

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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

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On Appeal from the United States District Court for the Middle District of Florida,  
No. 3:07-MD-1-PAM-JRK, Judge Paul A. Magnuson

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3:07-cv-00249

STATE OF ALABAMA, et al., *Plaintiffs-Appellees*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al., *Defendants-Appellants*,

UNITED STATES FISH AND WILDLIFE SERVICE, et al., *Defendants*.

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3:07-cv-00252

STATE OF GEORGIA, et al., *Plaintiffs-Appellants*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,  
*Defendants-Appellees, Cross-Appellants*,

JOHN P. WOODLEY, JR., in his official capacity as Assistant Secretary  
of the United States Army for Civil Works, et al., *Defendants-Appellees*.

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3:08-cv-00233

CITY OF APALACHICOLA, FLORIDA, *Plaintiff-Appellee*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al., *Defendants-Appellants*,

JOHN P. WOODLEY, JR., et al., *Defendants*.

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3:08-cv-00640

SOUTHEAST FEDERAL POWER CUSTOMERS, INC., et al., *Plaintiffs-Appellees*,

v.

LOUIS CALDERA, in his official capacity as Secretary of the Army, et al.,  
*Defendants*,

UNITED STATES ARMY CORPS OF ENGINEERS, et al., *Defendants-Appellants*.

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The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellants request oral argument in this case. This case is of vital importance to the people of the State of Georgia, as the district court's order threatens to deprive three million residents of the metropolitan Atlanta area of their primary source of water supply. In addition, the case raises important issues of law, including the scope of the U.S. Army Corps of Engineers' authority to allocate storage in multipurpose water projects. Appellants submit that the Court would benefit from oral argument in this case.

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## STATEMENT OF JURISDICTION

This appeal concerns four cases referred by the Judicial Panel on Multidistrict Litigation (JPML) to the Middle District of Florida. The district courts exercised jurisdiction under 28 U.S.C. §1331. The court issued its order on July 17, 2009 (RE274-RE370).<sup>1</sup> Notice of appeal was timely filed on September 14, 2009 (RE371-RE375), and a timely amended notice of appeal was filed on October 19, 2009 (RE376-RE380).

On January 20, 2010, this Court ruled that it has jurisdiction over the Georgia Parties' appeal in *Georgia v. United States Army Corps of Engineers*, 3:07-cv-00252, under 28 U.S.C. §1291 and Federal Rule of Appellate Procedure 4(a)(7)(B), as an appeal from a final judgment. The Court further "accept[ed] pendent jurisdiction over the entire July 17th order because all issues raised by the appellants are inextricably intertwined," thereby accepting jurisdiction over all aspects of the Georgia Parties' appeal. Order 5.

Although this Court did not reach the question, the Court also has jurisdiction under 28 U.S.C. §1292(a)(1), as the district court's order granted an injunction.

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<sup>1</sup> "RE" citations are to pages in the Record Excerpts.

## STATEMENT OF ISSUES

1. Did the district court err in concluding that the River and Harbor Act of 1946 did not authorize the U.S. Army Corps of Engineers (Corps) to operate Buford Dam to provide water supply to the Atlanta region, when the authorization record before Congress made clear that the Corps would operate Buford Dam to supply water for Atlanta?

2. Did the district court exceed its authority by making (erroneous) *de novo* findings of fact based on an administrative record that the Corps has never used as a basis for final agency action, and did the district court rely on those errors to conclude wrongly that the Corps lacked authority under the Water Supply Act of 1958, 43 U.S.C. §390b, to meet metropolitan Atlanta's water-supply needs?

3. Even if the Corps exceeded its authority by supplying water to metropolitan Atlanta, did the district court abuse its discretion in imposing a "draconian" remedy that will deprive three million people of their primary source of water?

## INTRODUCTION

Distilled to its essence, this case concerns how much discretion the Corps has to operate Buford Dam, a federal multipurpose dam impounding the Chattahoochee River, to provide water supply to the Atlanta region. Georgians have relied on the Chattahoochee since long before Buford Dam was constructed in the 1950s, and for fifty years the Corps has operated Buford Dam in a way that ensures an adequate water supply for metropolitan Atlanta. The district court held, however, that the Corps' accommodation of Georgians' water needs was illegal, and that the Corps had no authority to operate Buford Dam for water supply. That order, which takes effect on July 17, 2012, will be devastating to three million residents who have no meaningful alternative source of water.

The district court's opinion rests on a profoundly mistaken understanding of the Corps' authority (and its own). The opinion rests on the mistaken premise that, when Congress authorized construction of Buford Dam in the 1946 River and Harbor Act, it intended to deny the Corps authority to protect Georgia's interest in the Chattahoochee as a source of water supply. In fact, Buford Dam's location was specifically selected upstream of Atlanta precisely to "ensure an adequate water supply for the rapidly growing Atlanta metropolitan area." RE205-RE206 ¶73. Nevertheless, the district court concluded, based on scraps of non-authoritative

post-authorization history, that Congress did not authorize the Corps to operate Buford Dam to provide municipal water supply.

The court compounded its error by misapplying the Water Supply Act, 43 U.S.C. §390b (WSA), which endows the Corps with additional authority to operate reservoir projects for water supply, regardless of the purposes for which they were originally authorized. The court ruled that the Corps exceeded its authority under the WSA and reached that conclusion by engaging in *de novo* fact-finding and resolving factual conflicts within the administrative record (which the Corps has never used as a basis for final agency action). Such judicial fact-finding was inappropriate in this Administrative Procedure Act challenge, especially in the context of an order granting summary judgment; even if the Corps misapprehended the scope of its legal authority under the WSA, the court should have remanded the case to allow the Corps to apply its technical expertise under the correct legal standards. Indeed, the district court, unaided by the Corps' expertise, made several crucial errors—critically undermining its WSA analysis.

The court also overreached in the remedy it ordered. The court effectively capped the amount of water the Corps may provide the Atlanta region at levels from the *1970s*. The court volunteered that it intended this remedy—which it freely described as “draconian”—to spur political resolution. But equity demands more than a remedy designed to force a settlement. Depriving three million people

of their source of water cannot be justified, especially given the minimal benefits Alabama and Florida will receive from the injunction.

## STATEMENT OF THE CASE

The Georgia Parties' appeals<sup>2</sup> arise out of four challenges to the Corps' management of federal projects in the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin). The cases were referred by the JPML under the caption *In re Tri-States Water Rights Litigation*:

- *Alabama v. United States Army Corps of Engineers*, No. 3:07-cv-00249 (*Alabama*), was filed by Alabama in June 1990. RE689.<sup>3</sup> Florida and Alabama Power Company intervened as plaintiffs and Georgia intervened as a defendant. Alabama initially challenged a proposed reallocation by the Corps of storage in Lake Lanier to water supply, but the *Alabama* plaintiffs now challenge what they

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<sup>2</sup> The term "Georgia Parties" refers to the State of Georgia, the City of Atlanta, Fulton County, DeKalb County, the Cobb County-Marietta Water Authority, and the City of Gainesville, all of whom are directly interested in water supply from Buford Dam; the Atlanta Regional Commission (ARC), an entity that coordinates water-supply issues with the Corps on behalf of downstream water users; and Lake Lanier Association, a not-for-profit Georgia corporation that represents individuals and businesses who depend on Lake Lanier for a variety of uses. Gwinnett County, which also receives water from Lake Lanier, is filing a separate brief.

<sup>3</sup> Except where otherwise noted, the individual case numbers refer to the cases after they were transferred to the Middle District of Florida, where they were collectively placed on the MDL docket as No. 3:07-md-0001. The MDL docket will be cited through the form "R-[docket number]." Member case dockets are cited through the form "[case]-R-[docket number]." Pin cites will follow after a colon.

term the “de facto reallocation” of storage in Lake Lanier through which water supply has been provided to the Georgia Parties for decades. RE1116. The *Alabama* case was before this Court previously, when this Court vacated a preliminary injunction that would have prevented the Corps from entering into a proposed settlement (discussed below). 424 F.3d 1117 (11th Cir. 2005).

- *Southeastern Federal Power Customers, Inc. v. Caldera*, 3:08-cv-00640 (*SeFPC*), was filed in December 2000 by a consortium of entities that purchase hydropower generated by Buford Dam. RE1124. *SeFPC* alleges that the Corps wrongfully diverted water from hydropower generation to water supply, causing *SeFPC* members economic injury. Some of the Georgia Parties intervened as defendants. A proposed settlement among *SeFPC*, the Corps, and the Georgia Parties was reached under which the Georgia Parties would have paid higher rates that would be credited against hydropower costs, but Alabama and Florida intervened to oppose the settlement. The district court approved the settlement, but the D.C. Circuit ruled that the settlement exceeded the Corps’ authority. *See Southeastern Federal Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008).

