particular project is completed, that the city of Atlanta will make demands on the Corps because of the needs of the community, when at the same time it will be for the best interests of the overall picture * * * to retain water in the reservoir?" *Id.* at 122 (SUPPAR026658). Colonel Potter's response is illuminating: "The first thing we do is to decide, after a study, whether or not the water supply is more

valuable to use for the production of electricity. If it is, then we would have to come back, I believe, to Congress to alter the authorization of that project, were it a major diversion of the water." *Id.* He noted that the Corps "take[s] a very dim view of changing a project to the subsequent needs without Congress having a hand in it." *Id.*

3. Construction

In 1952, at the beginning of construction of the dam, Georgia's Representative Davis and the Corps's General Chorpening appeared at a hearing of the House Subcommittee on Appropriations to ask Congress for $8.5 million for the Buford project. Representative Davis described the project as providing flood control, power, and navigation benefits. *Civil Functions, Dep't of the Army Appropriations for 1953: Hearings on H.R. 7268 Before the Subcomm. of the H. Comm. on Appropriations,* 82d Cong. 1196-97 (1952) (statement of Rep. Davis, Georgia) (SUPPAR026679-80). Neither Representative Davis nor General Chorpening mentioned any water-supply benefits from the project.

The next year, two Corps officers testified before the Senate Subcommittee on Appropriations in support of the Corps's request for another $8.5 million in funding for the Buford project. Colonel Paules described the project as "a combination flood control-power project which will assist navigation downstream by the regulation of the river flows." *Civil Functions, Dep't of the Army Appropriations, 1954: Hearings on H.R. 5376 Before the Subcomm. of the S. Comm. on Appropriations,* 83d Cong. 480 (1953) (statement of Col. Paules, Corps officer) (SUPPAR026685). Colonel Paules and General Chorpening also testified before the House Subcom-

mittee on Appropriations regarding the requested funding for the Buford project. Colonel Paules discussed the anticipated completion dates for the project, including when the power plant was expected to be operational. He noted, "[t]he project has a total capacity of some 2 million acre-feet for flood control and power, and incidentally would supply additional water downstream for the benefit of the municipalities along the river* * *." *Civil Functions, Dep't of the Army Appropriations for 1954: Hearings on H.R. 5376 Before the Subcomm. of the H. Comm. on Appropriations,* 83d Cong. 503 (1953) (statement of Col. Paules, Corps officer) (SUPPAR026688). Representative Davis asked whether Atlanta was contributing to the cost of the project. The Corps officers responded, "While the city of Atlanta is not contributing to this, they get benefits from it, incidentally, as the result of the controlled release of floodwaters, and as the water is released through the powerplant." *Id.* General Chorpening explained:

> [T]here would be no legal way to collect payment from the city of Atlanta, since, as was just stated, there is no additional cost being included for the construction of this project to provide the more uniform flow of water which will pass the city of Atlanta. In other words, the building of the project, with its power production and flood control and navigation benefits will not make available any more water than is now going past Atlanta. It is only going to make it flow by at a more uniform rate.

Id. (statement of Gen. Chorpening, Corps officer).

The Corps requested an additional $5.8 million for the Buford project in fiscal year 1955. *Civil Functions, Dep't of the Army Appropriations, 1955: Hear-*

ings on H.R. 8367 Before the Subcomm. of the S. Comm. on Appropriations, 83d Cong. 324 (1954) (statement of Col. Whipple, Corps officer) (SUPPAR026698). Colonel Whipple told the Subcommittee that "[t]he project provides a considerable amount of flood control, but its main purpose is the output of power to the area." *Id.* He also testified that the project's "additional benefits" would include "increas[ing] the flow of water downstream which improves the water supply at Atlanta, and the project is unusually well situated for recreational use." *Id.* at 325 (SUPPAR026699). Again, the committee members asked about whether Atlanta would contribute toward the cost of the project. Colonel Whipple responded, "We understand not, sir* * *. There are no additional costs for [Atlanta's water supply]. It is purely an incidental benefit on account of the power releases which does not require any storage to be devoted to that purpose." *Id.*

In the next several years, Georgia's Representative Davis appeared in similar hearings before the House and Senate Subcommittees on Appropriations. He testified consistently that the purposes of the Buford project were flood control, navigation, and hydroelectric power, mentioning water supply only occasionally. *See, e.g., Public Works Appropriations for 1956: Hearings on H.R. 6766 Before the Subcomm. of the S. Comm. on Appropriations,* 84th Cong. 307-09 (1955) (statement of Rep. James Davis, Georgia) (SUPPAR026713-15) (stating that the Buford project is a "multi-purpose" project that will provide flood protection, "will augment the low water flow of the river" to support navigation and to assist in the generation of power downstream, will generate "810 million kilowatt-hours of electrical energy annually

and the additional water supply for the growing metropolis of Atlanta"); *Public Works Appropriations for 1957: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 84th Cong. 355-57 (1956) (statement of Rep. James Davis, Georgia) (SUPPAR026720-22) (discussing flood control, navigation, and power benefits but not mentioning water supply benefits).

During construction of the dam, Gwinnett County asked the Corps for permission to withdraw water from the reservoir for water supply. F.G. Turner, Ass't Chief, Eng'g Div., *Report on Withdrawal of Domestic Water Supply from Buford Reservoir* ¶ 1, at 1 (1955) (SUPPAR005459). The Corps responded:

> that the primary authorized purposes of the Buford project were flood control, power and low-flow regulation for navigation and other purposes, and that diversion of flows from the reservoir would, in some degree, adversely affect one or more of these purposes. [The Gwinnett County representatives] were informed that additional legislation would be necessary* * *.

Id. ¶ 2, at 1 (SUPPAR005459). The Corps noted that the project "will provide storage for flood control, hydro-electric power and increased flow for water supply at Atlanta, Georgia, and for navigation in the Apalachicola River." *Id.* ¶ 5, at 2 (SUPPAR005460). The report examined the "Provision for water supply in the Atlanta Area," discussing Atlanta's concern that the Corps maintain minimum flows in the river to meet Atlanta's water requirements. *Id.* ¶¶ 7-8, at 3 (SUPPAR005461). It also noted that Gwinnett County requested initial withdrawals of four million gallons per day from the reservoir and ultimate withdrawals of ten million gallons per day. *Id.* ¶ 9, at

3 (SUPPAR005461). The report predicted that "[t]he granting of permission to Gwinnett County to withdraw water for domestic water supply as requested will no doubt establish a precedence [sic] for possible like requests from other communities within the area* * *." *Id.* The report commented that Gainesville, Georgia, had been granted permission to withdraw a maximum of eight million gallons per day from the reservoir. *Id.* ¶ 9, at 4 (SUPPAR005462). As noted above, Gainesville had a water intake structure on the Chattahoochee River that was inundated by Lake Lanier, and thus had a pre-existing right to withdraw water.

In 1956, Congress granted the Corps permission to contract with Gwinnett County for the use of up to 11,200 acre-feet of storage in Lake Lanier annually, for a period not to exceed fifty years. Act of 1956, Pub.L. No. 84-841, 70 Stat. 725 (1956) (amending 1946 RHA). There is no evidence in the record that the Corps and Gwinnett County ever entered into the contract contemplated by this statute. Although the Corps and Gwinnett County did execute a water-supply contract in the 1970s, neither the original contract nor any supplement or extension thereto invoked the authority of the 1956 statute but rather relied on the more general authority of the WSA. *See, e.g.,* Supplemental Agreement No. 1 to Contract No. DACW01-9-73-624 Between the U.S. & Gwinnett County, Ga. for Withdrawal of Water from Lake Sidney Lanier, at 1 (Apr. 29, 1974) (ACF004022) (providing that, on expiration of the contract, Gwinnett County "shall have the right to acquire from the Government, under the provisions of the Water Supply Act of 1958, Public Law No. 85-500, the right to utilize storage space in the project * * *"). Moreo-

ver, the Corps's first agreements with Gwinnett County were, by their terms, "interim" contracts pending the completion of a study of the Atlanta area's water-supply needs. Contract Between the U.S. & Gwinnett County, Ga. for Withdrawal of Water from Lake Sidney Lanier, at 2 (July 2, 1973) (ACF004025); *see also infra* section C.1. As the Georgia parties admit, all of the Corps's contracts with Gwinnett County have expired. (Ga.'s Mot. for Summ. J. Factual App. ¶¶ 7.23, 7.33.)

In 1958, as the Buford Dam neared completion, the Corps promulgated the *Apalachicola River Basin Reservoir Regulation Manual*. U.S. Army Corps of Eng'rs, *Apalachicola River Basin Reservoir Regulation Manual* (1958) [hereinafter "1958 Manual"]. (ACF001640.) The 1958 Manual is a detailed description of the geography and hydrography of the ACF basin, including all federal projects undertaken in the basin. It describes Buford Dam as "a multiple-purpose project with major uses of flood control, flow regulation for navigation, and power." 1958 Manual ¶ 85, at 27 (ACF001677). The 1958 Manual does not specifically describe the operation of the Buford project; rather, the regulation manual for the Buford project, which was completed in October 1959, is appended to the 1958 Manual as Appendix B.[7] *Id.* app. B (ACF001776); *see also id.* app. B ¶ 43, at B-21 (ACF001804) (listing October 1959 completion date). The Corps has never updated the 1958 Manual or the Buford Reservoir Regulation Manual ("Buford Manual"), and thus these manuals are the current regulation manuals for the ACF basin and Buford

[7] Appendix A to the 1958 Manual is the regulation manual for the Jim Woodruff Reservoir on the Apalachicola River. (ACF001722.).

dam.

The Buford Manual lists the elevation for the top of the flood-control pool as 1085 feet above sea level. *Id.* app. B, at B-1 (ACF001784). The elevation of the top of the power pool is 1070 feet, and the bottom of the power pool is 1035. *Id.* The reservoir's flood-control storage (elevation 1085 to 1070) is 637,000 acre-feet. *Id.* Power storage is listed as 1,049,400 acre-feet. *Id.* The manual also noted that the reservoir reached full power pool on May 25, 1959, and that the President had signed a bill naming the reservoir Lake Sidney Lanier on March 29, 1956. *Id.* app. B ¶¶ 8-9, at B-5 (ACF001788).

The Buford Manual describes the project:

> Buford is a multiple-purpose project with principal purposes of flood-control, navigation and power. It reduces flood stages in the Chattahoochee River as far downstream as West Point, Georgia, 150 miles below the dam; provides an increased flow for navigation in the Apalachicola River below Jim Woodruff Dam during low-flow seasons; and produces hydroelectric energy, operating as a peaking power plant. The increased flow in dry seasons also provides for an increased water supply for municipal and industrial uses in the metropolitan area of Atlanta, and permits increased production of hydroelectric energy at downstream plants.

Id. app. B ¶ 12, at B-6 (ACF001789). The Buford Manual also details the regulation of the project:

> Normally, the Buford project will be operated as a peaking plant for the production of hydroelectric power with minimum releases during the daily and weekend off-peak period which will be sufficient, with local inflows added, to supply the Atlanta area

> with not less than 600 cfs. During low-water periods such regulation will provide increased flow downstream for navigation, water supply, pollution abatement, and other purposes* * *. [T]he primary purpose of the project is flood control, and a storage of 637,000 acre-feet between elevations 1,070 and 1,085 has been reserved exclusively for the detention storage of flood waters.

Id. app. B ¶ 29, at B-13 (ACF001796). The Corps contracted with the SEPA to provide 142,000 kilowatts of "dependable" power capacity from the project. *Id.* app. B ¶ 31, at B-13 (ACF001796). The Corps gave SEPA minimum declarations of energy the dam would produce each month. *Id.* app. B ¶ 31, sec. 2. 1, at B-15 (ACF001798). The Corps also noted its commitment to keep the flow at Atlanta at a minimum of 600 cfs. *Id.* app. B ¶ 33, at B-18 to 19 (ACF001801-02).

Enacted in 1958, the Water Supply Act ("WSA"), Pub.L. 85-500, tit. III, 72 Stat. 319, changed the way the Corps funded dam-building projects. Specifically, the WSA required the Corps to allocate the costs of each project to the benefits of the project so that, for example, if a project benefitted primarily hydroelectric power, the power interests would pay a proportionate share of the cost of that project. *See* WSA § 301(b), 72 Stat. at 319. The Buford project was well into construction by the time the WSA's cost allocation requirements took effect, but the Corps endeavored to comply with those requirements by issuing cost allocation studies for the projects in the ACF basin in 1959. Mobile Dist., U.S. Army Corps of Eng'rs, *Cost Allocation Studies, Apalachicola, Chattahoochee and Flint Rivers Projects, Basis of All Allocations of Costs for Buford and Jim Woodruff*

Projects Adopted by the Chief of Engineers 21 (1959) (ACF002103) (noting that according to an agreement between the Department of Interior, Department of the Army, and the Federal Power Commission, "costs of a multiple-purpose project shall be allocated among the purposes served in such a manner that each purpose will share equitably in the savings resulting from combining the purposes in a multiple-purpose development").

This study report introduced the projects in the ACF basin: "The primary benefits provided by the ACF project are flood control, navigation and hydroelectric power. The incidental benefits are low-water regulation for water supply and pollution abatement at Atlanta, Georgia and public use with facilities for recreation* * *." *Id.* at 2 (ACF002086); *see also id.* at 5 (ACF002089) (stating that the project "will be operated for the primary purposes of flood control, power, and navigation"). Although the report analyzes in detail the cost of the three benefits of flood control, power, and navigation, it does not attribute any costs to the "incidental" benefits of water supply, pollution abatement, or recreation. *Id.* at 20 (ACF002102).

The report gives the total "first" cost of the Buford project as $43,601,500. *Id.* at 23 (ACF002105). The portion of this total allocated to navigation was $1,518,200; to flood control, $3,402,600; and to power, $38,680,100. *Id.* No portion of the project's costs was allocated to water supply.

Appendix A of the report is the cost allocation study specifically for the Buford project. It states that "[t]he primary purposes of the Buford project are flood control and the generation of hydroelectric power. Incidental uses attributable to the operation

of the project for power include flow regulation for navigation in the Apalachicola River and water supply and pollution abatement in the Atlanta area." *Id.* app. A, at A-1 (ACF002108). The report notes that full-scale power operation began at Buford in July 1958. *Id.* app. A, at A-2 (ACF002109).

Table Four of the Appendix shows the "average annual benefits" of the Buford project. The annual benefit to navigation is listed as $75,900, to flood control is $193,000, and total power benefits (including benefits at site and downstream) are $2,476,200. *Id.* app. A tbl. 4 (ACF002127). There are no benefits calculated for any other purpose.

4. Water Supply

The various Corps reports and Congressional testimony discussed above show the original role of the Buford project in supplying water to Atlanta. At the time Buford Dam was authorized, planned, and constructed, the Corps did not anticipate any water-supply withdrawals from the reservoir itself, with the exception of the water withdrawn by the cities of Gainesville and Buford. Nor did the Corps or any other entity set aside any portion of Lake Lanier's storage for water supply. Rather, the water-supply benefit discussed throughout the legislative history was the regulation of the river's flow. A more regular flow was seen as providing Atlanta both with a reliable flow in the Chattahoochee from which to withdraw water, and more certainty diluting the wastewater Atlanta discharged into the river. Throughout the 1940s and 1950s, when water supply is mentioned in connection with the Buford project, that water supply is in the form of Atlanta's withdrawals from the river itself, far below the proposed dam.

In the decades after the Buford Dam was built, however, the Corps's and the Georgia parties' definition of water supply in the Buford project changed considerably. The origin of this change is difficult to pinpoint. However, at some point after the dam was completed, both the Corps and the municipal entities in the Atlanta area began to envision the water supply benefit as a storage-and-withdrawal benefit. In other words, water supply came to mean not flow regulation in the river but water withdrawals from the lake.

B. Operation of Buford Project

1. 1970s

Once construction on the Buford project was complete, the record reflects very little activity until the early 1970s. In 1974, in accordance with NEPA, the Corps prepared a final environmental impact statement ("EIS") "for continued operation and maintenance of the existing Buford Dam and Lake Sidney Lanier." Mobile Dist., U.S. Army Corps of Eng'rs, *Final Environmental Impact Statement, Buford Dam and Lake Sidney Lanier, Georgia (Flood Control, Navigation and Power),* Statement of Findings (1974) [hereinafter "*Final EIS* "] (ACF004338). The preliminary statement in the EIS reported that the "[a]uthorized project purposes provide peaking hydroelectric power, flood control, and low flow augmentation." *Id.* The preliminary statement added that "[a]dditional benefits derived from operation of the project are recreation and water supply." *Id.* The summary states:

> The project provides an average annual benefit of $638,400 in flood control. The hydroelectric facilities have a capacity of 86,000 kw and are operated

> to meet peak demands for electricity in the service area. Low-flow augmentation provides water for navigation, industrial and municipal uses down-stream. The reservoir provides a source of water supply for public water users. Over 15 million visitors utilized the recreational facilities of the lake in 1972. The benefit-to-cost ratio is 3.6 to 1.

Id. at i (ACF004339). The EIS's description of the project notes that the "principal purposes" of the project are flood control, navigation, and power. *Id.* at 1 (ACF004342). The description explains the project's effect on the principal purposes, adding that the "increased flow in dry seasons also provides for an increased water supply for municipal and industrial uses in the metropolitan area of Atlanta, and permits increased production of hydroelectric energy at down-stream plants." *Id.* The EIS recognizes that "recreation was not a primary purpose for which the project was authorized," but that recreation had become a significant part of the use of the reservoir, with Lake Lanier the most used Corps lake in the United States. *Id.* at 12 (ACF004353).

The total storage of the reservoir is 2,554,000 acre-feet, with 637,000 acre-feet of flood-control storage and 1,049,400 acre-feet of power storage. *Id.* at 4 (ACF004344). The EIS does not list any storage for water supply, but does note that Gwinnett County, Gainesville, and Buford "obtain water directly from the reservoir." *Id.* at 14 (ACF04355). In addition, "[t]he Atlanta metropolitan area increased its water use from the river 37% (from 117 mgd to 160 mgd)[8] between 1960 and 1968." *Id.* The EIS also discusses the changes in population in the area around the

[8] Million gallons per day is often abbreviated "mgd" or "MGD."

lake, stating that "[t]he number of residences within 2 ¼ miles of the lake * * * doubled from the time of completion of the project in 1956 through 1969." *Id.* at 15 (ACF004356). Such increases in population are not without consequences, of course: "Wastes [sic] treatment plants in the Atlanta metropolitan area have failed to keep pace with the expanding population, and the increased low flows with a 650 cfs minimum flow at Atlanta have provided some relief in improving stream water quality below Atlanta." *Id.* at 17 (ACF004358). The EIS also notes that "[i]ncreased low flows have created a more dependable water supply for the Atlanta metropolitan area, thus helping to insure an adequate source of water for the expanding population. Storage in Lake Lanier has increased the dependability of a source of water for Gainesville, Gwinnett County, and Buford, Georgia." *Id.*

Both the EIS and the comments thereto reference a study of Atlanta's water quality and water supply underway at the time the EIS was prepared. *See, e.g., id.* at 26-27 (comments of the Environmental Protection Agency) (ACF004367-68). This study, referred to in the EIS as the "Atlanta Urban Study" or the "Atlanta Water Resources Study," was a joint project of the Corps, the state of Georgia, and the ARC. *Id.* at 30 (ACF004371). Because the study was not completed in time for the EIS, the EIS stated that a new EIS should be written when the study was finished. *Id.* This study was not completed until the early 1980s, and is discussed below as the Metro Atlanta Area Water Resources Management Study ("MAAWRMS"). No new EIS has been completed since 1974.