- *Georgia v. United States Army Corps of Engineers*, 3:07-cv-00252 (*Georgia*), was filed on February 7, 2001, challenging the Corps’ failure to grant Georgia’s request for future water supply. RE387. The plaintiffs contend that the

Corps' denial was predicated on an erroneous interpretation of the law that led the Corps to understate its authority to grant the request. Florida and SeFPC moved to intervene, and this Court ruled they had a right to do so. *See* 302 F.3d 1242 (11th Cir. 2002). This Court later upheld a district court order abating *Georgia* pending resolution of *Alabama*. 144 F. App'x 850 (11th Cir. 2005).

- *City of Apalachicola v. United States Army Corps of Engineers*, 3:08-cv-00233 (*Apalachicola*), was filed on January 15, 2008. RE1370. *Apalachicola* argues, as the *Alabama* plaintiffs do, that the Corps exceeded its authority by supplying water to the Georgia Parties. (For simplicity, this brief will treat *Apalachicola* as one of the *Alabama* plaintiffs.<sup>4</sup>)

On March 21, 2007, the JPML transferred four suits against the Corps, including *Georgia* and *Alabama*, to Judge Magnuson in the Middle District of Florida.<sup>5</sup> R-1. On March 6, 2008, *Apalachicola* was similarly transferred (R-91), and on August 14, 2008, following the D.C. Circuit's rejection of the proposed settlement in *SeFPC*, that case was transferred as well (*SeFPC*-R-225).

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<sup>4</sup> While SeFPC's position differs in some ways from that of the other non-federal appellees, to the extent it argues that the Corps lacks authority to provide water supply to the Georgia Parties, it too will be described as one of the *Alabama* plaintiffs.

<sup>5</sup> The other suits were *Florida v. United States Fish & Wildlife Service*, No. 3:07-cv-00250, and *Georgia v. United States Army Corps of Engineers*, No. 3:07-cv-00251. In addition, *City of Columbus v. United States Army Corps of Engineers*, No. 3:07-cv-01033, was transferred on November 11, 2007.

On July 13, 2007, the district court bifurcated proceedings into two phases. R-33. The subject of this appeal, now called Phase 1 (R-142), concerns challenges related to the Corps' legal authority to operate Buford Dam for water supply. The four cases discussed above were either partially or wholly encompassed by Phase 1. Phase 2, which pertains to other issues, is ongoing in the district court.

In January 2009, the plaintiffs in *Alabama*, *Apalachicola*, *SeFPC*, and *Georgia* moved for summary judgment on their Phase 1 claims. R-190, R-191, and R-195; *SeFPC*-R-238. The Corps filed an opposition and cross-moved for summary judgment in each case. R-227.

On July 17, 2009, the district court issued an opinion and order granting partial summary judgment to the plaintiffs in *Alabama*, *Apalachicola*, and *SeFPC*, and denying the Georgia Parties' summary judgment motion in *Georgia*. That ruling resolved all issues in *Georgia*. Based on its ruling in the other three cases, the court also imposed an injunction that will significantly impair the Georgia Parties' water supply.

The Georgia Parties filed a timely notice of appeal. R-271. They also moved under Federal Rule of Civil Procedure 58(d) for entry of judgment in *Georgia*. *Georgia*-R-55. On October 5, 2009, the district court denied the motion. *Georgia*-R-63. On October 19, 2009, the Georgia Parties filed an amended notice of appeal. *Georgia*-R-66.

Florida and Alabama moved to dismiss the appeals for want of jurisdiction. On January 20, 2010, this Court denied the motion and held that it has jurisdiction to review the July 17, 2009 order in its entirety.

### STATEMENT OF FACTS

Buford Dam is a multipurpose dam upstream from Atlanta, where it impounds the Chattahoochee River, the Atlanta region's historical source of water supply. RE244. Today, approximately three million people in the Atlanta region depend on water from the Chattahoochee and Lake Lanier, the reservoir created by Buford Dam.

The Chattahoochee is and always has been subject to Georgia's jurisdiction. Its headwaters are in Georgia, and nearly the entirety of its 434-mile length runs through Georgia,<sup>6</sup> down to the Georgia-Florida border, where it merges with the Flint River to form the Apalachicola River.<sup>7</sup> Georgia's interest in the Chattahoochee's water was not diminished by Buford Dam's construction. The

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<sup>6</sup> The west bank of the Chattahoochee forms much of the border between Alabama and Georgia. When Georgia ceded the territory that became Alabama, it was intended that the entirety of the river remain within Georgia. *Howard v. Ingersoll*, 54 U.S. 381 (1851). Subsequent alterations to the flow of the river have caused small portions of the Chattahoochee to enter Alabama.

<sup>7</sup> Although Georgia's obligation to downstream states under the doctrine of equitable apportionment might impose some limit on Georgia's use of the Chattahoochee, no equitable-apportionment action has ever been brought. In any case, the Georgia Parties' use of the Chattahoochee has a barely perceptible impact upon Florida or Alabama, far too slight to raise any concern that Georgia is using more than its fair share of water. *See infra* pp. 82-84.

dam gives the Corps the ability to store large quantities of water and choose the time and size of releases, thereby controlling the flow downstream. But while the Corps controls storage in Lake Lanier, it does not own the water; the Corps thus controls how much water is released from the dam at any given time, but not how that water is used once it is released. When downstream municipalities draw water from the Chattahoochee, they do so under permits issued by the State of Georgia, not the Corps.

The Georgia Parties are, however, now dependent on the Corps to provide regular releases from which water supply can be drawn, and to allow withdrawals directly from the lake. For those withdrawing water downstream from the dam, to a large extent, this requires no special accommodation because Buford Dam is used to generate hydropower, and regular releases are made through the dam's turbines for that purpose. This water then becomes available downstream for use by the Atlanta region. As a result, downstream water supply can be facilitated by hydropower generation, and those purposes are generally complementary.

But though power generation and downstream water supply are partial complements, tension can arise between them. The relationship between maximizing the value of hydropower production and maintaining downstream flows for water supply is complex, but in general, hydropower value would be maximized by conserving water exclusively for large releases during periods of

peak power demand (primarily, but not necessarily limited to, weekdays). Water supply requires that releases be scheduled so that the river flow is not shut off for extended periods. The Corps struck an initial balance under which most water was to be saved for release during periods of peak power demand, but a constant lesser flow, sufficient to ensure water for the region, was to be maintained between peak releases.

As Congress anticipated, the Atlanta region has grown since the dam was first constructed, and the flow between weekday peak releases is not always sufficient to meet downstream water-supply needs. As Congress intended, in recent decades the Corps has accommodated that increased need by scheduling additional weekend releases to maintain a sufficient flow in the river. The Corps has also allowed some Georgia entities around Lake Lanier—chiefly Gwinnett County, but also others<sup>8</sup>—to draw water directly from the lake (upstream from the turbines). The central issues in this appeal are whether the Corps has the authority to continue to accommodate the region’s current needs, and whether the Corps has understated its authority to further accommodate water-supply needs in the future, as the Atlanta region continues to grow.

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<sup>8</sup> The Cities of Gainesville and Buford are both lake users, but each was granted the right to make lake withdrawals as compensation when the construction of Lake Lanier destroyed their pre-existing water intake systems. RE90; R-106:ACF014450-56; ACF014382-89. The City of Cumming also makes withdrawals directly from Lake Lanier.

The following summary begins with a brief history of Buford Dam's authorization and shows that Congress contemplated that the Corps would operate Buford Dam to support the region's growing water-supply needs. It then summarizes post-authorization events that led the district court mistakenly to conclude that the Corps may not operate Buford Dam to accommodate water supply. It next explains how the Corps, consistent with Congress' authorization, has accommodated water-supply needs to date. It concludes with an overview of the twenty years of litigation and the decision culminating in this appeal.

**A. Congress' Authorization Of Buford Dam For Water Supply Among Other Purposes**

In 1936, Congress instructed the Corps to investigate development of the ACF Basin. RE232. In response, the Corps' District Engineer, Colonel Park, prepared a comprehensive report, which concluded that significant benefits could result from development of the basin, including a reservoir on the Chattahoochee at Roswell, Georgia, just above Atlanta. The Park Report described the development as offering six "direct benefits," including "industrial and municipal water supply." RE235 ¶243. It further noted that, although there was "no immediate necessity for increased water supply" from the Chattahoochee, given Atlanta's "rapid growth of population and industry[,] ... a large reservoir might be of benefit for an assured continuous water supply," and that the prospect of future demand for increased water supply was "not improbable." RE237 ¶260. The Park Report (modified in

respects not relevant here) was approved by the Chief of Engineers, who transmitted the plan to Congress with a recommendation that it be implemented. RE228. In March 1945, Congress enacted the River and Harbor Act of 1945 (1945 RHA), which authorized development of the ACF Basin “in accordance with the plans” transmitted to Congress. R-231:SUPPAR004055-56.

After preparation of the Park Report, the Corps, through the Division Engineer, General Newman, recommended modifications to the development plan described in the Park Report. In particular, the Newman Report recommended locating the reservoir at Buford, Georgia, which would allow releases from the dam to provide water to Atlanta. RE204-RE205 ¶¶67-69.

The Newman Report suggested that the dam generally be operated on a peaking schedule but noted that off-peak releases would also be required to meet Atlanta’s water-supply needs. RE211 ¶80. To maximize the value of those releases, the Report suggested that, in addition to the dam’s primary turbines, which would be used for peak releases, a smaller generator be added so that power could be created by off-peak releases made to facilitate water supply. *Id.* The Report estimated that a continuous release of about 600 cubic feet per second (cfs) would suffice to meet “existing needs” as of 1946, but that 800 cfs would be needed by 1965 (*id.* ¶79), and that additional increases would be required as the region developed (*id.* ¶80). Even though such modifications would reduce the

value of hydropower production, the Newman Report concluded that “the benefits to the Atlanta area from an assured water supply for the city and the Georgia Power Co.’s steam plan[t] would outweigh any slight decrease in system power value.” *Id.*

The Newman Report was reviewed by the Chief of Engineers, who transmitted it to the Secretary of War in a May 13, 1946 letter (Chief of Engineers Report) that “recommend[ed] that the approved plan for the Apalachicola, Chattahoochee, and Flint River system be modified to include the improvements now proposed” in the Newman Report. RE184 ¶16. The transmittal letter concluded that the modified plan “would assure an adequate supply of water for municipal and industrial purposes in the Atlanta metropolitan area.” RE182 ¶11(d).

The proposed modifications were presented to Congress after the governors of all affected States had formally recommended the project. RE168-RE169. The public notice of the project stated that the Buford project was intended “to ensure an adequate municipal and industrial water supply for the Atlanta metropolitan area.” R-231:SUPPAR004294. At a congressional hearing in May 1946, Colonel Feringa, testifying for the Corps, stated that the purposes of Buford Dam included water supply. RE222.

Congress then amended the project authorized in the 1945 RHA, as recommended in the Newman Report and the Chief of Engineers Report, by enacting the River and Harbor Act of 1946 (1946 RHA), which authorized development of the ACF Basin “in accordance with the report of the Chief of Engineers, dated May 13, 1946.” Pub. L. No. 79-525, 60 Stat. 634, 635 (1946), R-231:SUPPAR005217-18. Congress did not further describe the project that had been authorized. Buford Dam was subsequently constructed based on that authorization, which has never been amended.

**B. Post-Authorization Statements By The Corps**

Since Buford Dam’s authorization, the Corps has taken inconsistent positions regarding whether Congress intended the Corps to operate Buford Dam to support water supply. Many of the Corps’ formal statements have recognized that water supply to downstream users was an authorized purpose, but on other occasions, the Corps has described the project’s purposes as flood control, hydropower generation, and navigation. Most of those references are not legally binding, as explained below. And the Corps’ documents clearly show that water supply has always been an important and integral consideration in the planning, construction, and subsequent operation of Buford Dam.

Consistent with its standard practice, immediately following authorization, the Corps prepared a Definite Project Report outlining the specifications for

construction of Buford Dam. In that 1949 report, the Corps stated that the “primary purposes” of Buford Dam were flood control, “hydroelectric power, increased flow for navigation in the Apalachicola River *and an increased water supply for Atlanta.*” RE87 ¶48 (emphasis added).<sup>9</sup> It also stated that, “during off-peak periods when the large [power generating] units are not operating, the small unit will be operated as necessary to provide flow to meet municipal and industrial requirements at Atlanta.” RE92 ¶120.

The Corps has recognized on other occasions as well that the 1946 RHA authorized the Corps to time its releases to benefit downstream users. In a 1955 District Engineer’s Report, the Corps concluded that, although it lacked authority to allow Gwinnett County to make direct withdrawals from Lake Lanier, supplying water to downstream users was a purpose of Buford Dam. R-231:SUPPAR005461-62 ¶9. That report also noted that Atlanta officials had raised concerns about whether the dam (which was 60% constructed at the time) was being built with sufficient capacity to make off-peak releases for water supply. The Corps persuaded the Atlanta officials “to wait and observe actual operating conditions,” because the Corps would “take steps, if necessary, to adjust the plant operation” to ensure adequate water for downstream water supply withdrawals. R-

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<sup>9</sup> The understanding that Lake Lanier would be operated for water supply is also memorialized in the bronze plaque and other signage at the lake, which list water supply among the project’s primary purposes. R-231:SUPPAR005532-33.

231:SUPPAR005461 ¶8. The Corps also stated in a published 1987 regulation and a 1994 report to Congress that the legislation creating Lake Lanier authorized the Corps to operate it for water supply. 33 C.F.R. §222.5, App'x E; R-106:ACF041892.

But at other times following Buford Dam's construction, the Corps has described water supply as an incidental benefit, rather than a fully authorized purpose, of the dam. For example, at congressional appropriations hearings, Corps witnesses testified that Atlanta need not make a financial contribution towards the construction of Buford Dam because Atlanta would be an incidental beneficiary of hydropower releases. R-231:SUPPAR026656-58. Some Members of Congress suggested that Atlanta should contribute financially if releases were to be made specifically for purposes of water supply. *Id.* The Mayor of Atlanta, in turn, testified that the City was "willing to do whatever is reasonable and in line with what is required of all other cities similarly situated."<sup>10</sup> Nevertheless, no request for contribution was ever made, and no appropriation was ever conditioned on the dam or Lake Lanier not being operated for water-supply purposes.

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<sup>10</sup> See *War Department Civil Functions Appropriations Bill, 1948: Hearings on H.R. 4002 Before the Subcomm. of the S. Comm. on Appropriations, 80th Cong. 702 (1947)* (statement of William B. Hartsfield, Mayor of Atlanta, Georgia). However, Mayor Hartsfield also stated, in correspondence directed solely to Atlanta's congressman, that he did not believe Atlanta should be required to pay for the dam in light of the City's other sources of water and the generalized benefits of the project. R-264:SUPPAR001063-64.

In other reports and statements, the Corps has omitted water supply from the list of authorized purposes, treating it as an incidental benefit of Buford Dam. *See* RE348 (collecting sources). The inconsistency of the Corps' later references shows imprecision in its terminology, but cannot rewrite the historical record, which establishes the Corps' and Congress' original intent to allow augmentation of downstream water supply from Buford Dam.

**C. The Corps' Operation Of Buford Dam, The Water Supply Act, And The Corps' Accommodation Of Water-Supply Needs**

In 1959, a year after Buford Dam opened, the Corps prepared a Reservoir Regulation Manual specifying how it would be operated. RE99. The Manual divided Lake Lanier into three tiers, measured by elevation. RE103 ¶16. This case concerns the permissible uses for the middle tier (conservation storage), which stores water that can be used for project purposes such as water supply and hydropower.<sup>11</sup> Under the 1959 Manual, which the district court cited as the current manual for the project (RE367), conservation storage was to be used for peak power generation, but the Corps also committed to maintaining a regular minimum flow of 600 cubic feet per second (cfs) in the river at Atlanta. RE109-RE110

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<sup>11</sup> The bottom tier is dead storage unavailable for any project purpose, and the top tier is held empty for flood control. RE104. The cutoff between the top two tiers is now raised seasonally from a mean sea level of 1070 feet to 1071. R-106:ACF018475. As a result, some record documents refer to the conservation pool as having 1,049,000 acre-feet of storage, while others use a figure of 1,087,600.

¶33.<sup>12</sup> The 1959 Manual defines the peak period to include certain weekend hours—7 a.m. to 10 p.m. Saturday and 9 a.m. to 2 p.m. Sunday—RE107 (although the district court mistakenly assumed that peak periods occur only on weekdays, RE363).

In 1958, Congress passed the Water Supply Act (WSA), general legislation that expanded the Corps’ authority to operate reservoir projects to meet water-supply needs. The WSA “recognize[s] 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.