Also in 1974, the Corps prepared a "Report on Con-

solidation of Existing Program Documents." Boyce J. Christiansen, Consultant, U.S. Army Corps of Eng'rs, *Report on Consolidation of Existing Program Documents, Lake Sidney Lanier (Buford Dam) Georgia* (1974) (ACF004096). This report specifically addresses water supply in three different sections. In the first section on "Facilities," the report states:

> Two cities, Gainesville and Buford, obtain water directly from the reservoir. These cities relocated their water works facilities with new or an addition to these facilities. No storage space is allocated to either Gainesville or Buford in these water supply contracts. The Gainesville and Buford contracts provides [sic] for the maximum withdrawal of 8,000,000 and 2,000,000 gallons of water respectively from the reservoir in any 24 hour period. Gwinnett County on [sic] June 1971 initiated a request which would permit withdrawal direct from the reservoir of 40,000,000 gallons per day by 1990. In a contract dated July 2, 1973 no storage space is allocated to the county for water supply, but the user will have the privilege of withdrawing water not to exceed that rate until such time as the Government studies of the areas [sic] water supply needs is [sic] completed. Withdrawal is not expected to be initiated for two or three years. Lake Lanier with its large water storage maintains a minimum flow of 650 cfs on the Chattahoochee River at Atlanta. The City of Atlanta and De Kalb County water systems draw their entire water supply from the Chattahoochee.

Id. at 32 (ACF004149).

In the section on "Trends," the report noted that neither Gainesville nor Buford pays anything for the water each withdraws from the reservoir, but that

"in the event the city desires to exceed th[e] [contractual] limitation an agreement will be necessary to provide payment for additional quantities withdrawn." *Id.* at 54 tbl. 15 (ACF004180). The section also discussed Gwinnett County's request for water supply withdrawals, stating that the requested withdrawal "would require a study of municipal and industrial water needs and a possible redistribution of project costs to include water supply as a project cost therefore a temporary contract on an interim basis was entered into." *Id.* at 54-55 tbl. 16 (ACF004180-81).

Finally, the report noted in the "Benefits" section that no revenues had yet been collected from Gwinnett County for the water-supply withdrawals. *Id.* at 63 (ACF004197).

In 1979, scientists at Georgia State University issued a report to the Corps on the environmental impacts of four of the alternatives being considered by the MAAWRMS mentioned above. Ga. State Univ. Team Project No. 834, *Preliminary Environmental Impact Assessment of Water Supply Alternatives for the Atlanta Metropolitan Area* (1979) (ACF006918). The alternatives under consideration were raising the water elevation of Lake Lanier, phasing out power generation at Buford Dam, constructing a second dam below Lake Lanier to further regulate the flows in the Chattahoochee River for the benefit of Atlanta's water supply and waste treatment, and dredging the Morgan Falls reservoir. *Id.* at 33 (ACF006955). The report described Buford dam as a "multipurpose project, built 1) to control floods, 2) to improve water quality by means of flow augmentation, 3) to insure sufficient riverflow in the Chattahoochee River before Columbus, Georgia, and 4) to

produce hydroelectric power." *Id.* at 21 (ACF006943). The report did not mention Lake Lanier as an independent source of water supply, nor did it discuss the environmental impact of large-scale water-supply withdrawals from Lake Lanier. *See, e.g., id.* at 37 ("In addition, no attention has been given to the effects of additional water intakes, increases in allowable supplies taken through existing intakes, etc. Such factors will affect the flow in the river and should be analyzed.") (ACF006959).

2. Drought Operations

Although flood control was a primary concern of both the Corps and Congress before and during construction of the Buford project, a drought in 1980 and 1981 caused the Corps to re-evaluate its operation of the project. The Corps formulated a "Drought Contingency Plan" to examine the operation of the ACF projects during the drought and "to explore alternative operational procedures during future periods of extreme drought." U.S. Army Corps of Eng'rs, *Drought Contingency Plan, Apalachicola, Chattahoochee, and Flint Rivers, Florida and Georgia* ¶ 2, at 1 (1982) (ACF008205). The Drought Contingency Plan was required because, during the 1981 drought, "not all project functions were met* * *. Functions that were not fully provided were navigation and contractual hydropower requirements." *Id.* ¶ 18, at 6 (ACF008210). The Plan did not comment on the fact that navigation and hydropower were two of the Congressionally mandated project purposes.

The Drought Contingency Plan described an agreement between Georgia Power and the Corps to provide minimum releases from Buford Dam of 1750 cfs at the request of Georgia Power each year be-

tween June 15 and September 15, to aid both water supply and water quality. *Id.* ¶ 14(b), at 5 (ACF008209). The previous release requirements for the dam were 600 cfs, 1958 Manual app. B ¶ 33, at B-18 to -19 (ACF001801-02), although in the mid-1970s the Corps had agreed to increase the minimum releases to 650 cfs. *Final EIS* at 17 (ACF004358). In addition, the Drought Contingency Plan described water supply as a "principal function" of the ACF basin projects, stating that water supply "must always have a high priority in drought operations." *Id.* ¶ 26, at 12 (ACF008216).

> Municipal and industrial water supplies which are derived from the Chattahoochee River can probably be adequately supplied during a drought. * * *. Even if Lake Lanier were drawn to elevation 1035 for other purposes there is still sufficient stored water which could be released through the low level sluice to meet the water supply requirements.
>
> No difficulty is contemplated in meeting water supply volume requirements in a drought that is no worse than those which have occurred in the past. There may be, however, difficulty with particular pumping installations. For example, within Lake Lanier there are several withdrawal facilities which could not get water if the pool were drawn to unusually low levels. River pumping stations could face the same problem. For this reason conservation of water should be promoted by local government.

Id. At the time the plan was drafted, communities surrounding Lake Lanier withdrew approximately fifty-five million gallons per day from the lake. Memorandum from Acting Commander, S. Atl. Div. (Apr. 23, 1982) (ACF008230).

In what appears to be an earlier version of the plan, called the "Drought Contingency Report," the Corps stated that the "project purposes specified in the authorizing document included flood control, hydropower, and streamflow regulation for navigation." U.S. Army Corps of Eng'rs, *Drought Contingency Report, Apalachicola, Chattahoochee, and Flint Rivers, Florida and Georgia* ¶ 3, at 1 (ACF008241). Under the heading "Project Purposes" the Drought Contingency Report provided: "Project costs for the Buford project have been allocated between the three legislatively authorized purposes. Prior to May 1979, recreation, water supply and water quality have always been considered to be functions of the Buford project and were accommodated as much as possible." *Id.* ¶ 4, at 1-2 (ACF008241-42). The Drought Contingency Report noted that in a recent public notice the Corps had recommended that "recreation, water supply, and water quality control be acknowledged as full project purposes of the Lake Lanier project* * *." *Id.* ¶ 5, at 2 (internal quotation and citation omitted) (ACF008242). The public notice also provided that "[a]ny significant change (in operation) would require reconsideration of cost-sharing requirements for the total project." *Id.* (internal quotation and citation omitted). According to the draft Drought Contingency Report, "[i]n other words, any 'significant' change favoring recreation, water supply or water quality over the three legislatively authorized purposes would require Congressional approval." *Id.*

3. MAAWRMS

As discussed briefly above, in the early 1970s the United States Senate directed the Corps and other entities to engage in a study of Atlanta's water

resources. This study lasted from 1972 to 1981 and was published in September 1981 as the Metropolitan Atlanta Area Water Resources Management Study, or MAAWRMS. U.S. Army Corps of Eng'rs, *Metropolitan Atlanta Area Water Resources Management Study: Final Report and Final Environmental Impact Statement* (rev. ed. Sept.1981) [hereinafter "MAAWRMS"] (SUPPAR001951). The final version of the MAAWRMS evaluated three "long-range water supply alternatives." *Id.* at I-16 (SUPPAR001978). The alternatives were: (1) construction of a reregulation dam below Buford Dam, (2) reallocation of storage at Lake Lanier, or (3) dredging the reservoir at Morgan Falls and reallocating Lake Lanier storage. *Id.*

The MAAWRMS noted that the Chattahoochee and Lake Lanier supply more than 90 percent of the total water supply for the metropolitan Atlanta area. *Id.* at II-16 (SUPPAR001996). Lake Lanier "provides storage for flood control, power, navigation, recreation, industrial and domestic water supplies, and low-flow augmentation." *Id.* at II-37 (SUPPAR002017). However, the project costs, totaling more than $55 million, were allocated to only four project purposes or uses: hydropower, navigation, flood control, and recreation. *Id.* at II-39 tbl. II-6 (SUPPAR002019). Of these four purposes/uses, hydropower had borne the lion's share of the costs, paying more than $44 million.[9]

[9] The MAAWRMS characterized recreation as an "authorized project purpose under general legislation, the 1944 Flood Control Act and the Federal Water Project Recreation Act of 1965." MAAWRMS at II-40 (SUPPAR002020). Because of the Court's resolution of the water-supply issue, it is not necessary to reach the issue of whether recreation is indeed an authorized project purpose.

The MAAWRMS recognized that changes in the operation of the Buford project would require Congressional approval. For instance, the study noted that one of the proposed alternatives was construction of a new reregulation dam below Buford Dam. *Id.* at II-48 (SUPPAR002028). If this construction was undertaken by local governments and not by the Corps, it would be the only alternative that would not require Congressional approval. *See id.* ("[I]t was considered that a reregulation dam constructed by local governments would be the most probable alternative to the other long-range alternatives which would require Congressional authorization for changes in operation of the Buford project.").

The MAAWRMS also contained a list of the existing water-supply contracts for withdrawals from Lake Lanier. *Id.* at II-51 tbl. II-8 (SUPPA002031). Despite the fact that only Gainesville and Buford had received Congressional authority to withdraw water from Lake Lanier, both Gwinnett County and the city of Cumming had also contracted with the Corps for these withdrawals. *Id.* The total withdrawals from the lake for water supply were given as 52.5 million gallons per day, with Gwinnett County receiving the majority of these withdrawals at 40 million gallons per day. *Id.* Although in this litigation the Corps characterizes Gwinnett County's and Cumming's water-supply contracts as "interim," the MAAWRMS states that "[o]nly the method and rate of payment are of an interim nature." *Id.* at II-51.

In 1975, to meet an immediate increased need for water supply, the state of Georgia asked the MAAWRMS group to develop an interim water-supply plan that would allow the state to approve additional withdrawals from the river and provide a

flow of 750 cfs at all times. *Id.* at II-60. The Corps agreed to a plan that allowed additional water releases from Buford Dam. *Id.* That plan required the hydropower interests to schedule peak releases from the dam on weekends. *Id.* at II-62 (SUPPAR002042). The power company agreed to this schedule only until 1983. *Id.*

The interim MAAWRMS, released in 1978, also recommended the imposition of a short-term water-supply plan in the event the MAAWRMS was not completed by 1983. *Id.* at II-69 (SUPPAR002049). This short-term plan "include[d] raising the normal pool at Lake Lanier by [one] foot and increasing off-peak releases from Buford Dam." *Id.* According to the MAAWRMS, the short-term plan "would necessitate reallocation or joint use of storage at the Lake Lanier project* * *." *Id.* at II-71 (SUPPAR002051). This plan provided for an average annual withdrawal of 33 million gallons per day directly from Lake Lanier, and the maintenance of a 750 cfs flow at Atlanta. *Id.* at II-72 (SUPPAR002052). The MAAWRMS recognized that the change in operations would have a negative effect on hydropower generation at Buford Dam, but calculated that hydropower would lose only one percent in benefits, and that raising the pool elevation one foot "would have a mitigating effect on this loss." *Id.* at II-74 (SUPPAR002054). The short-term plan was included as a recommendation of the Corps when the interim MAAWRMS was submitted in 1978. *Id.* at II-78 (SUPPAR2058).

The final MAAWRMS stated that the "primary purpose of all long-range alternatives was to enhance water supply benefits through increased water supply availability from the Chattahoochee River." *Id.* at II-83 (SUPPAR002063). Thus, "[a]lthough

consideration was given to the impacts of each alternative on other water related uses of the lake and river," any harm to those other uses was considered "incidental to formulation of each alternative for water supply." *Id.* The MAAWRMS acknowledged, however, that "[a]ny proposed change in the operation of Buford Dam which would significantly impact on authorized project purposes would require Congressional approval." *Id.* at III-2 (SUPPAR002074).

The MAAWRMS considered in detail three alternatives. The first alternative was the construction of a 4100 acre-foot reregulation reservoir and dam on the Chattahoochee six miles below Buford Dam. The second was a reallocation of storage at Lake Lanier. The third was a combination of dredging the Morgan Falls reservoir (to increase storage at that reservoir) combined with a reallocation of storage at Lake Lanier. *Id.* at IV-3 (SUPPAR002105). In evaluating these alternatives, the MAAWRMS considered as a "base" condition average annual water-supply withdrawals of 14.6 million gallons per day from Lake Lanier, with projected average annual withdrawals from the lake of 53 million gallons per day by 2010. *Id.* at IV-7 tbl. IV-2 (SUPPAR002109).[10] The study also pointed out "how the increasing withdrawals from Lake Lanier result in a decrease in the dependable peak energy from Buford Dam." *Id.* at IV-7 to -8 tbl. IV-3 (SUPPAR002109-10). According to the MAAWRMS, such decreases were acceptable because the Corps report on which Congress based its initial

[10] Although the analysis was "based on the assumption that [water-supply] withdrawals are part of a base condition," the MAAWRMS also assumed that "a separate contract would be entered into for such demands." *Id.* app. C, at C-58 (SUPPAR002643).

authorization of the project contemplated some increase in releases from the dam to support water supply. *Id.* at IV-9 (SUPPAR002111). The Corps report from 1947 stated that these increased releases "would not materially reduce the power returns" from the dam, and opined that the benefits of an assured water supply " 'would outweigh any slight decrease in system power value.' " *Id.* (quoting Newman Report ¶ 80, at 34 (ACF000668).). Although withdrawals of 53 million gallons per day would result in average annual power loss of $583,700 (in 1980 dollars), the MAAWRMS nevertheless considered 53 million gallons per day as the "base" withdrawal and "an integral part of each alternative." *Id.* at IV-17 (SUPPAR002119).

The first alternative the MAAWRMS suggested was the construction of a reregulation dam 6.3 miles below Buford Dam. *Id.* at IV-24 (SUPPAR002126). This reregulation dam would store outflows from Buford Dam until those outflows were needed for water supply. *Id.* at IV-31 (SUPPAR002133). The total cost of this alternative was estimated at approximately $17.5 million. *Id.* at IV-44 tbl. IV-10 (SUPPAR002146). However, this alternative mitigated somewhat the lost power benefits assumed by the "base" scenario of increasing water-supply withdrawals from Lake Lanier. The power benefits gained in this alternative were estimated at $1.2 million annually. *Id.* at IV-50 tbl. IV-14 (SUPPAR002152). The MAAWRMS estimated that the increase in net benefits (for water supply, recreation, and power) under the first alternative would be $1.2 million annually, for a benefit-cost ratio of 1.75. *Id.* This alternative had the greatest annual net benefits of any of the final three alternative plans.

Id. at IV-64 to 65 (SUPPAR002166-67). It also received the most support, from both federal and state agencies. *Id.* at VI-1 (SUPPAR002238). Should the federal government build the reregulation dam, the Corps would be required to seek Congressional authorization for the project. *Id.* at IV-81 (SUPPAR002183).

The second alternative called for reallocating storage at Lake Lanier from power to water supply. *Id.* at IV-86 (SUPPA002188); *see also id.* at IV-97 (SUPPAR002199) (describing alternative as involving "reallocating storage in Lake Lanier from power to water supply"). According to the MAAWRMS, water-supply storage in Lake Lanier amounted to 10,512 acre-feet in 1980, with 14.6 million gallons per day withdrawn from the lake. *Id.* at IV-87 tbl. IV-19 (SUPPAR002189). Under the second alternative, such storage would increase to 141,685 acre-feet by 2010, with 53 million gallons withdrawn. *Id.* Power generation would decrease from more than 123 million kilowatt-hours in 1980 to 97.7 million kilowatt-hours in 2010. *Id.* "Losses in power benefits * * * would occur primarily due to the need for scheduling additional weekend releases from Buford Dam for water supply." *Id.* at IV-92 (SUPPAR002194). The MAAWRMS estimated the total net annual benefit of the second alternative as $475,100, with a benefit-cost ratio of 1.42. *Id.* Finally, the MAAWRMS acknowledged that "Congressional authorization would be required for reallocation of storage to water supply." *Id.* at IV-97 (SUPPAR002199).

The final alternative was to dredge the downstream Morgan Falls Reservoir and also reallocate storage at Lake Lanier for water supply. *Id.* at IV-99

(SUPPAR002201). The loss of power benefits under this alternative was not as great as under the second alternative, from 124.5 million kilowatt-hours in 1980 to 112 million kilowatt hours in 2010. *Id.* at IV-100 tbl. IV-23 (SUPPAR002202). The annual net loss in power benefits would be $284,600. *Id.* at IV-112 (SUPPAR002214). The Lake Lanier storage reallocated to water supply would rise from zero acre-feet in 1980 to 48,550 acre-feet in 2010.[11] *Id.* at IV-100 tbl. IV-23 (SUPPAR002202). The dredging of the Morgan Falls Reservoir would result in increasing that reservoir's storage capacity to 3200 acre-feet, with maintenance dredging required to maintain that capacity. *Id.* at IV-100 (SUPPAR002202). The MAAWRMS calculated the net annual benefit of the third alternative as either $875,000 if the dredged material could be sold, or $312,000 if that material could not be sold. *Id.* at IV-114. The benefit-cost ratio varied from 2.13 to 1.23. *Id.* As with the second alternative, "Congressional authorization would be required for reallocation of storage to water supply." *Id.* at IV-119 (SUPPAR002221).

As discussed above, the MAAWRMS assumed a baseline for all alternatives of phased-in reallocations of storage at Lake Lanier from power to water supply. This phased-in reallocation, however, can skew the benefit-cost analysis. *See id.* at V-4 (SUPPAR002228) ("Non-phasing also reflects a more equal comparison of the costs of the three plans* * *."). When the MAAWRMS analyzed the three alter-

[11] The MAAWRMS does not explain why the second alternative plan assumes that approximately 10,000 acre-feet at Lake Lanier were allocated to water-supply storage in 1980, but the third alternative assumes that Lake Lanier had no storage allocated to water supply in 1980.

natives, assuming that all reallocations would occur at present to meet the future water-supply needs, the costs of the second and third alternatives rose and the net benefits decreased significantly. *Id.* at V-4 to -5 tbl. V-3 (SUPPAR002228-29). Thus, if the Corps did not have the authority to reallocate storage even in the limited way envisioned by the "baseline" of the MAAWRMS, the alternatives the study recommended were in general no longer cost-effective.