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<sup>12</sup> The Corps measures water and water storage using three different metrics. Storage in Lake Lanier is measured in acre-feet (one acre of water standing one foot deep); water flow in the river below Buford Dam is measured in cubic feet per second (cfs); and withdrawals from the lake and river are measured in millions of gallons per day (mgd). Although there is a fixed relationship between mgd and cfs (1.547 cfs equals 1 mgd) and a fixed relationship between those units and an acre-foot of water, there is no fixed relationship between those units and an acre-foot of *storage*. As with a pitcher that is being refilled as it empties, an acre-foot in the reservoir will yield varying quantities of water downstream (measured in cfs) depending on how much water upstream is flowing into the reservoir. The Corps generally takes the most conservative approach possible and bases its calculations on the worst drought conditions recorded for that reservoir. This calculation, called the “critical yield,” is the least amount of water that an acre-foot of storage in the reservoir has ever produced.

§390b(a). The WSA gives the Corps authority (to the extent it was not present before) to allocate storage in federal reservoir projects to meet municipal water needs so long as the reallocation will not “seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed” and will not “involve major structural or operational changes.” *Id.* §390b(d).

In 1973, the Senate Public Works Committee commissioned the Metropolitan Atlanta Area Water Resources Management Study (MAAWRMS) to develop a plan for the long-term provision of adequate water to the Atlanta region. RE245. In 1975, the Corps concluded that it could meet then-existing downstream water-supply needs—an annual average of 230 mgd, and 327 mgd during summer months—without affecting hydropower generation and while still providing the minimum flows required for water quality purposes. R-231:SUPPAR036984, SUPPAR036991.<sup>13</sup> In 1979, the Corps determined that, by scheduling additional peak releases from Buford Dam on weekends, it could provide an annual average of up to 266 mgd downstream as an incident of power operations, and up to 327 mgd in the summer. R-231:SUPPAR036999-7002.

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<sup>13</sup> This commitment was phrased in cfs and accounted for a water-quality standard instituted by the Georgia Department of Natural Resources requiring a minimum flow of 750 cfs in the river downstream of Atlanta. Thus, in the summer months, the Corps committed to 1256 cfs (506 cfs is equal to 327 mgd).

In 1982, the MAAWRMS issued its final report, which recommended construction of a new “reregulation” dam below Buford that could capture the varying hydropower releases and re-release the water at a steadier rate more suitable for water-supply withdrawals downstream. RE246. In 1986, Congress authorized construction of the reregulation dam. *Id.*

The MAAWRMS also recommended that water in Lake Lanier be made available for water-supply purposes while the proposed long-term solution was being implemented. In 1986, the Corps entered into a temporary water-supply contract with Appellant ARC based on the Corps’ revised determination that it could provide 327 mgd for water supply year-round as an incidental benefit of Buford Dam with “no impact” on hydropower, plus an additional 50 mgd as needed, for which ARC would have to pay. R-106:ACF011978-89, ACF011981. Interim water agreements were also reached with the City of Gainesville, City of Cumming, and Gwinnett County.<sup>14</sup> Those agreements expired in 1990.

Following an environmental study, the Corps concluded that it would be preferable to reallocate storage in Lake Lanier to water supply permanently rather than to build the reregulation dam proposed by the MAAWRMS report. To that end, the Corps prepared a draft Post Authorization Change report (PAC). RE241-

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<sup>14</sup> R-106:ACF014382-89 (Gainesville); R-106:ACF014399-401 (Cumming); R-106:ACF004004-4008 (Gwinnett).

RE269. The draft PAC report recommended allocating 207,000 acre-feet of storage in Lake Lanier to water supply, which would accommodate withdrawals of about 151 mgd from Lake Lanier, and 378 mgd from the river downstream.

RE254, RE268.

## **D. The Litigation**

### ***1. Alabama***

In 1990, Alabama sued to enjoin the Corps from implementing the PAC, which was still only in draft form. The case was promptly stayed, and in 1992, Alabama, Florida, Georgia, and the Corps entered into a Memorandum of Agreement (MOA) calling for comprehensive studies in the hope of facilitating a settlement. R-231:SUPPAR035535-42. A condition of the MOA was that the Corps withdraw the draft PAC. R-231:SUPPAR035537-38. The MOA also contained a “live-and-let-live” provision that allowed the Georgia Parties to continue to receive water supply, including reasonable increases. R-231:SUPPAR035538-39. In 1997, the three States entered into an interstate compact as part of a framework for possible settlement. R-106:ACF030011-24. The compact contained a provision akin to the live-and-let-live provision, which permitted the Georgia Parties to continue to receive water from the Corps. R-106:ACF0330015-16. Negotiations proved unfruitful, the compact expired in August 2003, and the litigation resumed. Meanwhile, the Corps has continued to

allow withdrawals from the lake and to make releases from Buford Dam to accommodate downstream withdrawals in the amounts that were allowed during the live-and-let-live period.

The *Alabama* suit now challenges the Corps' provision of water supply to the Georgia Parties after the expiration of the interim contracts in 1990. The *Alabama* plaintiffs call those expired agreements "holdover" contracts and argue that the Corps has continued to adhere to them and has thereby effected a "de facto reallocation" of storage in Lake Lanier. According to the *Alabama* plaintiffs, this "de facto reallocation" was impermissible both because Buford Dam was not authorized for water supply and because the "de facto reallocation" was too large and too damaging to hydropower to be permissible under the WSA.

## 2. *SeFPC*

In December 2000, Southeastern Federal Power Customers (SeFPC) filed suit against the Corps alleging that the Corps had wrongfully diverted water from hydropower generation to water supply, leading SeFPC's members to pay unfairly high rates for power. A settlement was reached among SeFPC, the Corps, and the Georgia Parties, who had intervened in the action. The settlement called for the Corps to allocate 240,858 acre-feet (22% of Lake Lanier's conservation storage) to water supply for a once-renewable period of ten years. The Georgia Parties would have paid substantially increased rates for water, and SeFPC's members would

have received a credit against rates charged for hydropower. *See SeFPC v. Geren*, 514 F.3d 1316, 1319 (D.C. Cir. 2008).

Alabama and Florida intervened to challenge the proposed settlement. The settling parties had (and continue to have) differing views as to whether water supply was an originally authorized purpose of Buford Dam. The Georgia Parties believe that the 1946 RHA contributes significant authority for the settlement, but all parties to the settlement agreed that the WSA alone supplied sufficient authority, so to present a united front, the parties defended the proposed reallocation exclusively under the WSA. The district court agreed and approved the settlement, but the D.C. Circuit reversed, concluding that, “[o]n its face, ... reallocating more than twenty-two percent ... of Lake Lanier’s storage capacity to local consumption uses constitutes the type of major operational change referenced by the WSA.” 514 F.3d at 1324 (citations omitted). The panel recognized that the question whether water supply was an original authorized purpose of Buford Dam had not been briefed and was not being decided. *See id.* at 1324 n.4.

### **3. Georgia**

In 2000, Georgia submitted a formal request to the Corps for a permanent allocation of storage in Lake Lanier sufficient to meet the region’s water-supply needs through 2030, which were projected as being 408 mgd from the river and 297 mgd directly from Lake Lanier. In April 2002, the Corps rejected Georgia’s

request. The rejection was accompanied by a memorandum prepared by Earl Stockdale, Deputy General Counsel for the Army's Civil Works and Environment Division. RE149-RE163. The 2002 Memo concluded that the Corps did not have authority to grant the request because water supply was only an incidental benefit of Buford Dam, and the size of the reallocation exceeded the Corps' combined authority under the 1946 RHA and the WSA. The 2002 Memo noted, however, that the Corps had authority to meet the Georgia Parties' then-current water-supply needs. RE156 n.2. Georgia's suit challenges the denial of its request to meet estimated year 2030 needs.

#### **E. The District Court's Decision**

After the JPML transferred the lawsuits, the parties cross-moved for summary judgment on their Phase 1 claims. Judge Magnuson granted partial summary judgment to Appellees and denied the Georgia Parties' motion for summary judgment. The court centrally concluded that "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." RE365.

In concluding that the Corps had exceeded its authority under the WSA through its "de facto reallocation" of water in Lake Lanier, the court rejected the Corps' calculation of the quantity of water that was incidentally available to

downstream parties as a result of hydropower operations and instead made its own *de novo* finding. RE354-RE356, RE361. Using that calculation, and several others of its own creation, the court found that the Corps had de facto reallocated 21.5% of Lake Lanier’s conservation pool to water supply,<sup>15</sup> and that a reallocation of that size constituted a “major operational change” that could not be implemented without congressional approval. RE356-RE357. The court similarly concluded that the Corps had violated the WSA by seriously affecting Buford Dam’s power-generation purpose. RE364-RE365. It applied that same analysis to the water-supply request at issue in *Georgia* and ruled that the Corps lacked authority to grant Georgia’s request without congressional authorization. RE360-RE361.<sup>16</sup>

The court then directed a remedy it acknowledged to be “draconian.” RE367. By July 17, 2012 (three years after the court’s order), *all* water-supply withdrawals from Lake Lanier must cease (with the exception of Gainesville and Buford, which were granted withdrawal rights when the project was built), and the Corps must reduce the amount of water available to downstream users by capping off-peak releases at 600 cfs—the minimum release specified in the original

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<sup>15</sup> The Corps has calculated that the Georgia entities have actually used only 11.7% of the conservation storage for water-supply purposes. *See* RE139.

<sup>16</sup> The court also held that the draft PAC Report, which had long been abandoned by the Corps, could not have been implemented without congressional authorization. RE359-RE360.

authorization to meet “existing needs” as of 1946. RE211 ¶79. The court gave no consideration to the effects its order would have on the three million people in the Atlanta area who depend on Buford Dam for their daily water. Nor did the court address how (if at all) that reduction in water for Georgians would benefit Alabama, Florida, or the hydropower companies. The court stayed the Phase 1 litigation for three years to allow the parties to obtain congressional assistance. RE366.

This appeal followed.

### **STANDARD OF REVIEW**

This Court reviews *de novo* a grant of summary judgment resolving an Administrative Procedure Act challenge. *See Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). In evaluating the merits, it applies the same standard as the district court—whether the challenged agency actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A).

The grant of an injunction is reviewed for abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). A district court “abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.” *Id.* (internal quotation marks omitted).

## SUMMARY OF ARGUMENT

The district court stepped far outside its proper role in this case. It misconstrued the 1946 RHA and the WSA; it encroached on the Corps' authority to determine whether Georgia's water needs can be met under those statutes; and it entered an egregiously excessive injunction. The court's decisions in both *Alabama* and *Georgia* should be vacated, and the cases remanded to the Corps to determine, under the correct legal standards, the extent to which releases from Buford Dam may be made and storage in Lake Lanier may be allocated to meet the current and future water-supply needs of the metropolitan Atlanta region.

I. The district court's foundational error is its misinterpretation of the 1946 RHA. When Congress authorized the Corps to build Buford Dam, it approved plans specifically stating that releases would be made to provide water supply to metropolitan Atlanta and that such releases would increase as the area developed. The court erred by failing to account for these statements from the authorized project documents in ruling on the Corps' authority under the 1946 RHA. Only by disregarding them could the court conclude that the Corps lacks authority under the 1946 RHA to increase releases as necessary to meet current water-supply needs.

The court's misreading of the 1946 RHA led to its ruling in *Alabama* that the Corps was acting illegally in meeting the area's current needs and was required

to drastically reduce the water supply it provides the Atlanta area, as well as its ruling in *Georgia* that the Corps could not grant Georgia's request for future water supply. In fact, the 1946 RHA by itself gives the Corps ample authority to meet downstream users' current needs, and when supplemented by the WSA, provides the Corps sufficient authority to allow current withdrawals from Lake Lanier and likely to meet the entire area's future water needs. The Corps should be allowed and directed to reexamine those questions in the first instance.

II. The court also went wrong in applying the WSA. The WSA gives the Corps substantial additional authority to supply water to the Atlanta area by reallocating storage at Lake Lanier for that purpose. Under the WSA, reallocation for water supply is permitted up to the point that it "seriously affect[s] the purposes for which the project was authorized" or "involve[s] major structural or operational changes." 43 U.S.C. §390b(d). The district court erred in concluding that the Corps had contravened those restrictions. The court's conclusions are based on a legally inappropriate and factually flawed *de novo* reevaluation of highly technical matters in the administrative record and an unjustified rejection of the Corps' determinations about the amount of water that can be supplied to the Atlanta region without substantially altering the operations of the dam and the reservoir. To the extent the existing administrative record does not support the provision of water

supply at current levels, the Corps should have the opportunity to reexamine that question and render a considered decision on remand.

III. Even if the court had reached correct conclusions about the application of the 1946 RHA and the WSA to this case, its remedial order would nonetheless be inappropriate. That order fails fundamental principles of administrative law and equity. The order reaches far more broadly than is necessary to rectify any violation of those statutes, for it ignores the substantial likelihood that the Corps would be able to meet some (even if not all) of Atlanta's current and future water needs and prevents the Corps from examining that possibility on remand. It is also inequitable because it will cause extraordinary harm to Georgia's citizens without any showing of irreparable harm to Alabama or Florida. At a minimum, the injunction should be dissolved and the Corps given the first opportunity to develop a new approach to management of Buford Dam that will meet Georgians' water needs within the applicable legal framework.

## **ARGUMENT**

### **I. THE RIVER AND HARBOR ACT OF 1946 AUTHORIZED THE CORPS TO OPERATE BUFORD DAM TO PROVIDE WATER FOR THE ATLANTA REGION**

Two sources of statutory authority for the Corps are at issue in this case: the River and Harbor Act of 1946 (1946 RHA) and the Water Supply Act of 1958 (WSA). The WSA gave the Corps authority to operate reservoir projects for the purpose of water supply *in addition to* any authority the Corps previously had, so

the first issue before the Court is the extent of the Corps' authority under the 1946 RHA to operate Buford Dam to supply water to the Atlanta region. The Corps' authority under the 1946 RHA serves as a baseline for its additional authority under the WSA to reallocate storage in federal reservoir projects to water supply.<sup>17</sup>

The district court seriously misunderstood the scope of the Corps' authority under the 1946 RHA to provide water to the Atlanta region from Buford Dam. The plans that Congress authorized specifically allowed the Corps to increase water-supply releases to meet growing needs as the Atlanta area developed. The court erred by failing to take this specific authorization into account. The court's crucial mistake was to conclude that water supply for Atlanta was merely an "incidental benefit" of other operations of the dam, with no independent claim on the Corps' operational discretion. That error stems in part from the court's misreading of the record before Congress at the time it enacted the 1946 RHA, and even more from an undue focus on post-authorization statements. The authorization record establishes that Buford Dam was intended to serve several purposes, including water supply for the downstream Atlanta region, and that the Corps was empowered to adjust its accommodation of those purposes over time. The references in that record to the dam's "incidental benefit" of water supply are

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<sup>17</sup> Appellant Gwinnett County argues that additional legislation authorizes its withdrawals from Lake Lanier. If this Court agrees, that legislation further contributes to the baseline for the Corps' WSA authority.

fully consistent with the historical evidence showing that the Corps was authorized to schedule dam releases to provide water for the Atlanta area, which was one of reasons the dam was located upstream from the city. Contradictory statements by Corps officials many years later do not undermine that conclusion.

The district court's misreading of the 1946 RHA requires reversal of its decisions in both *Alabama* and *Georgia* and a remand of each case to the Corps. At a minimum, the 1946 RHA by itself provides the Corps with the authority to schedule releases to meet current needs downstream from the dam, and the 1946 RHA in combination with the WSA provides the Corps with sufficient authority to meet *all* current needs. Similarly, in *Georgia*, the court's misreading of the 1946 RHA led to it to set the "baseline" for the Corps' additional authority under the WSA far too low. On remand, the Corps may well conclude that, under a proper understanding of those two statutes individually and in combination, it has sufficient authority to meet all or most of Georgia's future needs, as reflected in Georgia's request.

**A. Congress Authorized The Corps To Accommodate The Atlanta Region's Water Needs Through The Operation Of Buford Dam**

The first question presented is whether the 1946 RHA empowers the Corps to accommodate downstream water-supply needs by adjusting the operations of Buford Dam. The contemporaneous record accompanying Congress' authorization of Buford Dam admits only one answer: Not only were releases to provide water

supply for the metropolitan area authorized, but it was expressly contemplated that water-supply releases would be increased over time as the Atlanta area developed.

See RE211 ¶80.<sup>18</sup>

**1. Congress anticipated that the Corps would adjust its operations to meet increasing downstream water-supply demands**

The starting point for ascertaining Congress' intent, as in any case, is the text of the statute. See *Ardestani v. INS*, 502 U.S. 129, 135, 112 S. Ct. 515, 519 (1991). The 1946 RHA authorized development of the ACF Basin, including Buford Dam and other projects, "in accordance with the report of the Chief of Engineers, dated May 13, 1946." Pub. L. No. 79-525, 60 Stat. 634-635, R-231:SUPPAR005217-18.