Ultimately, the MAAWRMS recommended the adoption of the first alternative. *Id.* at VI-4 (SUPPAR002241). According to the Corps, the first alternative was best suited "to provide a long-range water supply, improvement in water quality and the net positive contribution to the goal of National Economic Development." *Id.* at EIS-1 (SUPPAR002256). The final recommendation of the MAAWRMS included a recommendation to Congress that "[r]ecreation, water supply, and water quality control should be acknowledged as full project purposes of the Lake Lanier project along with power, flood control, and navigation, and * * * all of these purposes [should] be fully considered in future decisions affecting the use or operation of the project." *Id.* ¶ 15, at IX-4 (SUPPAR002327).

4. Reregulation Dam to Reallocation of Storage

Congress considered the Corps's recommendation with respect to the reregulation dam in 1982. *Proposed Water Resources Dev. Projects of the U.S. Army Corps of Eng'rs: Hearings Before the Subcomm. on Water Resources of the H. Comm. on Public Works and Transp.,* 97th Cong. 713 (1982). At least one member of the Subcommittee expressed an unwillingness for the federal government to fund a project primarily for local water supply. *See id.* at 718

(statement of Rep. Edgar, Pennsylvania) (SUPPAR001443) ("Can you tell me when the corps got involved in providing local water supplies?"); *id.* at 719 (SUPPAR001443) (asking why the people of Atlanta did not construct the proposed dam "rather than the Federal Government coming in and providing the construction costs"); *id.* at 720 (SUPPAR001444) ("I am just wondering whether or not we are providing a subsidy to Atlanta at the Federal expense * * *."). Unlike during the construction of Buford Dam, however, Atlanta expressed its intention to share in the costs of the reregulation dam. *Id.* at 2459 (SUPPAR001451) (Letter from Andrew Young, Mayor, Atlanta, Ga., to Harry West, Exec. Dir., ARC (July 14, 1982)).

Not all testimony supported the proposed project, however. Nancy Wylie of the Georgia Conservancy testified against the reregulation dam, noting that some local governments in the area did not support that alternative and that even the Atlanta City Council had not strongly supported the project. *Id.* at 2508 (SUPPAR001476) (testimony of Nancy Wylie, Georgia Conservancy). Ms. Wylie also pointed out that neither Atlanta nor Georgia had made any binding financial commitments to fund the project. *Id.* Other participants in the MAAWRMS characterized the reregulation dam option as the preferred option of the Corps and one that essentially had been foisted on the other study participants. *Id.* at 2499-2500 (SUPPAR001471-72) (testimony of David Dingle, Chairman, MAAWRMS Citizen's Task Force). Mr. Dingle supported the reallocation-of-storage alternative, noting that such reallocation would require including water supply as an author-

ized project purpose. *Id.* at 2502 (SUPPAR001473).[12]

The Chair of the Subcommittee offered his thoughts on the project, asking that Georgia and Atlanta give the Subcommittee a firmer commitment to the proposed reregulation dam. *Id.* at 2520 (SUPPAR001482) (statement of Rep. Robert Roe). He also predicted what has come to pass:

> [W]ater resources and the need for water quality and water supply in this Nation is extraordinary.
>
> Power is vital to the Nation, but water is absolutely essential, so that you are facing enormous competition for resources available * * *. [O]ne of the tragedies of our time is that it takes so long to get anything achieved * * *.
>
> I think it would be a shame to allow this to get away from [Georgia] and 5 or 7 years from today * * * that you would not have the natural resources to be able to provide the economic resources required for the project.

Id.

In November 1984, the President's Office of Management and Budget ("OMB") declined to support the proposed project. "The plan * * * appears to be a desirable project that would go a long way toward meeting water supply demand in the Atlanta area. However, * * * non-federal development of the same reregulating dam [is] the most likely alternative to a Federal project for water supply." Letter from Frederick N. Khedouri, Assoc. Dir., OMB, to Robert K.

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[12] Others also recognized that water supply was "not specifically authorized as a purpose" of the Buford project. *Id.* at 3251 (SUPPAR001491) (Letter from W.T. Bush, co-chairman, Gwinnett County Water & Sewerage Auth. to Sen. Sam Nunn, Ga. (Aug. 21, 1980)).

Dawson, Assistant Sec'y of the Army-Civil Works (Nov. 7, 1984) (SUPPAR036642). The letter emphasized the Administration's policy of encouraging "non-Federal development of water resources * * *." *Id.* In January 1985 the Corps wrote to Congress, stating that it concurred with the OMB's opinion on the proposed reregulation dam project. Letter from Robert K. Dawson, Assistant Sec'y of the Army-Civil Works, to Sen. Robert T. Stafford, Chairman, S. Comm. on Env't and Pub. Works, at 2 (Jan. 8, 1985) (ACF010341).

Despite the lack of support from the Administration and the Corps, Congress authorized the construction of the reregulation dam in the Water Resources Development Act of 1986 ("1986 WRDA"), Pub.L. No. 99-662, tit. VI, § 601(a)(1), 100 Stat. 4137, 4140-41. The 1986 WRDA required that the project meet certain criteria, including a general design memorandum and supplemental environmental impact statement prepared and "jointly approved" by the Corps and Georgia. *Id.* It also provided that the dam could be constructed by Georgia or other local interests "at local cost." *Id.* 100 Stat. at 4141. Congress did not appropriate any money to fund any construction costs for the reregulation dam.[13]

Shortly thereafter, the Corps determined that real-

[13] In the design memorandum Congress required when it authorized the reregulation dam, the Corps determined that the most economical alternative was no longer a reregulation dam, but was instead reallocation of storage at Lake Lanier. Memorandum from Ralph V. Locurcio, Colonel, U.S. Army Corps of Eng'rs, to Commander, S. Atl. Div. (Oct. 13, 1988) (SUPPAR035867). This memorandum recommended that the Corps prepare "a Post-Authorization Change Report recommending reallocation of storage in Lake Lanier * * * for submittal to Congress for authorization." *Id.* ¶ 3.

location of storage at Lake Lanier was a more feasible alternative than the construction of a reregulation dam. A March 25, 1988, report prepared by the Corps's South Atlantic Division and entitled "Additional Information Lake Lanier Reregulation Dam," stated that if the costs of acquiring the land that would be inundated by the dam rose, the reallocation alternative would become the most economic alternative. U.S. Army Corps of Eng'rs, *Additional Information, Lake Lanier Reregulation Dam* 2 (1988) (SUPPAR016865). The report warned that "[t]he storage to be reallocated under [the second MAAWRMS alternative] is beyond the approval authority of the Chief of Engineers." *Id.* The Corps told ARC the same thing:

> The Chief of Engineers has the discretionary authority to approve reallocation of storage if the amount does not exceed 50,000 acre-feet, or 15 percent of total usable storage, whichever is lower, and if the reallocation would not have a significant impact on authorized project purposes. Plan B [the second MAAWRMS alternative] would require the reallocation of 202,000 acre-feet of storage to meet the year 2010 peak demand of 103 mgd from the lake and 510 mgd from the river. The reallocation of 202,000 acre-feet is much greater than the criteria of 50,000 acre-feet. Therefore, the required reallocation is not within the discretionary authority of the Chief of Engineers to approve. It can only be approved by the ASA(CW) [Assistant Secretary of the Army-Civil Works] if impacts are determined to be insignificant. We believe the power losses are significant and expect that Congressional approval would be required for the reallocation.

Letter from C.E. Edgar III, Major General, U.S.

Army Corps of Eng'rs, to Harry West, Exec. Dir., ARC, at 5 (Apr. 15, 1988) (SUPPAR017113). The Corps estimated that the cost of the storage reallocation would be more than $42 million. *Id.* at 6 (SUPPAR017114).

The Corps also provided a memorandum with a "chronology" of the Lake Lanier Reregulation Dam noting, among other events, a story in the May 31, 1988, edition of the *Gwinnett Daily News* that the Corps was considering supporting the reallocation alternative rather than the reregulation dam alternative. Memorandum, *Lake Lanier Reregulation Dam Chronology,* to Joseph A. Goode 2 (Aug. 16, 1988) (SUPPAR016869). Several weeks later, the Corps informed Georgia that it would recommend "that the water supply needs be provided through reallocation of storage in Lake Sidney Lanier." Letter from R.M. Bunker, Major General, U.S. Army Corps of Eng'rs, to J. Leonard Ledbetter, Comm'r, Ga. Dep't of Natural Res. (Sept. 1, 1988) (SUPPAR016870). The Corps acknowledged the switch in an internal memorandum, characterizing the decision to promote storage reallocation as "a political decision." Memorandum from James Couey, Chief of Eng'rs, to District Eng'r, U.S. Army Corps of Eng'rs, 1 (Sept. 6, 1988) (SUPPAR017083). This memorandum stated that the "next step" would be "for the Corps to prepare a storage reallocation report to submit through channels to the Secretary of the Army and Congress." *Id.*

While the Corps prepared a Post-Authorization Change Report, Georgia prepared legislation to submit to Congress authorizing the reallocation of storage in Lake Lanier. On September 23, 1988, Georgia Governor Joe Frank Harris sent proposed

reauthorization legislation to Georgia Senator Sam Nunn. Letter from Joe Frank Harris, Governor, Ga., to Senator Sam Nunn, Ga. (Sept. 23, 1988) (SUPPAR014842). The proposed legislation provided that the Buford project be "modified to provide that the Secretary is authorized to reallocate permanently from hydropower storage to water supply storage up to an additional 300,000 acre-feet for municipal water systems in the State of Georgia, at a total one-time cost not to exceed $29,000,000." *Id.* at 2 (SUPPAR014843).

The Corps issued its "Draft Post-Authorization Change Notification Report For The Reallocation of Storage From Hydropower To Water Supply at Lake Lanier, Georgia" ("PAC Report") in October 1989. Mobile Dist., U.S. Army Corps of Eng'rs, *PAC Report* (1989) (ACF041152). The PAC Report's purpose was to recommend that Congress rescind its approval of a reregulation dam and instead approve a reallocation of storage in Lake Lanier to water supply. *Id.* at 1 (ACF041165). The PAC Report endeavored

> to fully evaluate the future water supply demands for the Atlanta region to the year 2010, the storage needed from Lake Lanier to satisfy these projected demands, and to identify the associated impacts to all the project purposes, both upstream and downstream of Buford Dam, of reallocating storage from hydropower to water supply.

Id. at 6 (ACF041170).

According to the PAC Report, Lake Lanier has a total storage capacity of 2,554,000 acre-feet. *Id.* at 12 (ACF041176). However, 867,600 acre-feet of that amount is considered "inactive" storage, 637,000 acre-feet is allocated to flood control, and 1,049,400

acre-feet is allocated to conservation storage. *Id.* The Report calculated that water supply demands in 2010 would require a reallocation of 207,000 acre-feet of storage, and recognized that "congressional approval may be required" for that reallocation. *Id.* The cost of the reallocation was estimated at $49.3 million. *Id.* at 21 (ACF041185).

Appendix A to the PAC Report was a draft Water Control Plan for the ACF basin ("WCP"). *Id.* app. A, at A-1 (ACF041197). The WCP's objectives included balancing operations to meet the projects' purposes. *Id.* app. A, at A-4 (ACF041200). The "purposes cited in the projects' original authorizations" were "[f]ish and wildlife management, flood control, hydropower and navigation." *Id.* In addition, "over the years a variety of activities (industrial and municipal water supply, instream recreation, water quality, etc * * *) have become dependent upon the operational patterns of these projects." *Id.*

The WCP set forth, apparently for the first time, so-called "action zones" for each of the reservoirs in the basin. *Id.* app. A, at A-11 (ACF041207). According to the Corps, these action zones "are to be used to determine minimum hydropower generation at each project, as well as the maximum possible assistance to navigation from conservation storage." *Id.* The action zones took into consideration other factors, such as the time of year, historical pool levels, and "Resource Impact Levels" or "RILs." *Id.* The RILs were the Corps's attempt to quantify the effect on recreation of the various reservoir operations. *Id.* app. A, at A-8 (ACF041204). The RILs included: "Initial Impact Level," defined as "the level where recreation impacts are first observed (i.e., some boat-launching ramps are unusable, most beaches are

unusable or minimally usable and navigation hazards begin to surface)"; "Recreation Impact Level," which is "the level where major impacts to concessionaires and recreation are observed (more ramps are not usable, all beaches are unusable, boats begin having problems maneuvering in and out of marina basin areas, loss of retail business)"; and the final level, "Water Access Limited Level," defined as "all or almost all boat ramps [are] out of service, all swimming beaches [are] unusable, major navigation hazards occur, channels to marinas are impassable and/or wet slips must be relocated, and a majority of private boat docks are unusable." *Id.* For Lake Lanier, the Initial Impact Level was pool elevation 1066, Recreation Impact Level occurred at elevation 1063, and Water Access Limited Level was elevation 1060. *Id.* app. A, at A-9 (ACF041205). The normal elevation of Lake Lanier is 1070.

The "Water Control Guidelines" in the WCP listed objectives for all of the project purposes, including those initially authorized and those subsequently developed. Thus, the WCP outlined management for general hydropower operations, navigation, recreation, and water supply/water quality, among others. *Id.* app. A, at A-12 to -16 (ACF041202-12). For water supply, management "involves taking water from storage, either directly from the pool or through releases for downstream interests. Of primary concern is that sufficient drinking water is available for urban needs and that agreements to provide in-stream flow for water quality are not violated." *Id.* app. A, at A-15 (ACF041211). "Releases from projects in the system will be the minimum (capacity) release for hydropower or releases needed for basin-wide water quality/water supply, whichever is greater."

Id.

Although the WCP did not fully explain the "action zones" on which it based the ACF basin operations, the Corps uses the action zones "to manage the lakes at the highest level possible for recreation and other purposes that benefit from high lake levels." Memorandum, U.S. Army Corps of Eng'rs, ACF Drought Conference, at 11 (Sept. 20, 2007) (SUPPAR035773). The Corps describes those action zones as follows:

> **Zone 1** indicates that releases can be made in support of seasonal navigation [ ]when the channel has been adequately maintained, hydropower releases, and water supply, and water quality releases. If all the lakes are in Zone 1 or above, the river system would operate in a fairly normal manner.
>
> **Zone 2** indicates that water to support seasonal navigation may be limited. Hydropower generation is supported at a reduced level. Water supply and water quality releases are met. Minimum flow targets are met.
>
> **Zone 3** indicates that water to support seasonal navigation may be significantly limited. Hydropower generation is supported at a reduced level. Water supply and water quality releases are met. Minimum flow targets are met.
>
> **Zone 4** indicates that navigation is not supported. Hydropower demands will be met at minimum level and may only occur for concurrent uses. Water supply and water quality releases are met. Minimum flow targets are met.

Id. (alterations in original). The WCP's RILs and "action zones" highlight the shift in operations at Buford from hydropower, flood control, and navigation to water supply and recreation.

The draft WCP was never finalized or adopted, because in 1990 the state of Alabama filed a lawsuit challenging the WCP and various water-supply withdrawal contracts between the Corps and Georgia communities.

C. History of the Litigation

From the time the Buford Dam was constructed and Lake Lanier filled, municipal entities had requested and received permission to withdraw water from the lake. Initially, only Gainesville and Buford, whose water intake structures on the Chattahoochee River had been inundated by Lake Lanier, withdrew water directly from the lake. The withdrawals were relatively small-eight million gallons per day for Gainesville and two million gallons per day for Buford-and amounted to slightly more than 10,000 acre-feet[14] of Lake Lanier's "conservation" storage; storage that the Corps deemed usable storage, for hydropower or for purposes other than flood control.

1. Water-Supply Contracts

In the 1950s, Gwinnett County asked permission to make withdrawals from the lake. The Corps refused the request at that time, saying that such withdraw-

[14] One million gallons per day is equal to 1.547 cfs of flow. *See* MAAWRMS at III-6 (SUPPAR002078). According to the Corps, during normal operations, 1600 cfs equal one acre-foot of storage. The conservation storage of Lake Lanier is 1,049,400 acre-feet. Therefore, the total storage used between Gainesville and Buford is 10,146 acre-feet. (10 mgd x 1.547 cfs / 1600 = .00966875. And .00966875 x 1,049,400 = 10,146 acre-feet.) Under the conditions present in the 1986-1988 drought, during which 1485 cfs equaled one acre-foot, the storage necessary for 10 million gallons per day would be 10,932 acre-feet. The WCP uses a different figure for storage in which 1734 cfs equals one acre-foot. *See* WCP app. C, at C-4 (ACF041302). Using this figure, 10 million gallons per day is equal to 9,362 acre-feet.

als would affect the project's authorized purposes and that Gwinnett County would have to seek permission from Congress for the withdrawals. F.G. Turner, Ass't Chief, Eng'g Div., *Report on Withdrawal of Domestic Water Supply from Buford Reservoir* ¶ 2, at 1 (1955) (SUPPAR005459). Congress ultimately authorized Gwinnett County to use storage space "in an amount not to exceed eleven thousand two hundred acre-feet of water annually," Pub.L. No. 84-841, 70 Stat. 725 (1956) (amending 1946 RHA), but the Corps and Gwinnett County did not enter into any contracts at that time.[15] As discussed previously, in 1973, without invoking the authority provided by the 1956 statute, the Corps and Gwinnett County contracted for withdrawals of 40 million gallons per day from Lake Lanier pending the completion of the MAAWRMS and the adoption of the study's recommended plan. Contract Between the U.S. and Gwinnett County, Ga., for Withdrawal of Water from Lake Sidney Lanier at 2 (July 2, 1973) (ACF004025). Forty million gallons per day amounts to almost 37,500 acre-feet of storage using the 1734 yield figure, and more than 43,700 acre-feet using the current 1485 figure. In 1985, Gwinnett County agreed to pay $5.40 per million gallons, or $216 per day, for the 40 million gallons it was allowed to withdraw daily from the lake. Dist. Eng'r, U.S. Army Corps of Eng'r Dist.-Mobile, *Civil Works Projects Water Supply Contract Status Report-Gwinnett County* (1987) (SUPPAR014884). The Corps's Status Report for this contract noted that the Corps's South Atlantic Divi-

[15] 11,200 acre-feet of storage would provide approximately 10.2 million gallons per day of water, using 1485 cfs as the yield figure. Assuming 1734 as the yield, 11,200 acre-feet provides almost 12 million gallons per day.

sion had approved a supplement to this contract increasing the withdrawals to an annual average rate of 53 million gallons per day. *Id.* The Status Report also noted that the Gwinnett County contract was an "interim" contract "until 1 July 1989 to allow time for local interests to determine whether they will fund construction of a re-regulation dam downstream of Buford Dam." *Id.*

The status reports for the other water-supply contracts similarly note the "interim" nature of the contracts. The ARC's contract is for 377 million gallons per day, at a charge of $5.79 for each million gallons in excess of 327 million gallons per day. Dist. Eng'r, U.S. Army Corps of Eng'r Dist.-Mobile, *Civil Works Projects Water Supply Contract Status Report* (1988) (SUPPAR014880); *see also* Contract, Supplemental Agreement No. 1 to Contract No. DACW01-9-86-145 Between the U.S. and the Atlanta Reg'l Comm'n for Withdrawal of Water from the Chattahoochee River Downstream from Lake Sidney Lanier, Ga., at 1 (June 17, 1986) (ACF011978). Gainesville's contract, dated May 27, 1987, is for 20 million gallons per day, at a charge of $12.44 for each million gallons in excess of the Congressionally authorized 8 million gallons per day. Contract Between the U.S. and City of Gainesville, Ga. for Withdrawal of Water from Lake Sidney Lanier, at 2-3 (May 28, 1987) (ACF014383). Buford had no new contract aside from the initial authorization of 2 million gallons per day. Dist. Eng'r, U.S. Army Corps of Eng'r Dist.- Mobile, *Civil Works Projects Water Supply Contract Status Report-Buford* (1988) (SUPPAR014882). The Status Report provided that Buford must enter into a new agreement if it wanted to withdraw more than 2 million gallons per day. *Id.* The Status Report for

Cumming showed two contracts, one from 1978 and another from 1985. Dist. Eng'r, U.S. Army Corps of Eng'r Dist.-Mobile, *Civil Works Projects Water Supply Contract Status Report-Cumming* (1988) (SUPPAR014883). The 1978 contract allowed withdrawals of 2.5 million gallons per day; the 1985 contract allowed 5 million gallons per day. *Id.* The Corps charged Cumming $7.88 for each million gallons per day. *Id.* A contract dated November 16, 1988, allowed Cumming to withdraw 10 million gallons per day. Contract, Supplemental Agreement No. 2 to Contract No. DACW01-9-77-1096 Between the U.S. and the City of Cumming, Ga. For Withdrawal of Water from Lake Sidney Lanier, Ga., at 3 (Nov. 16, 1988) (ACF014401).

All of these "interim" water-supply contracts (save Buford's and Gainesville's Congressionally authorized withdrawals of two million and eight million gallons per day, respectively), expired on January 1, 1990. *See, e.g.,* Contract, Supplemental Agreement No. 5 to Contract No. DACW01-9-73-624 Between the U.S. and Gwinnett County, Ga. For Withdrawal of Water from Lake Sidney Lanier, at 3 (July 24, 1989) (ACF004006). However, the municipal entities continue to withdraw water pursuant to these contracts. Alabama and Florida therefore characterize the continuing withdrawals as occurring pursuant to "holdover" contracts. In addition, Alabama and Florida contend that the storage required by the "holdover" contracts has, for all intents and purposes, been reallocated to water-supply storage. They call this "de facto" reallocation.

The Eleventh Circuit Court of Appeals described the Corps's decisionmaking with respect to the water-supply contracts:

> Beginning in the 1970s, in accordance with the Corps' view that water supply was an appropriate "incidental benefit" of the creation of [Lake Lanier], the Corps entered into interim contracts with local government entities in Georgia to allocate storage capacity in the Lake for local water supply * * *. As demand for water increased and the local governmental entities desired an assured permanent supply, the Corps in 1989 announced plans to seek congressional approval in accordance with the Water Supply Act of 1958 ("WSA"), 43 U.S.C. § 390b (2003), to enter into permanent water storage contracts with the local governmental bodies, proposing [the PAC Report] for congressional approval.

Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1122 (11th Cir. 2005).

2. Pre-MDL Litigation

On June 28, 1990, the state of Alabama filed a lawsuit against the Corps in the United States District Court for the Northern District of Alabama challenging the water-supply contracts and the draft WCP.[16] Shortly after the case was filed, the state of Florida moved to intervene as a plaintiff and the state of Georgia moved to intervene as a defendant. In September 1990, however, before the court ruled on the intervention motions, the parties requested that the court stay the matter pending settlement negotiations. As part of the joint motion to stay, the Corps agreed that it would not "execute any contracts or agreements which are the subject of the complaint in

[16] Originally, the lawsuit challenged not only the Corps's operations in the ACF basin, but also the operations in the Alabama-Coosa-Tallapoose ("ACT") basin. The claims involving the ACT basin are no longer part of this case.

this action unless expressly agreed to, in writing, by Plaintiff [Alabama] and Florida." (Ex. A to Docket No. 20 in Case No. 3:07-md-00001 at 2.) The stay also provided that either party could terminate the stay by so notifying the court, the parties, and the proposed intervenors. (*Id.* at 2-3.) In 1992, the parties negotiated a Memorandum of Agreement ("MOA") that temporarily resolved the parties' differences.[17] The stay, however, remained in place.

In 1997, Congress ratified the ACF Compact. Pub.L. No. 105-104, 111 Stat. 2219 (1997). This Compact created an "ACF Basin Commission" composed of the Governors of Florida, Georgia, and Alabama, and a non-voting representative of the federal government, to be appointed by the President. *Id.* art. VI(b)-(c), 111 Stat. at 2221. The Commission was charged with establishing "an allocation formula for apportioning the surface waters of the ACF Basin among the states of Alabama, Florida and Georgia." *Id.* art. VI(q)(12), 111 Stat. at 2222. The Compact did not nullify or otherwise modify any existing water-supply contract, but rather provided that, until a water allocation formula was developed, existing water-supply contracts would be honored and, further, that water-supply providers could increase the amount of water they withdrew from the ACF basin's waterways "to satisfy reasonable increases in the demand" for such water. *Id.* art. VII(c), 111 Stat. at 2223-24. The right to use the water pending the allocation formula did not, however, create any permanent or vested rights to the water. *Id.* art. VII(c), 111 Stat. at 2224. The Compact was to

[17] According to the Court of Appeals, the MOA required the Corps to abandon the PAC Report. *Alabama,* 424 F.3d at 1123.

expire on December 31, 1998, but was extended several times. *Id.* art. VIII(a)(3), 111 Stat. at 2224. The Compact finally expired on August 31, 2003, when the Commission was not able to agree on a water allocation formula. *Alabama,* 424 F.3d at 1123. The stay of the Alabama case remained in effect during the pendency of the Compact.

In 2001, the Georgia parties filed their own lawsuit against the Corps in the United States District Court for the Northern District of Georgia. *Georgia v. U.S. Army Corps of Eng'rs,* No. 2:01-CV-26 (N.D. Ga. filed Feb. 7, 2001) ("*Georgia I* "). This lawsuit challenged the Corps's denial of Georgia's water-supply request, which sought a permanent reallocation of storage in Lake Lanier for water supply. (Comp.¶ 1.) In denying that request, the Corps found that the reallocation Georgia requested would "affect authorized project purposes" and that it "cannot be accommodated without additional Congressional authorization." Letter from R.L. Brownlee, Ass't Sec'y of the Army (Civil Works), to Roy E. Barnes, Governor, Ga. (Apr. 15, 2002) (ACF036354).

Meanwhile, the SeFPC filed its own lawsuit against the Corps in the United States District Court for the District of Columbia. *Se. Fed. Power Customers v. Caldera,* No. 1:00-cv-2975 (D.D.C. filed Dec. 12, 2000). The SeFPC alleged that the Corps's decision to reallocate water supply to municipal entities in Georgia harmed the SeFPC's ability to produce power from Buford Dam and increased the cost of that power. The Georgia parties intervened but Alabama and Florida did not intervene. The parties dispute whether Alabama and Florida were informed about the pendency of the case.

In 2003, before the ACF Compact expired, the

Corps, the SeFPC, and the Georgia parties settled the SeFPC's lawsuit and also resolved at least some of the issues pending in Georgia's lawsuit. The Settlement Agreement required the Corps to negotiate interim contracts for the purchase of storage in Lake Lanier with Gwinnett County, Gainesville, and ARC. Settlement Agreement § 3.1, at 4 (SUPPAR024052). Under the terms of the Settlement Agreement, Gwinnett County would purchase 175,000 acre-feet of storage, which would provide a withdrawal of 152.4 million gallons per day from the lake. *Id.* § 3.1.1(a), at 5 (SUPPAR024053). Gainesville would purchase 20,675 acre-feet, or 18 million gallons per day, also from the lake. *Id.* § 3.1.1(b), at 5 (SUPPAR024053). ARC would purchase 45,183 acre-feet of storage, which would allow ARC to withdraw 367 million gallons per day from the Chattahoochee. *Id.* § 3.1.1(c), at 5 (SUPPAR024053). The Corps would calculate a credit to the SeFPC for hydropower benefits foregone, not to exceed the revenues received from the interim contracts. *Id.* § 4.1, at 13 (SUPPAR024061). The agreement also required the Corps to seek Congressional approval to make the interim contracts permanent, unless a court determined that the Corps was not required to secure Congressional approval for the permanent reallocation of storage. *Id.* § 3.1.4(a), at 10 (SUPPAR024058); *see also Se. Fed. Power Customers, Inc. v. Caldera,* 301 F.Supp.2d 26, 33 (D.D.C.2004). The agreement provided for a stay of its provisions pending the Corps's completion of a NEPA review of the contracts. Settlement Agreement § 5.1.1, at 14 (SUPPAR024062).

In October 2003, the *Alabama* court enjoined the filing of the Settlement Agreement in the D.C. case,

finding that the Corps had violated the terms of the stay in the *Alabama* case by entering into the Settlement Agreement without first seeking Alabama and Florida's approval. *See Alabama v. U.S. Army Corps. of Eng'rs,* 357 F.Supp.2d 1313, 1316 (N.D.Ala.2005) (quoting 1990 Joint Motion to Stay). The court enjoined the Corps from filing or implementing the Settlement Agreement or entering into any new storage or withdrawal contracts affecting the ACF water basin without court approval. *Id.* at 1320-21. The Corps appealed the decision to the Eleventh Circuit Court of Appeals.

In February 2004, the *Southeastern Federal Power Customers* court approved the Settlement Agreement subject to the condition that the agreement not be implemented until the preliminary injunction in *Alabama* was dissolved. *Se. Fed. Power Customers, Inc. v. Caldera,* 301 F.Supp.2d at 35. The *Alabama* court refused to modify or vacate the preliminary injunction. *Alabama,* 357 F.Supp.2d at 1320.

In September 2005, the Eleventh Circuit Court of Appeals vacated the *Alabama* court's preliminary injunction. *Alabama v. U.S. Army Corps of Eng'rs,* 424 F.3d 1117, 1133-36 (11th Cir. 2005). The *Southeastern Federal Power Customers* court then entered final judgment, declaring the Settlement Agreement valid. Mem. & Order at 16, *Se. Fed. Power Customers, Inc. v. Caldera,*301 F.Supp.2d 26 (D.D.C. 2004). Alabama and Florida appealed that decision to the District of Columbia Circuit Court of Appeals. While the appeal was pending, the D.C. district court stayed the implementation of the Settlement Agreement to allow the Corps to complete the required NEPA processes. Mem. & Order at 1, *Se. Fed. Power Customers, Inc. v. Caldera,* No. 1:00-cv-2975 (D.D.C.

Jan. 20, 2006).

In March 2007, the Judicial Panel on Multidistrict Litigation transferred the *Alabama* and *Georgia* cases and two other related cases (*Florida v. U.S. Fish & Wildlife Serv.,* No. 4:06-410 (N.D. Fla. filed Sept. 6, 2006) and *Georgia v. U.S. Army Corps of Eng'rs,* No. 1:06-1473 (N.D. Ga. filed June 20, 2006) ("*Georgia II*")) to this Court for resolution. The Panel did not transfer the *Southeastern Federal Power Customers* case, because that case was pending before the Circuit Court of Appeals and such transfers exceed the Panel's authority. Since that time, three more cases have been transferred into the MDL: *City of Columbus, Ga. v. U.S. Army Corps of Eng'rs,* No. 4:07-125 (M.D. Ga. filed Aug. 13, 2007); *City of Apalachicola, Fla. v. U.S. Army Corps of Eng'rs,* No. 4:08-23, 2008 WL 460750 (N.D. Fla. filed Jan. 15, 2008); and finally, after the D.C. Circuit remanded the case to the district court, *Se. Fed. Power Customers, Inc. v. Caldera,* No. 1:00-2975 (D.D.C. filed Dec. 20, 2000).

3. Southeastern Federal Power Customers

As discussed briefly above, the *Southeastern Federal Power Customers* case and the attempted settlement of that case generated a flurry of litigation. Similarly, the D.C. Circuit's decision on the legality of the Settlement Agreement in that case has generated much briefing and argument here. At least according to the parties, this Court's interpretation of and deference to the D.C. Circuit's opinion will dictate the outcome of the pending Motions.

In *Southeastern Federal Power Customers v. Geren,*[18] 514 F.3d 1316 (D.C.Cir. 2008) ("*SeFPC* "), the

[18] Peter Geren was the Secretary of the Army at the time the

D.C. Circuit Court of Appeals considered whether the Corps exceeded its statutory authority by entering into the Settlement Agreement that required the Corps to reallocate some of the storage in Lake Lanier to water supply. The court held that the reallocation accomplished by the terms of the Settlement Agreement violated the requirements of § 301(d) of the WSA, 43 U.S.C. § 390b(d), because that reallocation was a "major operational change on its face." *Id.* at 1318. The Corps's failure to secure the approval of Congress before entering into the Settlement Agreement required, in the D.C. Circuit's opinion, that the Agreement be set aside. *Id.*

The D.C. Circuit noted that the reallocations required by the Settlement Agreement amounted to more than twenty-two percent of Lake Lanier's total conservation storage of 1,049,400 acre-feet, and was nine percent more than the storage space allocated to water supply in 2002. *Id.* at 1319-20. The court then turned to the statutory requirements for water supply. It noted that the WSA authorizes storage for water supply " 'in any reservoir project surveyed, planned, constructed or to be planned * * * by the Corps of Engineers * * *' so long as the costs of construction or modification are adequately shared by the beneficiaries." *Id.* at 1321 (quoting WSA § 301(b), 72 Stat. at 319 (codified at 43 U.S.C. § 390b(b))). The court quoted WSA § 301(d), which requires that any modification that "would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational chang-

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D.C. Circuit considered the *SeFPC* case. He was preceded in that position by Louis Caldera.

es shall be made only upon the approval of Congress * * *." *Id.* at 1321-22 (quoting WSA § 301(d), 72 Stat. at 320 (codified at 43 U.S.C. § 390b(d))).

Alabama and Florida argued that the Settlement Agreement's reallocations of storage constituted a "major operational change" within the meaning of the WSA. The appellees, who were the Georgia parties, the SeFPC, and the Federal Defendants, argued that the Settlement Agreement was not an operational change but merely preserved the status quo of allowing " 'incremental increases in withdrawal amounts * * *.' " *Id.* at 1322 (quoting Appellees' Br. at 37). The appellees also argued that because the Settlement Agreement provided for temporary contracts of two 10-year periods, the contracts did not require Congressional approval. *Id.*

The D.C. Circuit rejected the appellees' arguments:

> On its face, then, reallocating more than twenty-two percent (22%, approximately 241,000 acre feet) of Lake Lanier's storage capacity to local consumption uses constitutes the type of major operational change referenced by the WSA; the reallocation's limitation to a "temporary" period of twenty years does not change this fact. Even a nine percent (9%, approximately 95,000 acre feet) increase over 2002 levels for twenty years is significant. Appellees' contrary arguments are unpersuasive.

Id. at 1324 (citation omitted). The court also stated that "the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero, which was the amount allocated to storage space for water supply when the lake began operation." *Id.*

The court concluded:

> In other circumstances it is conceivable that the difference between a minor and a major operational change might be an ambiguous matter of degree, where the Court would consider whether [the Corps's] authoritative interpretation should be accorded deference * * * in defining the term "major operational change." But the Agreement's reallocation of over twenty-two percent (22%) of Lake Lanier's storage space does not present that situation. It is large enough to unambiguously constitute the type of major operational change for which section 301(d) of the WSA, 43 U.S.C. § 390b(d), requires prior Congressional approval.

Id. at 1325. The court thus reversed the district court's approval of the Settlement Agreement and remanded the case. Shortly thereafter, the MDL Panel transferred the *Southeastern Federal Power Customers* case into this Tri-State Water Rights litigation.

The administrative record is complete and the parties' Motions for Summary Judgment are fully briefed.[19] The matter is now ripe for the Court's resolution.

DISCUSSION

A. Standard of Review

The Administrative Procedures Act ("APA") waives

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[19] None of the parties addresses any statute of limitations issues in their extensive briefing on these Motions, although some of the contracts Alabama and Florida challenge were first executed in the 1970s. However, due to the "renewing" nature of the contracts and the PAC Report's acknowledgment in 1989 that the Corps was attempting to create a new scheme for the allocation of storage in Lake Lanier, the Court would find that Alabama and Florida's claims are within the statute of limitations in any event.

a government agency's traditional sovereign immunity by providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The statute also proscribes limits to this general rule. First, an agency action must be final to be reviewable: "A preliminary, procedural, or intermediate agency action * * * is subject to review [only] on the review of the final agency action." *Id.* § 704. In addition, relief under the APA is limited: a court may "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1), and may

> 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; [or]
>
> (D) without observance of procedure required by law * * *.

Id. § 706(2).

Because the agency action at issue here requires review of the agency's interpretation of a statute-namely the Corps's determination as to whether the storage reallocations require Congressional approval under the WSA-the Court must engage in a two-step analysis:

> First, * * * is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of

> the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue * * * the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (footnote call numbers omitted). The Court is not required to set aside the agency's construction merely because the Court's interpretation differs from the agency's. *Id.* at 843 n. 11, 104 S.Ct. 2778. However, the Court, not the agency, "is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n. 9, 104 S.Ct. 2778. Moreover, "a reviewing court 'must reject administrative constructions * * * that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.' " *Sierra Club v. Johnson,* 541 F.3d 1257, 1265 (11th Cir. 2008) (quoting *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.,* 468 U.S. 137, 143, 104 S.Ct. 2979, 82 L.Ed.2d 107 (1984)).

The first step in the *Chevron* analysis is to determine Congressional intent using the "traditional tools of statutory construction." *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778. "These tools include examination of the text of the statute, its structure, and its stated purpose." *Miami-Dade County v. U.S. Envtl. Prot. Agency,* 529 F.3d 1049, 1063 (11th Cir. 2008). If the examination of Congress's intent does not resolve the matter, the Court then proceeds to the second step, which involves examining the Corps's construc-

tion of the statute. That construction is "deemed reasonable if it is not arbitrary, capricious, or clearly contrary to law." *Ala. Power Co. v. Fed. Energy Regulatory Comm'n,* 22 F.3d 270, 272 (11th Cir. 1994) (citing *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778). "Unexplained inconsistency is * * * a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)

B. Standing

As they have in nearly every motion brought before this Court and other courts involved in litigating the issues in this case, the Georgia parties contest Alabama and Florida's standing to bring this litigation.[20] *See, e.g., Alabama,* 424 F.3d at 1130 (holding that Alabama and Florida have standing because "Corps management of Lake Lanier that violates federal law may adversely impact the environment and economy downstream in the ACF Basin, thereby injuring Alabama and Florida"); *SeFPC,* 514 F.3d at 1322 (holding that Alabama and Florida have standing to assert "major operational change" because they assert "that the proposed reallocation of water storage will result in 'diminish[ed][ ] flow of water reaching the downstream states' " (quoting Appellant's Br. at 2)).

Standing is both a doctrine reflecting "prudential considerations that are part of judicial self-government" and "an essential and unchanging part of the case-or-controversy requirement of Article III."

[20] The Corps has not challenged Alabama and Florida's standing.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The

> irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of * * *. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61, 112 S.Ct. 2130 (citations and internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561, 112 S.Ct. 2130. Moreover, at the summary judgment stage, it is a plaintiff's burden to prove that genuine issues of material fact exist as to whether or not plaintiff can prove standing. *See Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996) (concluding that summary judgment is appropriate when " 'there is no genuine issue as to any material fact' ") (quoting Fed.R.Civ.P. 56(c)); *see also Lujan,* 504 U.S. at 561, 112 S.Ct. 2130 (noting that each element of standing must be proved "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation").