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<sup>18</sup> Alabama and Florida have argued that collateral estoppel bars consideration of whether water supply is an authorized purpose of Buford Dam because that issue was supposedly decided by the D.C. Circuit in *SeFPC*. The district court correctly rejected that argument. RE341. Collateral estoppel applies only to matters that were "actually litigated" in an earlier proceeding where the determination was essential to the judgment in that proceeding. *In re Held*, 734 F.2d 628, 629 (11th Cir. 1984); see generally Wright, Miller & Cooper, *Federal Practice & Procedure* §4419 (2d ed. 2002). Neither requirement is met here. In *SeFPC*, the parties briefed only the Corps' authority under the WSA, not the dam's authorized purposes under the 1946 RHA, and the D.C. Circuit did not reach any issue involving the 1946 RHA. See 514 F.3d at 1324 & n.4 (court would not "address the original Congressional purpose of Lake Lanier"); *id.* at 1327 (Silberman, J., concurring) (whether water supply was originally authorized "is an open question that has not really been briefed"). Nor was this issue decided in this Court's prior decision in *Alabama*. Although this Court did state in passing that water supply was "not explicitly authorized by Congress," 424 F.3d at 1122, that question was not actually litigated—the issue was not discussed in the briefs or at the argument, and the Court's statement about the authorization was in no way essential to its holding.

Congress itself has therefore dictated that the Chief of Engineers' Report be consulted to ascertain the authorized purposes of Buford Dam. *See United States ex rel. Chapman v. FPC*, 345 U.S. 153, 160, 73 S. Ct. 609, 614 (1953) (“[T]he decisive question is ... how Congress may fairly be said to have received and read the report in the light of the legislative practice in relation to such public works.”); *see also Anderson v. Seeman*, 252 F.2d 321, 325 (5th Cir. 1958) (treating similar report as having been “made a part of the statute by reference”).

The Chief of Engineers' Report explained that Atlanta and other local interests “urge[d] that a reservoir be constructed above Atlanta to meet a threatened shortage of water for municipal and industrial uses,” and that the Corps' plan for development “would assure an adequate supply of water for municipal and industrial purposes in the Atlanta metropolitan area.” RE181 ¶9, RE182 ¶11(d). It also recommended approval of the Newman Report as the Corps' comprehensive proposal for improvement of the ACF Basin, including the development of a multipurpose project at Buford. RE184 ¶16.

The Newman Report made clear that protecting Atlanta's water supply was a primary justification for regulating the Chattahoochee with a reservoir located upstream from the city—and that a single multipurpose reservoir, rather than three separate reservoirs (as proposed in the earlier Park Report), could better serve the

growing region's water-supply needs.<sup>19</sup> RE204 ¶¶69; *id.* ¶¶68 (“If 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.*” (emphasis added)). Moreover, the Newman Report specifically recommended that the dam *not* be operated in a manner that would maximize its value to hydropower customers, which would entail releasing water only during peak power generation periods, but rather that off-peak releases be made to meet Atlanta's water needs.<sup>20</sup> In fact, to meet Atlanta's “existing needs” in 1946, the Corps recommended that releases be increased *twelvefold* (to 600 cfs) over the baseline release (50 cfs) required to operate the dam “for maximum power value”

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<sup>19</sup> Likewise, a public notice to the affected states following adoption of the Newman Report (as required by §1 of the 1945 RHA) announced water supply as being among the project's purposes. R-231:SUPPAR004294 (describing “a multiple-purpose reservoir ... on the Chattahoochee River at the Buford site, about 45 miles above Atlanta, to regulate the stream flow for navigation below Columbus and for the economical operation of the existing and proposed power plants downstream, *to ensure an adequate municipal and industrial water supply for the Atlanta metropolitan area*, and to reduce flood stages and damages in the valley below” (emphasis added)).

<sup>20</sup> See RE211 ¶¶80 (“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.”).

as a peaking facility. RE211 ¶80. At the outset, the Corps contemplated that an additional increase (to 800 cfs) would be required to meet the Atlanta area's needs by 1965 (*id.* ¶79), and that additional adjustments would be made over time to accommodate increasing needs as the area developed (*id.* ¶80).

Balancing and rebalancing of hydropower and water supply were thus built into the Buford project from its inception. During periods of peak power demand, Atlanta would receive its water supply as an incident to the hydropower releases; conversely, during non-peak times, hydropower would be generated as an incident to the releases necessary to ensure a steady supply of water downstream. The Corps has recognized that Congress understood that Atlanta's water needs were projected to grow with its population and that off-peak releases would need to increase to accommodate Atlanta's needs. RE128-RE130.

The court, however, misconstrued the authorization record to conclude that water supply was only "incidental" to the generation of hydropower at Buford Dam, and thus the Corps could not make changes in the operation of the dam for the purpose of accommodating the Atlanta area's water needs. RE347-RE348. One apparent source of that error is the fact that the Newman Report refers to water supply as an "incidental" aspect of the location of Buford Dam.<sup>21</sup> The

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<sup>21</sup> See RE204 ¶68 (*supra* p. 35), RE216 ¶100 ("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

Corps, for its part, misread the 1946 Newman Report through the lens of its later practice—not instituted until 1952—of distinguishing “incidental” benefits from fully authorized purposes of public works projects. RE154-RE155.<sup>22</sup> But the context reveals that the Newman Report used the term “incidental” not as the Corps later came to use that term, to mean “of secondary importance,” but rather to mean “incident to”—a common use at the time.<sup>23</sup>

The Newman Report referred to water supply as an incidental benefit of the reservoir’s location above Atlanta to explain the reason for that location, not to relegate water supply to an inferior status relative to other project purposes.

General Newman’s use of the word “incidental” in this sense was consistent with his other statements, discussed above, clearly providing that peak hydropower

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matters, and would, with the added flood-control storage proposed herein, contribute to the reduction of floods and flood damages in the basin below.”).

<sup>22</sup> See, e.g., U.S. Army Corps of Engineers, *Authorized and Operating Purposes of Corps of Engineers Reservoirs* 3-4 (rev. 1994) (R-106:ACF041733) (“Authorized Purposes Report”) (distinguishing between the “authorized purposes” and “incidental benefits” of the Corps’ 541 reservoirs and defining the latter as “benefits derived incidentally to the regulation of the reservoirs for their authorized purposes”). Nonetheless, the Authorized Purposes Report lists water supply as one of Lake Lanier’s “[a]uthorized [p]urposes” rather than as one of its “incidental benefits.” R-106:ACF041892.

<sup>23</sup> See *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 513 (1941) (using the word “incidental” to mean “incident to”); see also Garner, *A Dictionary of Modern Legal Usage* 430 (2d ed. 1995) (“incident to; incidental to. Though to some extent interchangeable historically, these phrases have undergone a plain differentiation that has gained acceptance among stylists. The former means ‘closely related to; naturally appearing with’; the latter, ‘happening by chance and subordinate to some other thing; peripheral.’”).

releases might be shifted as necessary to meet Atlanta's needs. Indeed, the report also referred to flood control as "[i]ncidentally" resulting from Buford Dam's construction, and no one contests that flood control was authorized. RE216 ¶100.

The district court's opinion and the 2002 Stockdale Memo also rely on the fact that no storage in Lake Lanier was specifically allocated to water supply. RE348; RE153. But no storage capacity was specifically allocated for navigation either (RE182 ¶11(d); RE152-RE153), yet storage is required for navigation and navigation was a fully authorized purpose of the project. *E.g.*, RE345-RE347; RE152; R-217:56.

Further, the court and the Corps overstate the significance of two facts related to the financing of the project: first, that Atlanta was not required to contribute financially to the construction of Buford Dam, and, second, that water supply was not assigned a monetary value in the Newman Report's cost-benefit analysis. RE152, RE154, RE281-RE286. As to financial contribution, the Mayor of Atlanta testified before Congress that the City was "willing to do whatever is reasonable and in line with what is required of all other cities similarly situated."<sup>24</sup> That Congress appropriated the funds without such contribution is of no moment because appropriations were never conditioned on such contribution and the scope of the project's authorization was never altered. And the requirement that every

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<sup>24</sup> See *supra* p. 17 & n.10.

purpose of a public works project be quantified in the underlying cost-benefit analysis did not emerge until 1952.<sup>25</sup> Thus, the 1938 Park Report identified water supply as a “direct benefit” of regulating the Chattahoochee above Atlanta, but did not quantify its monetary value. RE235 ¶¶243, RE237 ¶¶260. The 1949 Definite Project Report likewise identified water supply as a “primary purpose[]” of the Buford project, but stated that a “definite evaluation of this benefit cannot be made at this time.” RE87 ¶¶48, RE95 ¶¶124. The 1946 Newman Report’s valuation of flood-control benefits, which all agree was another purpose of Buford Dam, was similarly inexact. RE214-RE215 ¶¶95.