The Georgia parties contend that Alabama and Florida cannot establish any injury in fact, as *Lujan* requires. They argue that there is no evidence that the Corps's support of water supply and recreation in Lake Lanier has resulted in any "discernable reduction in flows downstream in Alabama or Florida."

(Ga.'s Mem. in Opp'n to Ala. & Fla.'s Mot. for Partial Summ. J. at 68.) In support of this statement, they cite to an affidavit, a declaration, and a publication that is not part of the administrative record. (*Id.* (citing Ga.'s Mot. for Summ. J. Factual App. at ¶¶ 2.7-2.9).)

On a motion for summary judgment, such evidence might be sufficient to find no genuine issue of fact as to injury if the opposing party had no evidence to support its claimed standing. Such is not the case here. Alabama and Florida have cited declarations stating the opposite of the declarations and affidavits the Georgia parties cite. (Ala. & Fla.'s Reply Mem. in Supp. of Mot. for Partial Summ. J. at 35 (citing Ala. & Fla.'s Factual App. in Supp. of Mot. for Partial Summ. J. ¶¶ 1132-1226).) It is not the province of the Court, on a motion for summary judgment, to weigh the evidence and determine which evidence to credit. *Mize,* 93 F.3d at 742.

Alabama and Florida have come forward with evidence sufficient to support their contention that they have suffered harm because of the Corps's operations in the ACF basin. For example, the Biological Opinion for the Jim Woodruff Dam ("BiOp") notes that the lower flows in the Apalachicola in the spring and summer are likely due to "a combination of climatic differences * * *, higher consumptive uses, as well as reservoir operations." U.S. Fish & Wildlife Serv., *Biological Opinion on the U.S. Army Corps of Engineers, Mobile District, Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River* 56 (2008). The BiOp states that low flows "are likely among the most stressful natural events faced by riverine biota." *Id.* at 57. In other words, according to gov-

ernment documents, low flows in the Apalachicola River are at least to some extent caused by the Corps's operations in the ACF basin and consumptive uses of the water in the basin, and those low flows cause harm to the creatures that call the Apalachicola home. According to the evidence to which Alabama and Florida cite, low flows harm not only wildlife, but also harm navigation, recreation, water supply, water quality, and industrial and power uses downstream. Even if annually the average flows are reduced by only a small amount, as the Georgia parties argue, the actual variation in flows can wreak havoc on the downstream uses of the water.

Alabama and Florida have standing to bring their claims. Georgia's Motion on this point is denied.

C. Effect of D.C. Circuit's decision in *SeFPC*

Alabama, Florida, and the SeFPC urge this Court to find that the Corps and the Georgia parties are bound under the doctrine of collateral estoppel by the decision of the D.C. Circuit Court of Appeals in *SeFPC*. In that case, the Court of Appeals held that a reallocation of the magnitude contemplated by the invalidated Settlement Agreement constitutes a major operational change on its face. *SeFPC,* 514 F.3d at 1318. Not surprisingly, the Georgia parties and the Corps contend that the D.C. Circuit's holding in *SeFPC* does not address many of the issues presented by this case, determining conclusively only that the Settlement Agreement was invalid under the WSA. The Georgia parties in particular contend that the D.C. Circuit limited its holding to a determination of the reallocation's legality under the WSA and did not discuss what the Georgia parties believe is the authority provided by other federal statutes in

combination with the WSA for the reallocation Georgia requests.

The law governing issue preclusion is well settled:

> The doctrine of collateral estoppel [issue preclusion] bars relitigation of an issue if three requirements are met:
>
> (1) that the issue at stake [is] identical to the one involved in the prior litigation;
>
> (2) that the issue [was] actually litigated in the prior litigation; and
>
> (3) that the determination of the issue in the prior litigation [was] a critical and necessary part of the judgment in that earlier action.

In re Held, 734 F.2d 628, 629 (11th Cir. 1984). The Court has previously determined that Florida and Alabama could not relitigate here their claims that the Settlement Agreement in *Southeastern Federal Power Customers* was invalid. (Mem. & Order 8, October 22, 2007.) Thus, the *SeFPC* court's holding that the Settlement Agreement is invalid is binding on all parties to this litigation.

However, Alabama and Florida do not limit their contentions to the validity of the Settlement Agreement. They argue that all of the following determinations from *SeFPC* are binding in this litigation:

1. No storage for water supply has ever been allocated by Congress at Lake Lanier.

2. The correct "baseline" for measuring the Corps's proposed and "de facto" reallocations is zero.

3. To determine whether the proposed and "de facto" reallocations constitute major operational change, the Court must evaluate the percentage of conservation storage reallocated.

4. To calculate the percentage of storage reallocated, the Court must compare the amount of reallocated storage to the total conservation storage.

5. The WSA applies to both interim and permanent reallocations of storage.

6. As of 2002, approximately thirteen percent of Lake Lanier's conservation storage was allocated to water supply.

7. The Corps has never reallocated 95,000 acre-feet or more in a federal reservoir without seeking Congressional approval.

8. A reallocation of twenty-two percent of Lake Lanier's conservation storage is a major operational change on its face.

The D.C. Circuit stated all of these things in its opinion in *SeFPC*. However, it is not the case that all of these statements were "critical" and "necessary" parts of the judgment in *SeFPC*. Indeed, only two conclusions were necessary to the holding in *SeFPC* that the Settlement Agreement was invalid. First, the D.C. Circuit concluded that the WSA applied to interim reallocations of storage. *SeFPC,* 514 F.3d at 1324-25 ("[I]t 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."). Without this conclusion, the court could not have determined that the Settlement Agreement violated the WSA, because the Settlement Agreement involved temporary reallocations of storage for water supply.

The second conclusion that was critical and neces-

sary to the *SeFPC* holding is that a reallocation of twenty-two percent of Lake Lanier's total conservation storage is a major operational change on its face. *Id.* at 1324. This conclusion is the underpinning of the judgment in *SeFPC* that the Settlement Agreement is invalid under the WSA.

The remaining determinations are not, however, binding on the parties or on this Court. This is not to say that the D.C. Circuit's comments about the appropriate "baseline" for evaluating storage reallocations and its calculations regarding storage reallocations are not persuasive authority, for those comments certainly are persuasive. This Court will not, however, blindly accept the *SeFPC* court's conclusions; instead, the Court will make its own determination of the evidence and how that evidence affects the legal decisions to be made here.

D. The Water Supply Act of 1958

In 1989, the Corps decided that the WSA did not require it to seek Congressional authorization for the reallocation of significant amounts of Lake Lanier's storage to water supply. Under the APA and *Chevron,* this Court must determine whether that decision was arbitrary and capricious. To make that determination, the Court must first examine the statute itself to determine whether Congress has spoken to the precise question at issue before the Court: whether the reallocations undertaken prior to and those proposed by the PAC Report or Georgia's 2000 water supply request constituted a major operational change or seriously affected the purposes for which the Buford Dam was authorized.

The WSA provides in relevant part:

(a) Declaration of policy

> It is * * * declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

WSA § 301(a), 72 Stat. at 319 (codified at 43 U.S.C. § 390b(a)).

> In carrying out the policy set forth in this section, it is * * * provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed, and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, * * *. *Provided,* That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction * * *.

Id. § 301(b), 72 Stat. at 319 (codified at 43 U.S.C. § 390b(b) (emphasis in original)).

> 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 * * *.

Id. § 301(d), 72 Stat. at 320 (codified at 43 U.S.C. § 390b(d)).

Thus, the WSA provides that the Corps may set aside storage for water supply in a previously constructed reservoir as long as (1) the beneficiaries of that storage pay a proportionate share of the costs of the project, and (2) the modification does not seriously affect the project's purposes or constitute a major structural or operational change. There can be no debate that the water-supply users have not paid a proportionate share of the project's costs, although the record is less clear whether they would be willing to do so were the Court to find that Congressional approval for the requested storage reallocations was not required. The Court will assume for the purposes of the instant Motions that the beneficiaries of the proposed and "de facto" reallocations would pay a proportionate share of the cost of the Buford project.

1. Authorized Project Purposes

The WSA inquiry is academic if water supply was an authorized project purpose of the Buford project, either from the initiation of the project or made so by Congress at some point after the project began. The Georgia parties contend that water supply was always a purpose of the Buford project, as evidenced by the sign at an observation point above Lake Lanier, reproduced on the first page of nearly every one of the Georgia parties' briefs. This sign states that the "PRIMARY PURPOSES" of Buford Dam are "FLOOD CONTROL-POWER-WATER SUPPLY-INCREASED FLOW FOR NAVIGATION." (Ga.'s Mem. in Supp. of Summ. J. at 1 (SUPPAR005533).) This sign, however, is not authoritative legislative

history, and it is legislative history that the Court must examine to determine whether water supply, in the form of large withdrawals from Lake Lanier itself, was an authorized project purpose.

The legislative history of the Buford project is set forth in detail above and will not be repeated here. It is worth noting that, both before and during construction of Buford Dam, the Corps consistently described the primary purposes of the project as flood control, navigation, and hydropower. *See, e.g.,* F.G. Turner, Ass't Chief, Eng'g Div., *Report on Withdrawal of Domestic Water Supply from Buford Reservoir* ¶ 2, at 1 (1955) (SUPPAR005459) (Corps told Gwinnett County that "the primary authorized purposes of the Buford project were flood control, power and low-flow regulation for navigation and other purposes"); 1958 Manual ¶ 85, at 27 (ACF001677) (describing Buford Dam as "a multiple-purpose project with major uses of flood control, flow regulation for navigation, and power"); U.S. Army Corps of Eng'rs, *Cost Allocation Studies, Apalachicola, Chattahoochee and Flint Rivers Projects, Basis of All Allocations of Costs for Buford and Jim Woodruff Projects Adopted by the Chief of Engineers,* app. A, at A-9 (1959) (ACF002116) (allocating costs to the "primary purposes of the Buford project": navigation, flood control, and power). Others also recognized that the purposes of the project did not include water supply. *See, e.g., Civil Functions, Dep't of the Army Appropriation Bill for 1949: Hearing on H.R. 5524 Before the Subcomm. of the H. Comm. on Appropriations,* 80th Cong. 723 (1948) (statement of Rep. Stephen Pace, Georgia) (SUPPAR026606) (describing the ACF projects as having three purposes: navigation, power, and flood control); *Civil Functions, Dep't of the Army, Appro-*

priations, 1953: Hearings on H.R. 7268 Before the Subcomm. of the H. Comm. on Appropriations, 82d Cong. 1196-97 (1952) (statement of Rep. Davis, Georgia) (SUPPAR026679-80) (describing the project as providing flood control, power, and navigation benefits); *Public Works Appropriations for 1957: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 84th Cong. 355-57 (1956) (statement of Rep. James Davis, Georgia) (SUPPAR026720-22) (discussing flood control, navigation, and power benefits); *Proposed Water Resources Development Projects of the U.S. Army Corps of Eng'rs: Hearings Before the Subcomm. on Water Resources of the H. Comm. on Public Works and Transp.,* 97th Cong. 3251 (1982) (Letter from W.T. Bush, Co-Chairman, Metro Atlanta Water Managers Assoc., Gwinnett County Water & Sewerage Auth., to Sen. Sam Nunn, Ga., at 1 (Aug. 21, 1980) (water supply "not specifically authorized as a purpose" of the Buford project)) (SUPPAR001491).

In the decades after Buford Dam was completed, the Corps continued to describe the project's purposes as hydropower, flood control, and navigation. *See, e.g., Final EIS* Statement of Findings (1974) (ACF004338) (Buford Dam's "[a]uthorized project purposes provide peaking hydroelectric power, flood control, and low flow augmentation"); *Drought Contingency Report, Apalachicola, Chattahoochee, and Flint Rivers (A-C-F), Florida and Georgia* ¶ 4, at 1-2, *in* U.S. Army Corps of Eng'rs, *Drought Contingency Plan, Apalachicola, Chattahoochee, and Flint Rivers* (1982) (ACF008241-42) (stating that costs at Buford project "have been allocated between the three legislatively authorized purposes" of flood control, navigation, and hydropower).

There is also no doubt that both Congress and the Corps anticipated some benefits to water supply from the project. *See, e.g.,* Park Report ¶ 243, at 77 (ACF000160) (describing water supply as "direct benefit" but ascribing no monetary value to water supply benefit); Newman Report ¶ 68, at 27 (ACF000661) (noting that water supply was "incidental benefit[ ]" of Buford project); Definite Project Report ¶ 115, at 41 (ACF001486) (describing project's "principle purposes" as: "to provide flood control; to generate hydroelectric power; to increase the flow for open-river navigation in the Apalachicola River below Jim Woodruff dam; and to assure a sufficient and increased water supply for Atlanta"). As discussed previously, however, the water supply benefit was not from storage for water supply provided by Lake Lanier. Rather, the water supply benefit derived from the regulation of the Chattahoochee River's flow provided by the dam and the releases for hydropower. *Civil Functions, Dep't of the Army, Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations,* 82d Cong. 120, 121-22 (1951) (statement of Col. Potter, Corps officer) (SUPPAR026656, SUPPAR026657-58) ("[The Buford project does not] furnish [ ] water directly or furnish[ ] storage for that purpose * * *. [Water supply is] an adjunct to the power supply and flood control. Had we put in some storage purely for water supply, which they would tell us to release at certain intervals, we would then charge them for it."); *Civil Functions, Dep't of the Army Appropriations for 1954: Hearings on H.R. 5376 Before the Subcomm. of the H. Comm. on Appropriations,* 83d Cong. 503 (1953) (statement of Gen. Chorpening, Corps officer) (SUPPAR026688) ("[The project] will not make

available any more water than is now going past Atlanta. It is only going to make it flow by at a more uniform rate."); *Civil Functions, Dep't of the Army Appropriations, 1955: Hearings on H.R. 8367 Before the Subcomm. of the S. Comm. on Appropriations,* 83d Cong. 325 (1954) (statement of Col. Whipple, Corps officer) (SUPPAR026699) (stating that water supply "is purely an incidental benefit on account of the power releases which does not require any storage to be devoted to that purpose").

Indeed, from 1955, when the Corps told Gwinnett County that Congressional authorization would be required to accommodate the county's water-supply request, until at least 1988, when the PAC Report sought Congressional approval for the reallocation of storage in Lake Lanier to water supply, the Corps recognized that allowing water-supply withdrawals from the lake was not an authorized purpose of the project and would require Congress's approval. Even in 2002, long after this litigation began, Earl Stockdale, the Corps's Deputy General Counsel, concluded that Georgia's 2000 water-supply request "would result in serious impacts on other project purposes" so that the Corps could not grant that request "absent legislative authority." Memorandum from Earl Stockale, Deputy General Counsel, Civil Works & Env't, to Acting Ass't Sec'y of the Army for Civil Works 2 (Apr. 15, 2002) [hereinafter "2002 Stockdale Memorandum"] (ACF036355). The 2002 Stockdale Memorandum determined that, even if water supply was a specifically authorized project purpose, the Corps would still lack the authority to grant Georgia's request without Congressional approval because the Corps did not "have the authority to reorder specifically authorized project purposes without

additional Congressional authorization." *Id.* at 13 (ACF036367); *see also* Memorandum from E. Manning Seltzer, General Counsel, U.S. Army Corps of Eng'rs, to Special Assistant to Sec'y of the Army for Civil Functions ¶ 4, at 2 (Jan. 21, 1969) (SUPPAR001361) ("[T]he discretionary authority given the Chief of Engineers to make post-authorization changes in projects extends only to what might be termed engineering changes * * * [such as] minor variations in the allocation of storage for the various project purposes * * *.").

At some point between the 2002 Stockdale Memorandum and the present Motion, the Corps changed its mind on this important issue. Attached to the Corps's brief in this matter is a new memorandum from Mr. Stockdale which concludes that the Corps does have the authority to reallocate storage in Lake Lanier to water supply and that Congressional authorization is not required. Memorandum from Earl Stockdale, Chief Counsel, to the Chief of Engineers (Jan. 9, 2009) [hereinafter "2009 Stockdale Memorandum"]. The 2009 Stockdale Memorandum is not part of the administrative record in the case, but the Corps urges the Court to accept the memorandum as part of that record, because it allegedly is an "extra-record document that helps explain complex facts provided in the administrative record and helps explain the Corps' past and present legal interpretation of its governing statutes and regulations." (Corps's Mem. Supp. Mot. for Summ. J. at 3 n.4.) As stated at the hearing on these Motions, however, the Court will not make the 2009 Stockdale Memorandum part of the administrative record in this case. It does not shed any light on the Corps's decisionmaking with respect to the actions challenged here. Nor

does the memorandum explain any complex facts that the Court is unable to understand without such assistance. Moreover, the memorandum is clearly a document prepared for litigation purposes only; large sections of the memorandum appear verbatim in the Corps's brief with no attribution. The 2009 Stockdale Memorandum does little more than justify the Corps's current legal position. The merits of that position are for the Court, not the Corps, to decide.

Having thoroughly reviewed the legislative history and the record, the Court comes to the inescapable conclusion that water supply, at least in the form of withdrawals from Lake Lanier, is not an authorized purpose of the Buford project. Therefore, if the Corps's actions to support water supply constitute "major structural or operational changes" or "seriously affect" the project's authorized purposes, the Corps was required to seek Congressional approval for those actions and its failure to do so renders the actions illegal. WSA § 301(d), 72 Stat. at 320 (codified at 43 U.S.C. § 390b(d)).

2. Major Operational Change

The Corps's actions to support water supply in Lake Lanier have taken the form of reallocations of the lake's storage capacity to water supply. In other words, by committing to allow municipal entities to withdraw a certain amount of water from Lake Lanier, the Corps has either explicitly or effectively allocated some of Lake Lanier's storage to those withdrawals. Because water supply is not an authorized purpose of Lake Lanier, if any of these reallocations constitute a major structural or operational change or seriously affect the purposes for which the project was authorized, the Corps must seek Congressional approval for the reallocations.

Alabama, Florida, and the SeFPC challenge several of the Corps's water-supply reallocations. The first are what Alabama and Florida call "de facto" reallocations. Prior to the initiation of this lawsuit in 1990, the Corps had entered into water-supply contracts with several Georgia entities: ARC, Gwinnett County, Gainesville, Buford, and Cumming. While all of these contracts expired in 1989 or 1990, there is no dispute that the Corps continues to allow these entities to withdraw water pursuant to the contracts today. In fact, the amount of water these entities presently withdraw far exceeds the amount they were entitled to under the so-called "holdover" contracts. With the exception of the withdrawal amounts approved by Congress in the 1950s, Alabama and Florida contend that all of the "holdover" contracts require an illegal reallocation of storage to water supply. The Corps maintains that these contracts were interim only and that no permanent reallocations were intended or accomplished under the pre-1990 contracts. However, the Corps is bound by the D.C. Circuit's determination in *SeFPC* that interim contracts are subject to the strictures of the WSA. Thus, the "de facto" reallocations accomplished by the "holdover" contracts must be evaluated under the WSA.

The PAC Report endeavored to make permanent these "de facto" reallocations and some additional reallocations of storage. The PAC Report's reallocations are the second type of reallocations at issue.

The final reallocations that must be evaluated under the WSA are the reallocations requested by Georgia in the 2000 water-supply request. These reallocations are the largest of the three reallocations at issue. Thus, if the Court determines that

either the "de facto" reallocations or the PAC Report's reallocations violate the WSA, then the water-supply request's reallocations likewise violate the WSA.

a. "De facto" reallocations

Starting in the early 1970s, the Corps began allowing municipalities surrounding Lake Lanier to withdraw water directly from the lake. Two of these municipalities, Buford and Gainesville, had a preexisting right to withdraw some water from the lake because their previous water intake structures on the Chattahoochee River were inundated by Lake Lanier. The Corps recognized that it could not unilaterally determine that the remaining municipalities were allowed to withdraw large amounts of water from the lake, and thus characterized the various contracts as "interim." For example, the Corps told Gwinnett County in 1973 that it could withdraw water from the reservoir, pending the completion of the MAAWRMS and the changes in the project that the Corps expected to result from that study.

By 1990, contracts were in place for reallocations that would allow 85 million gallons per day to be withdrawn from Lake Lanier and 50 million gallons per day to be withdrawn from the Chattahoochee River.[21] In 2006, the average daily withdrawals from the lake totaled 141 million gallons per day. Report, Water Withdrawals-Lake Sidney Lanier (Buford

[21] ARC's contract with the Corps provided for 50 million gallons per day in addition to what the Corps considered the "incidental benefit" from releases for power of 327 million gallons per day. As discussed *infra,* the Corps's conclusion that 327 million gallons per day is available incidentally to power operations is not supported by the record.

Reservoir), Georgia-Chattahoochee River-ACF Basin 1-8 (no date) (ACF044236-43). The ARC's average daily withdrawal was 316 million gallons per day.[22] *Id.* at 9.

Under normal operations, the contracted-for withdrawal amounts equal approximately 86,200 acre-feet of storage for the lake withdrawals, and approximately 50,700 acre-feet for the excess river withdrawals. (*See supra* n. 14.) In 2006, the actual withdrawals required 143,000 acre-feet of storage for the withdrawals from the lake. Although the ARC did not require the additional 50 million gallons per day in its contract with the Corps, by virtue of the Corps's commitment to provide that amount (should ARC need it), the additional 50 million gallons per day, or 50,700 acre-feet, were nevertheless held in water-supply storage and were unavailable for other uses. Thus, the average daily total amount of storage in Lake Lanier dedicated to water supply was 193,700 acre-feet under normal conditions, or 18.5% of Lake Lanier's conservation storage of 1,049,400 acre-feet. If the Corps's "critical yield" calculations are used, however, the amount of storage dedicated

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[22] The Georgia parties argue that the Court must take into account return flows, which are water the municipal entities return to the lake and the river in the form of highly treated wastewater. According to the Georgia parties, "[o]mitting return flows is a major omission, and error, because storage utilization is a function of net, and not gross, withdrawals of water." (Ga.'s Mem. in Opp'n to SeFPC's Mot. at 41.) However, none of the municipal entities is required to return any water to Lake Lanier or the Chattahoochee River, but the Corps is required by the various water-supply contracts to allow the entities to withdraw a certain amount of water from the lake and river. The Court must evaluate the Corps's obligations, independent of any voluntary return flows, because regardless of the return flows the Corps's obligations remain the same.

to water supply rises to an average of slightly more than 208,800 acre-feet. The Corps generally calculates storage requirements using critical yield, as opposed to normal operations. *PAC Report,* app. C, at C-1 (ACF041299) (stating that to determine storage-yield relationship, the Corps selects a severe drought period "during which the project will be expected to provide a 'firm' yield"); *see also* Steven R. Cone, Team Leader, Planning & Pol'y Div., U.S. Army Corps of Eng'rs, *Summary of "Technical Data" on Impacts of GA Request for WS at Lake Lanier* ¶ 1 (2002), *in* 2002 Stockdale Memorandum, enclosure (SUPPAR005092) (using "critical period" yield for storage calculations).

According to the Corps's storage calculation method, the reallocation accomplished by virtue of the "holdover" contracts is 208,100 acre-feet, or 19.8% of Lake Lanier's conservation storage. This calculation assumes that 327 million gallons per day in the ARC's river withdrawals are indeed "incidental" to the power operations at the dam, a point that the parties vigorously dispute. It also assumes that the "baseline" for operations in Lake Lanier is zero storage for water supply. The D.C. Circuit concluded that zero storage was the correct baseline but, as discussed above, neither the Court nor the parties are bound by that conclusion.

The base of operations at Buford Dam was to provide 600 cfs of flow past Atlanta and to allow Buford and Gainesville to withdraw a total of 10 million gallons per day from Lake Lanier. *1958 Manual* app. B, at B-13 (ACF001796) (providing for flows of 600 cfs to Atlanta). In 1975, the Corps, Atlanta, and Georgia Power Company agreed that "existing practices" allowed an average annual downstream with-

drawal of 230 million gallons per day. (Corps's Mem. Supp. Mot. Summ. J. at 31) (citing Letter from Edwin C. Keiser, Col., U.S. Army Corps of Eng'rs, to Leonard Ledbetter, Dir., Ga. Dep't of Natural Res. (July 21, 1975) (SUPPAR036976-77).) In 1979, the same parties determined that "an annual average of 266 million gallons per day * * * could be withdrawn from flows that occur incidentally as a result of project operations." (*Id.* at 47 n. 34 (referencing the 1979 Modified Interim Plan, described in MAAWRMS at 8 (ACF015500), but not included in the administrative record).)[23] Withdrawals of 266 million gallons per day would, however, require operational changes. (*Id.* at 32 (citing Letter from Kenneth E. McIntyre, Brigadier Gen., U.S. Army Corps of Eng'rs, to Leonard Ledbetter, Dir., Ga. Envt'l Protection Div. (Apr. 27, 1979) (SUPPAR036997-37002)).)

Thus, the Corps determined in 1975 that the "baseline" for operations was 230 million gallons per day downstream, plus the 10 million gallons per day Gainesville and Buford were Congressionally authorized to withdraw from the lake. This "baseline"

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[23] In 1986, the Corps revised this number to the 327 million gallons per day figure it uses today. There is no explanation in the record as to how the incidental benefits of regular power operations at the dam would increase from 230 million gallons per day in 1975 to 327 million gallons per day in 1986. Even the Corps appears to recognize that 327 million gallons per day is at best an estimate, stating that it "expects that further analysis * * * would validate the Corps' 1986 determination that up to 327 mgd could be provided on an annual average basis from flows that occur incidentally as a result of project operations." *Id.* at 47 n. 34. The Court must rely on the data that is supported by the record, however, not data that the Corps expects, at some point in the future, to be borne out by "further analysis."

amounted to slightly less than 224,700 acre-feet of storage, using the 1734 cfs yield figure. The 1979 baseline of 266 million gallons per day for downstream withdrawals required storage of almost 258,400 acre-feet. In 2006, the Corps allowed an average of 141 million gallons of water to be withdrawn daily from the lake, and committed to 377 million gallons per day for the ARC's use downstream. *See* Report, Water Withdrawals-Lake Sidney Lanier (Buford Reservoir), Georgia-Chattahoochee River-ACF Basin 1-9 (Corps document listing total withdrawals from 1987 through September 2007) (ACF044236-44). These commitments amount to almost 485,000 acre-feet of storage using the 1734 cfs yield (and 566,300 acre-feet using the more current 1485 cfs yield figure). This is 226,600 acre-feet more than the "base" operations the Corps described in 1979 and 260,300 acre-feet more than the 1975 base operations.[24] Whichever baseline is used, the difference is more than 21.5% of Lake Lanier's total conservation storage. Thus, without any Congressional authorization, the Corps has reallocated nearly a quarter of Lake Lanier's conservation storage to support water supply.

That this reallocation is a major operational change

[24] Adding the 11,200 acre-feet Congress allocated to Gwinnett County in 1956 increases the 1975 baseline to 235,900 acre-feet, and the 1979 baseline to 269,600 acre-feet. As noted above, however, Gwinnett County did not begin to withdraw water from Lake Lanier until sometime in the 1970s, pursuant to contracts that did not purport to be based on the 1956 legislation and which allowed far greater withdrawals than Congress envisioned. The inclusion of Gwinnett County's original authorization does not, however, significantly change any of the Court's calculations. Moreover, Gwinnett County's Congressionally authorized use of 11,200 acre-feet of storage expired in 2006.

is self-evident. The D.C. Circuit held that a reallocation of twenty-two percent of Lake Lanier's conservation storage was a major operational change "on its face" and, as discussed previously, the parties are bound by this holding. The WSA requires the Corps to seek Congress's authorization before effecting any major changes to project purposes. The Corps failed to do so and thus the so-called "de facto" reallocations violate the WSA.

b. PAC Report

The PAC Report recommended that Congress approve a reallocation of 207,000 acre-feet of storage in Lake Lanier to support water supply. *PAC Report* at 12 (ACF041176). Under the Corps's calculations, this amounts to 19.7% of the total conservation storage in Lake Lanier.

The PAC Report assumed that by 2010, water-supply withdrawals from Lake Lanier would reach 151 million gallons per day. *Id.* app. C, at C-2 (ACF041300). The projected downstream needs were 378 million gallons per day. *Id.* Using a "firm yield" figure of 1734 cfs from the 1939-1942 drought,[25] 151 million gallons per day of lake withdrawals requires 141,700 acre-feet of storage. *Id.*[26]

To calculate the storage required for downstream withdrawals, the Corps assumed that 200 million gallons per day were available for withdrawal down-

[25] The Corps recognized that the 1986-1988 drought would likely result in a lower "firm yield" than the 1939 drought, and estimated that the new yield figure would be 1455 cfs. *Id.* Actual yield from the 1986 drought has been set at 1485 cfs. *See supra* n. 14.

[26] The Court's own calculation of the storage required for 151 million gallons per day yields a slightly different figure of 141,370 acre-feet.

stream during the 66-hour off-peak (weekend) generation period, as a result of the smaller turbine's releases of 600 cfs during this period. The Corps calculated that the storage necessary to accommodate the extra 178 million gallons per day, or 275 cfs, necessary for downstream water supply during this off-peak period was 65,225 acre-feet. *Id.* app. C., at C-4 (ACF041302). To achieve this number, the Corps did not perform the usual calculation.[27] Rather, the Corps assumed that 378 million gallons per day could be accommodated by existing operations during peak generation periods. According to the Corps, the only withdrawal that would require a reallocation of storage was the 178 million gallons per day in non-incidental withdrawals that occurred during the off-peak generation period of 66 hours, or 2.75 days. Thus, the Corps multiplied the cfs required for 178 million gallons per day (calculated as 178 x 1.547) by 2.75 to give a "dsf" figure.[28] The dsf were then divided by 7 days to give a daily cfs rate of 108 cfs. The Corps then performed the usual calculation (108/1734 x 1,049,400) to determine that 178 million gallons per day of off-peak withdrawals would require storage of only 65,225 acre-feet.

The assumption that 378 million gallons per day is available downstream as incidental to the peak operation of the dam is, however, far greater than any assumption the Corps has ever made regarding "incidental" operation of the project. If 378 million gallons per day is "incidentally" available for 4.25 days every week, with 200 million gallons per day

[27] The usual storage calculation would have been 178 mgd x 1.547 cfs/1734 x 1,049,400. Under this formula, 178 million gallons per day requires 166,600 acre-feet of storage.

[28] The Corps nowhere defines this term.

available for 2.75 days, the average daily "incidental" benefit is more than 308 million gallons per day, which is 68 million gallons per day more than the 1975 "baseline" average and 42 million gallons per day more than the Corps's 1979 assumptions. The Corps does not explain this large discrepancy.

Using instead the "baseline" average of 230 million gallons per day available incidentally to downstream users, the PAC Report's reallocations are much greater. To accommodate the projected need of 378 million gallons per day minus the incidentally available 230 million gallons per day would require an average of 148 million gallons per day, or 138,500 acre-feet of storage using the 1734 cfs yield figure. Using the more recent critical yield figure of 1485 cfs, the PAC Report's reallocations for downstream use is almost 161,800 acre-feet. When added to the acknowledged 141,000 acre-feet necessary to support in-lake withdrawals, the total reallocation requested by the PAC Report is 279,500 acre-feet, or 302,800 acre-feet using current yield figures. The percent of storage reallocated under the PAC Report is 26.6% to almost 28.8% of Lake Lanier's total conservation storage.

Whether the Court uses the Corps's calculations of a 19.7% reallocation or its own calculations, however, is of no moment to the WSA analysis. As the Corps itself acknowledged when sending the PAC Report to Georgia's Senator Nunn, the reallocations recommended by the PAC Report would require Congressional authorization under the WSA. Letter from Louis J. Martinez, Lt. Col., U.S. Army Corps of Eng'rs, to Sen. Sam Nunn, Ga., at 2 (Dec. 29, 1989) (SUPPAR011719). Before the Corps can implement any of the recommendations in the PAC Report, it

must secure Congress's approval to do so.

c. Georgia's 2000 Water-Supply Request

In May 2000, Georgia Governor Roy E. Barnes sent a formal request to the Corps to allow withdrawals from Lake Lanier of up to 297 million gallons per day by 2030, and to provide sufficient releases from the dam to allow downstream withdrawals of 408 million gallons per day by 2030. Letter from Roy E. Barns, Governor, Ga., to Joseph W. Westphal, Asst. Sec'y of the Army for Civil Works, at 1 (May 16, 2000) (ACF042582). The Corps denied the request, stating that the requested withdrawals would require a reallocation of 370,930 acre-feet of storage, or more than thirty-four percent of the total conservation storage in Lake Lanier.[29] 2002 Stockdale Memorandum at 9 (SUPPAR001050).

Given that the D.C. Circuit in *SeFPC* determined that a reallocation of twenty-two percent of Lake Lanier's conservation storage was a major operational change that required Congressional approval, there can be no doubt that Georgia's request to reallocate thirty-four percent of Lake Lanier's con-

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[29] The 2002 Stockdale Memorandum stated that the total conservation storage in Lake Lanier is 1,087,600 acre-feet. 2002 Stockdale Memorandum at 8 (SUPPAR001049). The Corps uses this figure throughout its briefing on the instant Motions. From the time of Buford Dam's construction, the Corps has calculated the conservation storage as 1,049,400 acre-feet. It appears that the 1,087,600 acre-feet figure is in fact a seasonal variation-during the summer months the Corps increases the conservation pool from elevation 1070 to 1071. *See Apalachicola Basin Reservoir Regulation Manual* app. B, at B4-1(ACF018475). Because the larger storage amount is a short-term variation from the usual conservation storage figure, the Court has used the well-documented, historical storage amount in its calculations. However, the use of the larger storage amount would not significantly change the calculations.

servation storage likewise requires Congressional authorization.

3. "Seriously Affect" Project Purposes

The Corps contends that any storage reallocation to accommodate existing water-supply needs will have an insignificant impact on the project's authorized purposes of hydropower generation and downstream navigation. According to the Corps, the reallocations will cause only a one percent reduction in hydropower generation. (Corps's Mem. Supp. Mot. Summ. J. at 60.) However, as discussed above, the Corps's calculations of the storage required to meet current needs are suspect: according to the Corps, existing needs require only 122,714 acre-feet of storage for in-lake withdrawals and no storage for downstream withdrawals, because those withdrawals are within the 327 million gallons per day of alleged incidental benefit from operation of the dam. The Corps uses the wrong baseline, however, assuming not only that 327 million gallons per day are available downstream, but also assuming that the "baseline" for in-lake withdrawals is considerably higher than the 10 million gallons per day allowed by the 1950s contracts.

As noted above in footnote 23, the Corps determined in 1986 that 327 million gallons per day were available incidental to hydropower generation at Buford Dam. The Corps's conclusion was not, however, that more water was somehow going through the turbines to allow for the increased downstream withdrawals. Rather, the Corps determined that allowing downstream withdrawals of 327 million gallons per day would not seriously affect the hydropower benefits. In other words, the Corps determined in 1986 that 327 million gallons per day for down-

stream withdrawals was "the point at which the Lake Lanier project authority ends." (Corps's Mem. Supp. Mot. Summ. J. at 33.) Because the Corps has not sufficiently supported its conclusions with respect to the 327 million gallons per day figure, the Court has used an earlier Corps determination that 230 million gallons per day is available as truly incidental to power generation at the dam.

Not only has the Corps failed sufficiently to support the 327 million gallons per day figure, but its incremental increases of the alleged water-supply benefit incidental to hydropower illustrate a fundamental problem with the Corps's arguments regarding when its authority under the WSA ends. To take the Corps's arguments to their logical conclusion, the Corps may allow small changes in operations year after year, without seeking any Congressional approval for those changes. Thus, if hydropower is affected only one percent this year, another one percent next year, and so on, the Corps would argue that no Congressional authorization is required. But if the cumulative effect on hydropower throughout the years adds up to twenty percent, then the question becomes at what point Congress must be consulted. As the D.C. Circuit stated, "it is unreasonable to believe that Congress intended to deny the Corps authority to make major operation changes without its assent, yet meant for the Corps to be able to use a loophole to allow these changes" to occur incrementally, rather than all at once. *SeFPC,* 514 F.3d at 1324-25. The Court must evaluate the cumulative effect of all of the changes in operations at Lake Lanier. In doing so, the Court has determined that 327 million gallons per day are not available as incidental to the operations of Buford Dam as Con-

gress, the Corps, and the hydropower interests envisioned. Rather, as the Corps determined in 1975, 230 million gallons per day are available as a result of the normal operation of the Buford Dam.

In the original Cost Allocation Studies for the Buford project, the Corps computed the available power benefits from Buford Dam as 170,000,000 kilowatt hours ("kwh"), or 170,000 megawatt hours ("mwh"). U.S. Army Corps of Eng'rs, *Cost Allocation Studies, Apalachicola, Chattahoochee and Flint Rivers Projects, Basis of All Allocations of Costs for Buford and Jim Woodruff Projects Adopted by the Chief of Engineers* 19 (1959) (ACF002101). According to the SeFPC, one way the harm to hydropower can be calculated is by comparing the actual annual generation to the benefits the Corps believed would be available from the project. Only four times since 1994 has the Buford Dam generated 170,000 mwh or more; and in five different years, power generation has fallen below 100,000 mwh. According to the SeFPC, the total value of the loss of hydropower benefits at Buford Dam is more than 60,000 mwh, which is worth $59 million. Now the Corps and the Georgia parties take issue with the SeFPC's calculation of its damages. However, in the 2002 Stockdale Memorandum the Corps stated that the expected loss of hydropower benefits from the reallocations Georgia requested were more than 95 mwh per day, or a $3 million annual reduction in benefits. 2002 Stockdale Memorandum at 9 (SUPPAR001050).

Another way to look at the harm to hydropower is in the change from peak operations to non-peak operations. From the beginning of the Buford project, the purpose of weekend release was to support water supply. Thus, the generation figures demonstrate

that releases were much lower on weekends for the first decades of the project's operation. *See, e.g.*, Report, 24 Hour-Actual Generation at Buford, 1960 Water Year 3 (SUPPAR026251) (showing weekend generation figures that are hundreds of mwh lower than weekday figures). In 1989, only nine percent of the energy generated by the Buford project was generated on Saturdays and Sundays. By 2007, however, weekend energy generation constituted nineteen percent of the total power generated by the dam. (Ala. & Fla.'s Factual App. ¶ 750 (citing Report, 24 Hour-Actual Generation at Buford 1-51 (SUPPAR026249-99)).) Because non-peak power is much less valuable than peak power, the harm to hydropower from this change in operations is obvious.[30]

The SeFPC argues that, if the Court orders the Corps to put in place the "crediting mechanism" described by the *Southeastern Federal Power Customers* Settlement Agreement, the serious effect on hydropower will be remedied. (*E.g.,* SeFPC's Resp. Mem. to Mot. for Summ. J. and Opp'n filed by Corps at 1.) It is far from clear that Congress intended that the Corps could sidestep the Congressional-authorization requirement of the WSA by merely paying off the interests seriously affected. Such a remedy is, in the Court's opinion, for Congress to consider when it evaluates the proposed changes in the project's operation.