The crucial question is whether Congress intended to allow the Corps to operate Buford Dam to accommodate water supply, not whether Congress quantified the benefits for a specific project purpose. The record before Congress when it authorized Buford Dam makes clear that the dam was intended to ensure a supply of water for Atlanta, and that releases from the dam would not be dictated solely by demands for hydropower. Indeed, when asked by Congress whether Buford would be “a power project, mainly,” the Corps answered that it would not,

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<sup>25</sup> See Bureau of Budget, Executive Office of the President, Budget Circular A-47 (Dec. 31, 1952); see generally Powers, Congressional Research Service, *Benefit-Cost Analysis and the Discount Rate for the Corps of Engineers’ Water Resource Projects: Theory and Practice* 4-5 (June 23, 2003).

and that it would instead be a “multiple-purpose project” providing navigation, flood control, power, and “water for the city of Atlanta.” RE222.

**2. The district court erred by relying almost exclusively on post-authorization “legislative history”**

Although the court recounted, and erroneously interpreted, aspects of the Newman Report in the background of its opinion, in explaining the reasoning for its holding, the court focused almost exclusively on statements and reports generated long after the project was authorized in 1946. RE348 (citing *exclusively* statements made at appropriations hearings in 1951, 1953, and 1954). The district court’s mode of analysis violates fundamental principles of statutory construction.

First, “subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.” *PBGC v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990) (internal quotation marks omitted). That is particularly true where the statements are “so distant in time from the enacting Congress that we cannot accept their remarks as an accurate expression of the earlier Congress’s intent.” *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) (involving a committee report issued five years after the relevant legislation). Where, as here, the central issue is the intent of Congress in 1946, statements made in or to Congress many years later do not meaningfully inform, and certainly cannot alter, the purposes for which the project was initially authorized.

Second, the statements relied on by the court are particularly off-point because they were made in connection with appropriations requests, rather than congressional consideration of substantive legislation. To conclude that those subsequent statements made in appropriations committee meetings narrowed the substantive authorization for Buford Dam, this Court would have to hold, in effect, that those statements were incorporated *sub silentio* as conditions of the appropriations, and impliedly repealed the 1946 RHA—but such a ruling would violate the cardinal rule that repeals by implication are not favored. *See Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 2482 (1974). The doctrine disfavoring repeals by implication applies with particular force when the subsequent legislation is an appropriations measure, because the rules of both Houses of Congress expressly provide that appropriations measures may not change existing substantive law. *See TVA v. Hill*, 437 U.S. 153, 191, 98 S. Ct. 2279, 2300 (1978).

The district court’s statutory construction was not only methodologically flawed; it was also inaccurate. The court stated that, during the construction of the dam in the 1950s, the Corps “consistently described the primary purposes of the project as flood control, navigation, and hydropower.” RE345. To the contrary, during hearings on the 1952 appropriations bill, the Corps 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”—and, further, that “water supply is of equal importance” to hydropower and flood control. R-231:SUPPAR026654-6655 (emphasis added).<sup>26</sup> Ultimately, however, comments made in congressional appropriations hearings are beside the point, because *none* of the appropriations bills amended the substantive authorization for the project in the 1946 RHA. “Courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point.” *Shannon v. United States*, 512 U.S. 573, 583-584, 114 S. Ct. 2419, 2426 (1994) (internal quotation marks omitted).

**3. The 2002 Stockdale Memo’s conclusion that water supply is not an authorized purpose of Buford Dam is not entitled to deference**

In ruling that the 1946 RHA did not authorize the Corps to operate Buford Dam for the purpose of water supply, the district court did not purport to defer to the Corps’ interpretation of that statute in the 2002 Stockdale Memo. Such deference would be inappropriate on this particular issue, which is a pure question of law (as contrasted with technical questions about the application of the statute to the operation of the Dam, where deference is due to the Corps).<sup>27</sup> Under the settled

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<sup>26</sup> See *supra* pp. 15-18 (other post-authorization statements by Corps).

<sup>27</sup> The 2002 Stockdale Memo’s conclusion that the 1946 RHA treats water supply as only an incidental benefit, and not an authorized purpose, of Buford Dam notably does not rest on technical matters uniquely within the agency’s expertise. The Corps addressed that issue as a pure question of law and did not rely, for

framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781-2782 (1984), a reviewing court will defer to an agency's construction of a statute it is charged with administering if (a) Congress has not expressed its own intent on the matter in question, and (b) Congress has delegated to the agency the authority to fill a gap in the statute and the agency has done so in a reasonable fashion. As explained above, Congress has spoken to the precise question in this case: It authorized the Corps to operate Buford Dam for the purpose of water supply, among other purposes, by releasing water during off-peak periods and increasing such releases as the region developed. Thus, this case should be resolved at the first step of the *Chevron* analysis, for Congress' intent is clear.

But even if this Court were to proceed to the second *Chevron* step, deference would not be appropriate here. Deference to an agency's statutory interpretation is appropriate only when the agency has exercised its own judgment in filling a statutory gap, not when it believes that its interpretation is compelled by Congress. *See Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). In the 2002 Stockdale Memo, however, the Corps did not even purport to fill a gap in the

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example, on a technical assessment that it would be impracticable to operate the dam for water supply. Indeed, as a matter of policy the Corps has agreed with the Georgia Parties that operating Lake Lanier for water supply is consistent with the highest and best use of the project. *See* RE269 (recommending reallocation of 207,000 acre-feet of storage for water supply).

statute that Congress had left to its discretion. Rather, it concluded that it had no choice but to deny Georgia's request because (it believed) the 1946 RHA did not allow it to allocate sufficient storage to meet Georgia's projected needs in 2030. In *Chevron* terms, then, the Corps itself stopped at step one, deeming the statute unambiguous. As explained above, the Corps' legal conclusion is incorrect, for Congress intended Buford Dam to meet the Atlanta region's water-supply needs.

The 2002 Stockdale Memo's interpretation would not, in any event, merit deference under the second *Chevron* step. The Corps' reading of the 1946 RHA—not rendered in the context of a rulemaking or a formal adjudication, the classic occasions for *Chevron* deference because they require greater procedural regularity and care in reading statutes<sup>28</sup>—conflicts with many formal statements by the Corps that water supply is an authorized purpose of Buford Dam, inconsistencies the Memo never acknowledges. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (“An agency may not ... depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). Most strikingly, the 2002

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<sup>28</sup> This Court has observed that *Chevron* deference is generally limited to agency decisions that are the products of formal adjudications and notice-and-comment rulemaking. See *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 & n.3 (11th Cir. 2008). *Chevron* deference applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S. Ct. 2164, 2171 (2001).

Memo did not mention the Corps' seminal articulation of the project's purposes in the 1949 Definite Project Report, which identified water supply among the project's primary purposes. RE91 ¶115 (“[T]he princip[al] purposes of the Buford project are: to provide flood control; to generate hydroelectric power; to increase the flow for open-river navigation ...; and to assure a sufficient water supply for Atlanta.”).<sup>29</sup> If any statement by the Corps warrants deference, it is that one, because it represents the Corps' more contemporaneous understanding of the way Congress intended Buford Dam to be implemented, unclouded (as is the 2002 Memo) by decades' remove from the authorizing legislation and the later treatment of “incidental purposes.”<sup>30</sup>

Nor does the 2002 Memo mention the Corps' published regulation identifying water supply as one of Buford's authorized purposes, 33 C.F.R. §222.5, App'x E—a regulation first adopted in 1987, applicable at the time Georgia

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<sup>29</sup> The Corps has referred inconsistently to the purposes of Buford Dam. Shortly after the authorization of the project, it variously called them “principle purposes” (RE91 ¶115), “primary purposes” (RE87 ¶48), and “principal purposes” (R-231:SUPPAR05099), but not “authorized purposes.” That characterization came in the Authorized Purposes Report, which was submitted to Congress in 1994 and identified flood control, hydropower, water supply, navigation, and recreation among the project's “[a]uthorized [p]urposes.” R-106:ACF041892.