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[30] That hydropower has been harmed is relevant in determining whether the Corps's operation of the project to support water supply has seriously affected the Congressionally authorized purposes. However, this does not mean that the SeFPC has any monetary claim for lost hydropower benefits. As the Court has made clear in previous rulings, the Court will not consider arguments regarding remedies at this time.

The Corps's decision to support water supply has seriously affected the purposes for which the Buford project was originally authorized. The Corps is therefore in violation of the WSA.

E. Combined Authorities

The Georgia parties claim that the WSA, 1944 FCA, 1946 RHA, the 1956 statute that allowed the Corps to contract with Gwinnett County for water-supply withdrawals, and the Corps's contracts with Gainesville and Buford (the "relocation contracts"), taken together, establish that water supply is an authorized purpose of the Buford project. The Court has addressed the legislative history of the Buford project, including the 1946 RHA, the relocation contracts, and the Gwinnett County water-supply request and resulting Congressional enactment. *See supra* pp. 1310-22. Contrary to the Georgia parties' argument, taken together the relevant statutes and legislative history point to only one conclusion: water supply, in the form of withdrawals from Lake Lanier and large-scale withdrawals from the Chattahoochee River, was not an authorized purpose of the Buford project. The Georgia parties' argument that a combination of authorities allows the water-supply withdrawals is without merit.

F. Remaining Claims

The parties claim that the Corps's operations of the Buford project violate NEPA, the 1944 FCA, the CZMA, and other statutes, and that the various manuals, plans, and other methods through which the Corps operates the Buford project also violate federal law. Because the Court has determined that the Corps must seek Congressional authorization before it can reallocate storage in Lake Lanier to

water supply, the parties' remaining Phase 1 claims regarding the Corps's operations and the plans for those operations are moot. *See Envtl. Def. Fund, Inc. v. Alexander,* 467 F.Supp. 885, 888 (N.D.Miss.1979) (noting that, if a project is not legally authorized, "all other issues are mooted until such time as proper authorization may be obtained from Congress").

G. Operations Going Forward

The Court recognizes that it will take time to secure the required Congressional authorization for the changes to the operation of the Buford project. In addition, the municipal entities that withdraw water from Lake Lanier and the Chattahoochee River cannot suddenly end their reliance on that water merely because a federal court has determined that the Corps failed to comply with its statutory obligations. Thus, the Court will stay Phase 1 of this litigation for three years, to allow the parties to obtain Congress's approval for the operational changes the water-supply providers request. During the stay, the parties may continue to operate at current water-supply withdrawal levels but should not increase those withdrawals absent the agreement of all other parties to this matter. The Court does not believe that a stay of Phase 2 is warranted at this time, and therefore will consider the Phase 2 claims in accordance with the most recent scheduling order.

At the end of three years, absent Congressional authorization or some other resolution of this dispute, the terms of this Order will take effect. For Atlanta and the communities surrounding Lake Lanier, this means that the operation of Buford Dam will return to the "baseline" operation of the mid-1970s. Thus, the required off-peak flow will be 600

cfs and only Gainesville and Buford will be allowed to withdraw water from the lake. The Court recognizes that this is a draconian result. It is, however, the only result that recognizes how far the operation of the Buford project has strayed from the original authorization.

As the Court stated at the hearing, the slow pace at which the Corps operates has only served to further complicate and provoke this already complicated and inflammatory case. It is beyond comprehension that the current operating manual for the Buford Dam is more than 50 years old. Certainly, the pendency of this litigation has made the Corps's completion of plans and manuals more difficult. However, the states and municipalities that rely on the ACF basin for water cannot determine how the operation of the project will affect their interests if they do not understand how the Corps intends to operate the project. The uncertainty created by the Corps's alarmingly slow pace only adds to the frustration of all parties involved in this litigation. The Court encourages the Corps to complete its plans for the ACF basin as quickly as possible, to allow the parties and Congress to analyze more effectively the future of this vital resource.

The blame for the current situation cannot be placed solely on the Corps's shoulders, however. Too often, state, local, and even national government actors do not consider the long-term consequences of their decisions. Local governments allow unchecked growth because it increases tax revenue, but these same governments do not sufficiently plan for the resources such unchecked growth will require. Nor do individual citizens consider frequently enough their consumption of our scarce resources, absent a

crisis situation such as that experienced in the ACF basin in the last few years. The problems faced in the ACF basin will continue to be repeated throughout this country, as the population grows and more undeveloped land is developed. Only by cooperating, planning, and conserving can we avoid the situations that gave rise to this litigation.

CONCLUSION

As we all learned in grade school, the separation of powers is fundamental to our federal government: a power reserved to one branch may not be usurped by another. This litigation presents a case study in the need for this tripartite federal system. Congress authorized and paid for the Buford Dam, and gave the Corps authority to operate the dam. Congress specified, however, that the Corps's authority was not without limits. If the Corps believes that it must operate the project in a manner contrary to Congress's initial authorization of the project, it must so inform Congress and secure Congress's permission to do so. Congress has made no exceptions for situations such as the present, when the need for the change is great: the WSA does not provide that "changes shall be made only upon the approval of Congress unless it is inconvenient to do so." Congress reserved to itself the power to change the purposes for federal projects such as the Buford Dam project. The executive branch simply may not circumvent that authority. Congressional approval of the reallocation of storage in Lake Lanier is required.

The Court is sympathetic to the plight of the Corps, which is faced with competing and legitimate claims to a finite resource. Neither the Corps nor the Court can make more water. However, as the D.C. Circuit remarked, "Congress envisioned that changed cir-

cumstances or 'difficult situations' might arise and specified that any solution involving 'major operational * * * changes' required its prior authorization." *SeFPC,* 514 F.3d at 1325 (citations omitted). The Corps's failure to seek Congressional authorization for the changes it has wrought in the operation of Buford Dam and Lake Lanier is an abuse of discretion and contrary to the clear intent of the Water Supply Act. As such, the Corps's actions must be set aside.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Alabama and Florida's Motion for Summary Judgment (Docket No. 191) is **GRANTED in part** and **DENIED in part;**

2. The Georgia parties' Motion for Summary Judgment (Docket No. 195) is **DENIED;**

3. The SeFPC's Motion for Summary Judgment (Docket No. 238 in Civ. No. 3:08-640) is **GRANTED in part** and **DENIED in part;**

4. The Corps's Motion for Summary Judgment (Docket No. 227) is **DENIED;**

5. APC's Motion for Summary Judgment (Docket No. 86 in Civ. No. 3:07-249) is **DENIED;**

6. Columbus and Columbus Water Works' Motion for Partial Summary Judgment (Docket No. 22 in Civ. No. 3:07-1033) is **DENIED;**

7. Apalachicola's Motion for Summary Judgment (Docket No. 190) is **GRANTED in part** and **DENIED in part;** and

8. The claims raised in Phase 1 of this litigation are hereby **STAYED** for a period of three (3) years.

APPENDIX C

In the

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14657-GG

In Re:

MDL-1824 TRI-STATE WATER RIGHTS LITIGATION.

On Appeal from the United States District Court
For the Middle District of Florida

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 16 2011

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before MARCUS and ANDERSON, Circuit Judges, and MILLS,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Proce-

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

dure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX D

United States Court of Appeals,
District of Columbia Circuit

SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC., Appellee

v.

Peter GEREN, Secretary of the United States Department of the Army, et al., Appellees

State of Florida, Appellant.

Nos. 06-5080, 06-5081 | Argued Nov. 16, 2007 | Decided Feb. 5, 2008.

Before: ROGERS and KAVANAUGH, Circuit Judges, and SILBERMAN, Senior Circuit Judge.

Opinion

ROGERS, Circuit Judge.

This case arises out of the requirements of three States for water stored in a federal reservoir. The States of Alabama and Florida appeal the order of the district court approving a Settlement Agreement between Southeastern Federal Power Customers, Inc. ("Southeastern"), a group of Georgia water supply providers ("Water Supply Providers"), the U.S. Army Corps of Engineers (the "Corps"), and the State of Georgia. The Agreement provides for a ten or twenty year "temporary" reallocation of over twenty percent (20%) of the water storage in the Lake Lanier reservoir, which is located in the State of Georgia and operated by the Corps. Alabama and Florida contend that the Agreement violates the Water Supply Act ("WSA"), 43 U.S.C. § 390b(d), the

Flood Control Act ("FCA"), 33 U.S.C. § 708, and the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 et. seq. We need address only one of the statutory challenges. Under the WSA, the Corps must obtain prior Congressional approval before undertaking "major * * * operational changes." § 301(d), 43 U.S.C. § 390b(d). Because the Agreement's reallocation of Lake Lanier's storage space constitutes a major operational change on its face and has not been authorized by Congress, we reverse the district court's approval of the Agreement.

I.

The setting for this case is Lake Sidney Lanier, a federally owned reservoir operated by the Corps and located in Georgia. It was created by the construction of the Buford Dam on the Chattahoochee River, approximately fifty miles northeast of the city of Atlanta. To the south of the Buford Dam, the Chattahoochee joins the Flint River and the two become the Apalachicola River, which flows through northern Florida and eventually into the Gulf of Mexico. The three river systems make up the Apalachicola-Chattahoochee-Flint river basin ("ACF Basin"), which includes counties in Alabama.

Congress authorized the Corps to design and build Buford Dam in 1946, and the project was completed in the mid-1950s. Beginning in the 1970s, the Corps entered into a series of five-year renewable contracts that allowed some of Lake Lanier to be used for storage of local water supply. *See Se. Fed. Power Customers, Inc. v. Harvey,* 400 F.3d 1, 2 (D.C.Cir. 2005). The last of the local water storage contracts expired in 1990, but the Corps has permitted the withdrawal of water, in increasing amounts, under the terms of the expired contracts. *Id.*

In 1989, before the expiration of the last temporary local water storage contract, the Corps transmitted a report to Congress recommending that 207,000 acre-feet of storage in Lake Lanier be reallocated from hydropower to local consumption, noting that this might require Congressional approval. USACE, POST AUTHORIZATION CHANGE NOTIFICATION REPORT FOR THE REALLOCATION OF STORAGE FROM HYDROPOWER TO WATER SUPPLY AT LAKE LANIER, GEORGIA ("PAC REPORT") 1, 12, 26 (1989). In response, Alabama sued the Corps in the federal district court in the Northern District of Alabama, seeking to enjoin reallocation of Lake Lanier's storage space to water supply. This litigation resulted in a stay order, *Alabama v. USACE,* No. CV90-H-1331-B (N.D.Ala. Sept. 19, 1990), and no permanent water storage reallocation was undertaken despite the recommendations of the PAC REPORT. In 1992, Alabama, Florida, Georgia and the Corps entered into a Memorandum of Agreement allowing existing withdrawals to continue or increase in response to reasonable demand; in 1997, the same three States and Congress approved the Apalachicola-Chattahoochee-Flint River Basin Compact ("Compact") to facilitate water storage allocation, planning and dispute resolution in the ACF Basin. Pub.L. No. 105-104, 111 Stat. 2219. The Compact, which did not assign rights to any quantity of water, *id.* at 8, terminated on August 31, 2003, without resulting in an agreement on the allocation of water storage resources.

In 2000, Southeastern sued the Corps in the federal district court in the District of Columbia, challenging the Corps' statutory authority to divert water

from Lake Lanier to the detriment of hydropower users and alleging economic injury stemming from increased withdrawals of water from Lake Lanier, which allegedly compromised use of Lake Lanier's water for power generation. Georgia thereafter petitioned the Assistant Secretary of the Army for Civil Works to formally reallocate reservoir storage space for local consumption-effectively requesting a threefold increase in the amount of space devoted to local water supply. In 2001, not having received a response to its request, Georgia sued the Corps in the federal district court in the Northern District of Georgia. In 2002, Georgia's request was denied. By letter of April 15, 2002, the Acting Assistant Secretary of the Army for Civil Works explained that because "[t]his request involves substantial withdrawals from Lake Lanier and accommodating it would affect authorized project purposes * * * [the matter had been referred to] the Office of the Army General Counsel, [and t]hat office has * * * concluded that it cannot be accommodated without additional Congressional authorization." Letter from R.L. Brownlee, to Hon. Roy E. Barnes, Governor of Georgia (Apr. 15, 2002), *citing* Memorandum of Earl Stockdale, Deputy Gen. Counsel, Dep't of the Army, regarding Georgia Request for Water Supply from Lake Lanier (Apr. 15, 2002) ("Army Legal Memorandum"). The Georgia lawsuit is currently abated. *Georgia v. USACE,* 223 F.R.D. 691, 699 (N.D.Ga.2004).

Meanwhile, in March 2001, the D.C. district court referred the parties to mediation, where they were eventually joined by Georgia and the Water Supply Providers. The parties negotiated the Agreement at issue and signed it in January 2003. The Agreement

specifies that Lake Lanier's storage space is 1,049,400 acre-feet. It requires the Corps to allocate between 210,858 and 240,858 acre-feet of Lake Lanier's water storage to local municipal and industrial uses for a once-renewable period of ten years; the exact amount of space allocated depends on whether Gwinnett County chooses to purchase all of the storage space to which it is entitled. If, under the Agreement, all of the storage space that may be officially dedicated to local consumption is, then the reallocation constitutes more than twenty-two percent (22%) of the total storage space in Lake Lanier and approximately nine percent (9%) more of the total storage space than was being allocated for local use in 2002. *Compare* Agreement at 5, *and* Army Legal Memorandum at 8, *with* Agreement at 6. The interim ten-year leases will become permanent if Congress approves the change in use or a final court judgment holds that such approval is not necessary, Agreement at 10, and the Corps commits to recommending that Congress formally "make the storage covered by the Interim Contracts available on a permanent basis," *id.* at 11. The Agreement also provides hydropower generators with payments in the form of "credit to be reflected in hydropower rates," based on "revenues paid into the United States Treasury [under contracts based on the Agreement]," to compensate for lost opportunities related to its reallocation of water storage rights. *Id.* at 13.

In October 2003, after the Agreement was signed, the D.C. district court allowed Alabama and Florida to intervene and denied the motions to transfer the case to the Georgia district court; Alabama and Florida also resuscitated the Alabama lawsuit that

was filed in 1990. On October 15, 2003, the Alabama district court entered a preliminary injunction, preventing the Agreement from being implemented. The D.C. district court approved the Agreement on February 10, 2004, contingent upon the "dissolution of the [Alabama district court's] injunction." *Se. Fed. Power Customers v. Caldera,* 301 F.Supp.2d 26, 35 (D.D.C.2004). The district court rejected Alabama's and Florida's argument that the Agreement exceeded the authority conferred on the Corps by Congress, including applicable provisions of the WSA, the FCA and NEPA. *Id.* at 31. It also concluded that while the Agreement would affect hydropower generation, an original purpose of Lake Lanier, the assent of the hydropower generators meant that Congressional approval for the allocation of storage space was not required. *Id.* at 31-32. The district court quoted the WSA's "operational change" provision, but did not explicitly address this issue. *See id.*

This court dismissed the initial appeal filed by Alabama and Florida for lack of a final order, in view of the conditional nature of the district court's approval of the Agreement. *Se. Fed. Power,* 400 F.3d at 5. Following the dissolution of the Alabama district court's injunction, *Alabama v. USACE,* 424 F.3d 1117, 1136 (11th Cir. 2005), the D.C. district court, on March 9, 2006, entered a final judgment that is the basis for this appeal by Alabama and Florida.

II.

Alabama and Florida contend that the Agreement should be set aside because it violates the WSA, the FCA, and NEPA. They maintain that the reallocation in the Agreement requires Congressional approval under the WSA because it both constitutes a major operational change and seriously affects

project purposes. They also contend that the Agreement violates the FCA because it allows only the short-term sale of surplus water, whereas the Agreement is a long-term transaction involving water that is not surplus; because the FCA prohibits negatively affecting existing uses of affected water; and because the Agreement is contrary to the Corps' internal FCA contracting guidelines. Finally, they contend that the Agreement violates NEPA by "irrevocably committ[ing] [the Corps] to executing the [Agreement] at the completion of its NEPA analysis," Appellants' Br. at 48, effectively bypassing the statute.[1]

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[1] Alabama's and Florida's contention that the district court abused its discretion in denying the motion to abate or transfer this case to the Alabama district court is without merit. They note that the Georgia district court abated the case before it in favor of the prior-filed Alabama case, *Georgia,* 223 F.R.D. at 697-99, and that they urged the D.C. district court to do likewise on the grounds that the Alabama and D.C. cases involve substantially the same parties and subject matter, the Alabama lawsuit was first filed, the Alabama court is more convenient, and the "equities weigh in favor of abatement." Appellants' Br. at 58. However, the district court adequately justified its denial of the motion and did not abuse its discretion. *See Handy v. Shaw, Bransford, Veilleux & Roth,* 325 F.3d 346, 349 (D.C.Cir. 2003). The district court explained that "more entities purporting to be affected by the manner in which the Corps makes disposition of the water storage capacity * * * in Lake Lanier are now subject to the jurisdiction of this [district c]ourt than are before [the Alabama district court]," and reasonably concluded that the prospects of "duplicative litigation and inconsistent adjudicative results" were reduced by its review of the Agreement. *Caldera,* 301 F.Supp.2d at 31. Hence, because reversal is not justified, the court need not decide whether 28 U.S.C. § 2105, which precludes reversal by "a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction," prevents review of the abatement motion. *Cf. Nascone v. Spudnuts, Inc.,* 735 F.2d 763, 771 (3d Cir. 1984); *see also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL

The court reviews the fairness of a settlement agreement for abuse of discretion. *Moore v. Nat'l Ass'n of Sec. Dealers, Inc.,* 762 F.2d 1093, 1106 (D.C.Cir. 1985). Although there are few precedents on review of a settlement agreement for compliance with statutory requirements, the district court could hardly approve a settlement agreement that violates a statute, *see, e.g., Sierra Club, Inc. v. Elec. Controls Design, Inc.,* 909 F.2d 1350, 1355 (9th Cir. 1990), and this court owes the district court no deference in its legal interpretations. Our statutory review then is *de novo,* although this is largely a matter of semantics: "A district court by definition abuses its discretion when it makes an error of law," *Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *see also Donovan v. Robbins,* 752 F.2d 1170, 1178 (7th Cir. 1984). In considering the Corps' interpretation of its statutory authority to enter into the Agreement, the court applies the familiar two-step analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> [Where] Congress has directly spoken to the * * * issue * * * that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress * * * if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. 2778.

Section 301 of the WSA, 43 U.S.C. § 390b, addresses the development of "water supplies for

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PRACTICE AND PROCEDURE § 3903 (3d ed.2007).

domestic, municipal, industrial, and other purposes," specifically acknowledging that primary responsibility for their development is lodged in States and localities. *Id.* § 301(a), § 390b(a). It authorizes storage "in any reservoir project surveyed, planned, constructed or to be planned * * * by the Corps of Engineers or the Bureau of Reclamation" so long as the costs of construction or modification are adequately shared by the beneficiaries. *Id.* § 301(b), § 390b(b). The WSA provides, however, that:

> Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section 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 as now provided by law.

Id., § 301(d), § 390b(d) (emphasis added).

Alabama and Florida contend that the Agreement's reallocation of up to 240,858 acre-feet of storage space to the Water Supply Providers constitutes a "major * * * operational change[ ]" and thus requires Congressional approval. They point to previous analyses prepared by the Corps and the Office of the Army General Counsel indicating that operational changes on a similar scale would require Congressional approval. *See, e.g.,* PAC REPORT at 12; Army Legal Memorandum at 12. Appellees offer that the Agreement "merely leaves in place * * * [t]he status quo [of] incremental increases in withdrawal amounts by the Water Supply Providers as those increases are permitted by Georgia," Appellees' Br. at 37, and thus does not constitute an operational

change. They would distinguish the 2002 Army Legal Memorandum on the basis that Georgia's request involved a larger percentage of Lake Lanier than the storage allocated by the Agreement and included projections that were thirty as opposed to ten years in the future. Appellees further offer that the Agreement provides for compensation payments to hydropower producers, thus "retaining the hydropower benefit and adding the water benefit," *id.* at 38. Finally, Appellees offer that the reallocation is temporary rather than permanent, and thus does not require Congressional approval.

1.

As a threshold matter, we hold that Alabama and Florida have standing to challenge the Agreement insofar at it constitutes a major operational change to the Lake Lanier reservoir.[2] They credibly claim to fear that the proposed reallocation of water storage will result in "diminish[ed][ ] flow of water reaching the downstream states." Appellants' Br. at 2. The Agreement does potentially reduce the amount of water flowing downstream, Agreement at 5; *Alabama,* 424 F.3d at 1122, and the ACF basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years, *see, e.g.,* Agreement at 10; *cf. Georgia v. USACE,* 302 F.3d 1242, 1252 (11th Cir. 2002). As the ACF basin includes parts of both Alabama and Florida, they would be directly impacted by the Agreement's proposed changes to water storage uses;

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[2] The court, therefore, has no occasion to consider whether Alabama and Florida would have standing to challenge the Agreement as "seriously affect[ing]" the original Congressionally authorized purposes of Lake Lanier. *Cf.* Opinion Concurring in the Judgment (hereinafter, Concurring Op.) at ----.

in its complaint, Florida alleged various negative environmental impacts from reduced water flow. In addition, the states' quasi-sovereign interests entitles them to "special solicitude" in standing analysis. *See Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 1455, 167 L.Ed.2d 248 (2007). To the extent the Agreement provides that "entering into the storage contracts described in this Agreement * * * potentially gives rise to certain obligations under NEPA," Agreement at 14, any attendant delay due to the Corps' compliance with NEPA does not affect the imminence of the claimed injury. The Agreement commits the Corps to use its "best efforts to complete any applicable requirements of NEPA as expeditiously as practicable." *Id.*; *cf. Massachusetts,* 127 S.Ct. at 1456. In addition, the Agreement states that its NEPA compliance provision "does not apply to the Supplement to Relocation Contract" between the Corps and the City of Gainsville allowing removal of water from Lake Lanier from the date of settlement, Agreement at 12, 14.

Alabama and Florida thus show both the imminence of injury-in-fact and its causation, and reversing the approval of the Agreement would provide redress to their injury. *See generally Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Alabama's and Florida's prudential standing is likewise established because they come within the zone of interests that Congress could reasonably have intended to protect. *See Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399-401, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

2.

Section 301 of the WSA plainly states that a major operational change to a project falling within its

scope requires prior Congressional approval.[3] Consistent with this plain text, the Corps has long recognized that its discretion to alter a project's operations without Congressional approval is limited to non-major matters. It acknowledged in the 1989 PAC REPORT, at 12, that Congressional approval might be required for reallocation of 207,000 acre-feet, or approximately twenty percent (20%) of Lake Lanier's total current storage as specified in the Agreement. In 2002, on the basis of a legal opinion from the Office of the Army General Counsel, the Corps rejected Georgia's request that 370,930 acre-feet, approximately thirty-five percent (35%) of Lake Lanier's total storage, be reallocated to local use. That legal opinion concluded that Georgia's request was of a magnitude that would "involve substantial effects on project purposes and major operational changes" and therefore required prior Congressional approval. Army Legal Memorandum at 1; *see also id.* at 9, 13. This conclusion was based on a comprehensive analysis: The Army Legal Memorandum identified the "specifically authorized purposes [of Lake Lanier] * * *. [as] navigation, hydropower generation, and flood control-with water supply as an incidental benefit," *id.* at 6; reviewed relevant congressional authorizations, beginning with the Rivers and Harbor Acts of 1945, noting that, according to engineers' reports, water supply was an "incidental benefit" of the Dam; and cited statutory limitations on the Corps' authority to modify any existing project

[3] The Corps has not suggested that "the approval of Congress" required by the statute means anything other than a bill or resolution passed by both Houses that is either signed by the President or passed by two-thirds of both Houses over the President's veto. *Cf.* U.S. CONST. art. I, § 7.

under the WSA, *id.* at 3-9, referencing a House subcommittee report contrasting the Corps' authority to make "minor modifications" as distinct from "major changes in a project" and observing that "[t]he Corps' view of its discretionary authority in this area comports with that of Congress," *id.* at 10-11 (quoting U.S. HOUSE COMM. ON PUBLIC WORKS, SUBCOMM. TO STUDY CIVIL WORKS, REPORT ON THE CIVIL FUNCTIONS PROGRAM OF THE CORPS OF ENGINEERS, 82ND CONGRESS at 22 (1952)). The Corps' legal defense of then-existing water withdrawals was limited to a footnote, without citation to authority, which stated that "the agency does have the discretionary authority to meet the current water supply needs of the municipalities surrounding the reservoir," *id.* at 8 n. 2.

On its face, then, reallocating more than twenty-two percent (22%, approximately 241,000 acre feet) of Lake Lanier's storage capacity to local consumption uses, *see* Agreement at 5-6, constitutes the type of major operational change referenced by the WSA; the reallocation's limitation to a "temporary" period of twenty years does not change this fact. Even a nine percent (9%, approximately 95,000 acre feet) increase over 2002 levels for twenty years is significant. Appellees' contrary arguments are unpersuasive.

First, Appellees maintain that the Agreement simply reflects the status quo of gradual water storage reallocation, and consequently does not constitute a major operational change. But the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero, which was the amount allocated to storage space for

water supply when the lake began operation. Otherwise, under Appellees' logic, even if the Agreement had simply kept in place a series of interim agreements that allocated all of Lake Lanier to storage for local consumption, no major operational change would have occurred-a chain of logic that would effectively bypass section 301(d) of the WSA, 43 U.S.C. § 390b(d).[4] Even taking the status quo as the consumption level in 2002, the reallocation of approximately nine percent (9%, approximately 95,000 acre feet) of storage space for a twenty-year period is still significant. As the Corps acknowledged during oral argument, the change from current local usage storage to the storage levels envisioned by the Agreement would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval. Oral Arg. Tape (Nov. 16, 2007) at 45:16.5.

Second, Appellees maintain both that the amount of storage space reallocated by the Agreement is too limited to qualify as a major operational change, and that the Agreement's compensation of hydropower users prevents the reallocation from constituting a major operational change. But in defending the Agreement, Appellees provide no rational reason to explain why a reallocation of approximately thirty-

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[4] The court, in responding to the Corps' defense of its approval of the Agreement, has no occasion to opine whether the Corps' previous storage reallocations were unlawful. *See* Concurring Op. at 1326-27. The court relies only on initial allocations of water storage-a more limited issue than would be presented were the court to address the original Congressional purposes of Lake Lanier alluded to by our colleague, *see id.* at 1326-27. In any event, it is hardly "draconian," *id.* at 1327, to follow Congress' explicit instructions for prior approval of major operational changes.

five percent (35%) of total storage, taking into account thirty years of future local needs, constitutes a major operational change, *see* Army Legal Memorandum at 9, 12; Agreement at 6, whereas a reallocation of more than twenty-two (22%) of total storage, taking into account twenty years of future local needs, does not. *See* Agreement at 5-6, 10. In suggesting that the Agreement's compensation for the loss of hydropower uses is meaningfully different from Georgia's reallocation request in 2000, Appellees ignore the fact that even if compensation provides hydropower producers the full financial benefit they would have received from use of Lake Lanier in the absence of the water storage reallocation, a major operational change still occurs because there is less flow through as a result of increased water storage for local use.

Third, Appellees maintain that the absence of a permanent reallocation under the Agreement removes the need for prior congressional approval. But 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. Appellees' attempt to respond by suggesting a time period of ninety-nine years " 'might cause a serious impact,' " Appellees' Br. at 38 n. 6 (quoting counsel for the Corps during oral argument before the D.C. district court, Transcript of Oral Argument (Feb. 8, 2005) at 30, *Se. Fed. Power Customers v. Caldera,* 301 F.Supp.2d 26 (D.D.C.2004)), fails to explain why a twenty year term would not cause the same "serious impact."

In other circumstances it is conceivable that the difference between a minor and a major operational change might be an ambiguous matter of degree, where the Court would consider whether an agency's authoritative interpretation should be accorded deference under *Chevron* step two in defining the term "major operational change," *cf.* Concurring Op. at 1327-28. But the Agreement's reallocation of over twenty-two percent (22%) of Lake Lanier's storage space does not present that situation. It is large enough to unambiguously constitute the type of major operational change for which section 301(d) of the WSA, 43 U.S.C. 390b(d), requires prior Congressional approval. This conclusion is reinforced by the Corps' prior consideration of reallocation proposals, *see* PAC REPORT at 12; Army Legal Memorandum at 8-12. The same conclusion applies to a reallocation of approximately nine percent (9%) of Lake Lanier's storage space, for it too presents no ambiguity. This is illustrated by the Corps' acknowledgment of the reallocation's unprecedented scale, Oral Arg. Tape (Nov. 16, 2007) at 45:16.5. Vaguely committing to request Congressional approval of the reallocation at some future date, *see, e.g.,* Agreement at 11; Oral Arg. Tape (Nov. 16, 2007) at 47:00.0, does not accord with the plain text of the WSA.

The Corps may understandably be of the view that it faces a "difficult situation," Oral Arg. Tape (Nov. 16, 2007) at 51:38.8, and is attempting to balance multiple interests and achieve a "creative solution," *id.* at 52:04.2. However, Congress envisioned that changed circumstances or "difficult situations" might arise and specified that any solution involving "major operational * * * changes" required its prior authorization. WSA § 301(d), 43 U.S.C. § 390b(d). We there-

fore need not reach the other contentions of Alabama and Florida. The Agreement's reallocation of Lake Lanier's storage capacity to local consumption is a major operational change that under section 301(d) of the WSA, 43 U.S.C. § 390b(d), may not occur without Congress' prior authorization. Accordingly, because no authorization has been obtained, we hold that the district court erred in approving the Agreement and reverse.

SILBERMAN, Senior Circuit Judge, concurring in judgment:

I agree with the majority's conclusion that, notwithstanding our limited scope of review of a district court's approval of a settlement agreement, we are obliged to reject this one. I write separately to discuss issues appellants raise which I think should be disposed of-and should be rejected so as not to complicate any further possible litigation-and to disagree with my colleagues on one important point.

Appellants argued that the Agreement violated the Flood Control Act ("FCA"), as well as the Water Supply Act ("WSA"). I think that alternative claim is quite weak. The relevant provision of the FCA states:

> **Sale of surplus waters for domestic and industrial uses; disposition of moneys** - The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided,* that no contracts for such water shall adversely affect then existing lawful uses of such water * * *.

33 U.S.C. § 708. By its plain terms, this provision sets the conditions under which the Secretary may sell "surplus water." However, the Corps does not contend that the Settlement Agreement disposes of "surplus" water. The Agreement does *reallocate* a certain amount of reservoir capacity to water storage, but reallocations are governed by the Water Supply Act, not the Flood Control Act. Section 301(d) of the WSA requires Congressional approval of "[m]odifications of a reservoir project * * * which would involve major structural or operational changes * * *." 43 U.S.C. § 390b(d). It is abundantly clear, then, that the Water Supply Act, not the Flood Control Act, is the statute that governs the Corps' actions in this case, and I would accordingly explicitly reject the appellants' FCA claims.

Turning to the WSA, appellants argued-indeed, it was their main argument-that the Agreement was unlawful under that statute, not just because it constituted a "major operational change," but also because it was inconsistent with the project's authorized purposes. 43 U.S.C. § 390b(d). The Buford Dam was constructed to improve navigation, generate hydroelectric power, and control flooding. *Alabama v. U.S. Army Corps of Engineers,* 424 F.3d 1117, 1122 (11th Cir. 2005). (For many years, the Corps has maintained that an incidental benefit of the project was to provide metropolitan Atlanta with water supply.) *Id.* One of the project's primary purposes, thus, was to provide hydroelectric power to downstream users. The Agreement, it is contended by Alabama and Florida, will reduce the amount of water released from the reservoir which will, in turn, reduce the water available for Alabama's and Florida's power requirements. Appellees responded that

the Agreement's compensation mechanisms met the hydroelectric purposes of the project.

Under those mechanisms, the water supply providers will pay substantially higher rates for water storage, and the resulting revenue will be credited to hydropower customers to compensate them for the reduced water flows through the dam. The Corps, the power customers, and the water supply providers all agree that this compensation mechanism will ensure that the Agreement does not have an adverse effect on hydropower generation.

I would not reach the merits of this argument because I do not think Florida and Alabama have standing to raise it. The two states have not identified any cognizable injury attributable to this claim. They do not assert that they or their citizens will pay any more for electricity as a result of the Agreement. Indeed, the hydroelectric companies supplying Florida and Alabama customers-the members of the Southeastern Federal Power Customers-support the Agreement because the compensation mechanism does adequately offset the reduction in water supply. To be sure, Florida and Alabama do have standing-as the panel concludes-to object to the alleged "major operational change" because the decreased water supply will have environmental impacts on Florida and Alabama. However, standing must be established for each claim, *The Wilderness Society v. Norton,* 434 F.3d 584, 591 (D.C.Cir. 2006), and appellants lack standing to assert that the Agreement will "seriously affect" the project purposes of the reservoir.

* * *

My fundamental disagreement with my colleagues'

determination that the Agreement works a "major operational change" is with their conclusion that the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero. That seems to imply that the project was never intended to provide water to the city of Atlanta, which is in tension with the 11th Circuit's observation mentioned *infra,* and is an issue which the settling parties agreed was not determined by the Agreement; it is an open question that has not really been briefed.

Beginning in the 1970s, the Corps allocated a steadily increasing volume of storage space to the water supply providers. *Alabama v. U.S.A.C.E.,* 424 F.3d at 1122. It does not appear that Alabama and Florida challenged this policy until 1990, when the Corps was seeking Congressional approval to enter into permanent water supply contracts. *Id.* at 1122-23. Thus, for over a decade, the appellants acquiesced to a policy of increasingly large withdrawals. Even after Florida and Alabama initiated litigation in 1990, the states entered into two agreements that allowed the Corps to increase water withdrawals "to satisfy reasonable increases in [ ] demand" while settlement negotiations were pending.[1]

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[1] These agreements do contain disclaimers that they "shall not be construed as granting any permanent, vested or perpetual rights to the amounts of water used" during settlement negotiations. (It would appear that the word "used" in the agreements only refers to the water withdrawn during the settlement negotiations, and not to reservoir space that had been allocated to water storage prior to those agreements.) Moreover, the 1992 agreement states that it shall not be construed as "changing the status quo as to the Army's authorization of water withdrawals." This implies that-at the very least-Florida and Alabama did not contest the amount of storage that had been authorized by the Corps *prior* to 1992.

By asserting that the baseline is zero, the majority implicitly suggests that for many years some amount of water stored for (and supplied to) the city of Atlanta was illegal. That is a draconian conclusion I do not think warranted by the record.

I nevertheless agree with the majority's determination that the Settlement Agreement is unlawful. To be sure, the definition of *major* operational change is by no means clear. Typically we would defer to an agency's interpretation of that ambiguous term, but we cannot do so here because we are not reviewing an agency rulemaking or adjudication, but only a settlement agreement (which does not even purport to interpret the crucial language). *See United States v. Mead Corp.,* 533 U.S. 218, 230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). We have given deference to agency interpretation of settlement agreements when Congress has granted the agency "an active role in approving the agreement." *Nat'l Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563, 1571 (D.C.Cir. 1987). But we have also emphasized that such deference is inappropriate where-as here-"the agency itself [was] an interested party to the agreement." *Id.* In such cases, "deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *Id.* The government seems to have implicitly interpreted the term "major" in its brief-as not including incremental changes-but we do not defer to mere litigating positions. *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

The Agreement appears to me to constitute a "major operational change" because it substantially increases the amount of reservoir space allocated to water supply compared to the allocation *in 2002,*

which is all we have to conclude. The total storage capacity of Lake Lanier is 1,049,400 acre-feet. In a 2002 memorandum regarding Georgia's request for more water storage, the General Counsel of the Department of the Army stated that, "[c]urrently, municipal and industrial interests, through direct withdrawals and releases from the reservoir, utilize the equivalent of 145,460 acre-feet of storage in Lake Lanier for water supply." Thus, in 2002, approximately 13.9% of the reservoir's capacity was being used for water supply. Under the Settlement Agreement, up to 240,858 acre-feet of the reservoir would be set aside for water storage (175,000 acre-feet for Gwinnett County, 20,675 acre-feet for the City of Gainesville, and 45,183 acre-feet for the Atlanta Regional Commission). This represents an increase of 95,398 acre-feet, which is a 65.6% increase over the 2002 level. Put another way, under the Agreement, approximately 9% more of Lake Lanier's total capacity will be set aside for water storage-in 2002, 13.9% of the total capacity was allocated to water supply, but under the Agreement that figure increased to 22.9%. Like the majority, I also find it noteworthy that the storage levels permitted by the Agreement "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval." Maj. Op. at 1324.

At oral argument, counsel for the Corps acknowledged that the Settlement Agreement would increase the amount of reservoir space allocated to storage by approximately 100,000 acre-feet (or 10% of total reservoir capacity), compared to the status quo prior to the Agreement. Tr. of Oral Arg. at 43:20. Counsel then conceded that a *permanent* reallocation of 10% of the reservoir's capacity would constitute a "major

operational change." *Id.* at 49:08. In a letter dated December 13, 2007, the Corps attempted to retract this concession, noting that it was "in error." But the logic of this concession was ineluctable. The Corps argued, however, that even if a *permanent* reallocation of 10% of the reservoir would be deemed "major," the Settlement Agreement does not require Congressional approval because it is only an *interim* measure. That is not persuasive. The requirements of the Water Supply Act apply to "major structural or operational changes"-the text of that statute draws no distinction between interim and permanent changes.

The Corps argues that the burden was on Florida and Alabama to show that the Settlement Agreement was unlawful, and that the plaintiffs-appellants failed to offer sufficient evidence to meet this burden. But as explained above, the record-including the Corps' own documents-shows that the Agreement would allocate an additional 95,398 acre-feet of reservoir capacity to water storage, and would increase the share of the reservoir allocated to water storage from 13.9% to 22.9%. I simply do not see how we can conclude that is not a *major* change.