<sup>30</sup> See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445 (1978) (observing that “an administrative practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new” (internal quotation marks omitted; alteration in original)).

submitted its request and the Corps denied it, and still in force today. *See id.* (under 1946 RHA, authorized project purposes consist of flood control, hydropower, navigation, water supply, and recreation); *see also* 52 Fed. Reg. 15,804, 15,813 (Apr. 30, 1987) (same). And the 2002 Memo ignores the Corps’ comprehensive 1994 Authorized Purposes Report to Congress on the authorized purposes of each of the Corps’ 541 reservoirs, which lists water supply, not as an “incidental” benefit, but as an “[a]uthorized [p]urpose[.]” of Buford Dam and Lake Lanier. R-106:ACF041892.<sup>31</sup>

The 2002 Memo’s conclusion that water supply is merely an “incidental benefit” with only a subsidiary claim on the Corps’ discretion does not reflect a reasonable interpretation of Congress’ intent in the 1946 RHA. This Court should hold that, under a proper understanding of the 1946 RHA, the Corps has authority to operate Buford Dam for the purpose of supplying water to the residents of the metropolitan Atlanta region—as the Corps has, in fact, done for decades.

**B. The District Court’s Error In Interpreting The 1946 RHA Requires Reversal In Both *Alabama* And *Georgia* And A Remand To The Corps**

How exactly the Corps should exercise its authority to operate Buford Dam for the purpose of water supply—and how it should balance that purpose against

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<sup>31</sup> Barely a year before issuing the 2002 Memo, the Corps affirmed in this litigation that “the authorized and operating purposes of the Buford Dam are flood control, fish and wildlife conservation, navigation, hydroelectric power, *water supply*, water quality, and recreation.” *SeFPC-R-7:5* ¶16.

the other purposes of the dam, including hydropower—should be addressed by the Corps in the first instance, for those *are* matters that lie within the Corps’ broad discretion, within the basic framework established by Congress and subject to review under the APA’s arbitrary-and-capricious standard. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027, 1031-1032 (8th Cir. 2003); *Creppel v. United States Army Corps of Eng’rs*, 670 F.2d 564, 572 (5th Cir. 1982). The extent to which the Corps might, under a proper understanding of its legal authority, decide to operate Buford Dam to meet Georgia’s current and anticipated water needs cannot be answered on the present record, for the Corps has not applied its technical expertise to answer that question.

The district court’s erroneous conclusion that Congress did not authorize the Corps to operate Buford Dam for water supply requires reversal of its ruling in *Alabama* that the Corps violated the WSA by meeting the Georgia Parties’ present water-supply needs and its order enjoining the Corps from operating the dam to meet those needs. *See* RE364-RE365. The court recognized that, if water supply were an authorized purpose of the Buford project, operating the dam to meet that purpose would not violate the WSA, which was enacted to *expand* the Corps’ ability to meet water-supply needs beyond its authority under pre-existing statutes. *See* RE345.

Nor can the court's resolution of *Georgia* stand, given the court's (and the Corps') legal errors. The Corps' rejection of Georgia's request to accommodate the Atlanta region's 2030 needs by allocating storage in Lake Lanier rests squarely on the 2002 Stockdale Memo's misapprehension of the Corps' legal authority under the original authorization for Buford Dam. To be sure, that memo also stated that, even if water supply were an original purpose of the project, the Corps would lack the authority to grant Georgia's request because doing so would require "substantial changes in the relative sizes of project purposes." RE159 (internal quotation marks omitted). But that alternative conclusion was plainly influenced by the Corps' perception that water supply was not one of those project purposes. *See Massachusetts v. EPA*, 549 U.S. 497, 533-535, 127 S. Ct. 1438, 1462-1463 (2007) (holding that EPA erred when it concluded that it lacked power to regulate greenhouse gas emissions and remanding for EPA to address whether and how to exercise its discretion to do so). The Corps should be allowed, and obligated, to reexamine the question free of legal error.

The Corps' alternative basis for denying the request also understated the breadth of its authority. The Corps relied on a (now) thirty-year-old district court decision, *Environmental Defense Fund, Inc. v. Alexander*, 467 F. Supp. 885, 899 (N.D. Miss. 1979), which indicated that the Corps may not materially change a project from its original scope, purpose, or plan. RE159 (discussing *Alexander*).

Since then, the Eighth Circuit has taken a considerably more expansive view of the Corps' authority to balance project purposes. *See Ubbelohde*, 330 F.3d at 1027. Given the intervening decision in *Ubbelohde*, the matter should be remanded to the Corps to address that point anew. *See National Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249-1250 (D.C. Cir. 1990) (“an agency should be afforded the first word on how an intervening change in the law affects an agency decision pending review”); *cf. NLRB v. Coca-Cola Bottling Co.*, 55 F.3d 74, 78 (2d Cir. 1995) (remanding case to agency to decide how to follow intervening change in the law).

## **II. THE DISTRICT COURT ERRED IN THE ALABAMA LITIGATION IN CONCLUDING THAT THE CORPS VIOLATED THE WATER SUPPLY ACT**

Even if water supply were not an original authorized purpose of Buford Dam, the district court would still have erred in ruling that the Corps' past and present accommodations of Georgia's needs exceeded its authority. The Corps has extensive authority under the WSA to allocate storage in federal reservoirs to water supply.

The administrative record does not support a conclusion that this WSA authority is insufficient to meet Georgia's current water needs. In fact, because of Alabama's premature initiation of its lawsuit, the Corps did not have the opportunity to make a considered decision as to whether the WSA allows it to meet Georgia's current water needs. The district court should have dismissed the case

outright for lack of final agency action or remanded the case to the Corps for further action without reaching the merits of the *Alabama* plaintiffs' claims.

If it was to reach the merits of the case, however, the district court was obligated to constrain its review to the existing administrative record. In APA challenges, “[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.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607 (1985). Rather, when final agency action is challenged under the APA in district court, that court sits “as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the agency’s decision was factually flawed.” *PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) (internal quotation marks omitted). *De novo* fact-finding is particularly inappropriate on technical issues where courts lack the capacity of the expert agency. *Cf. City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005) (“The reviewing court may not substitute its judgment for that of the agency but must, instead, defer to the agency’s technical expertise.”).

Yet in this complex and technical case, the district court made numerous *de novo* factual determinations that were essential to its holding that the Corps exceeded its authority under the WSA. Most glaringly, on a record that included several different computations of a crucial variable, the court—without any basis

for doing so—adopted the oldest value in the record, despite its inapplicability and the Corps’ repeated disavowals of it. In reaching that and several other erroneous conclusions, the court exceeded its limited role in reviewing an APA challenge.

**A. The Water Supply Act Grants The Corps Substantial Discretion To Provide Water Supply To The Georgia Parties**

In the WSA, Congress declared that “the Federal Government should participate and cooperate with States and local interests in developing ... water supplies.” 43 U.S.C. §390b(a). To that end, Congress empowered the Corps to include storage “for present or anticipated future demand or need for municipal or industrial water” in any reservoir project planned, surveyed, or constructed by the Corps. *Id.* §390b(b). The Corps therefore has authority to allocate storage to help local governments meet their water-supply needs, except where the proposed allocation “would seriously affect the purposes for which the project was authorized” or would “involve major structural or operational changes.”<sup>32</sup> *Id.* §390b(d). Although Congress provided no further elaboration on these limits, the modifiers “major” and “serious[,]” particularly when read in the context of the WSA’s declaration of policy, convey that Congress intended to give the Corps broad discretion to determine how much storage can be reallocated to water supply.

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<sup>32</sup> The WSA also imposes requirements for local jurisdictions to pay for the storage allocated. The Georgia Parties are willing to do so and agreed to a payment formula in the proposed settlement rejected in *SeFPC*.

Before this litigation, there was little judicial or administrative guidance regarding the meaning of the phrases “major operational change” or “seriously affect the purposes for which the project was authorized,” and the Corps had not promulgated regulations interpreting the extent of its authority under the WSA. The D.C. Circuit has since held in *SeFPC* that a reallocation of 22% of conservation storage in Lake Lanier would constitute a major “operational change” requiring congressional authorization.<sup>33</sup> The Georgia Parties continue to believe that *SeFPC* was incorrectly decided, but in any event, that decision does not resolve the *Alabama* plaintiffs’ challenges, which concern a far more limited reallocation.

It therefore falls to this Court, if it reaches the merits, to articulate the standard by which allocations (at least those of less than 22%) should be judged under the WSA. The Court should not extend the *SeFPC* approach of assessing allocations by reference to bare percentages rather than case-specific factors. The WSA’s grant of authority to the Corps to reallocate storage to water supply extends

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<sup>33</sup> The Georgia Parties believe any percentage-based approach is not the correct mode of analysis under the WSA, but the *SePFC* court’s focus on *conservation* storage was particularly misguided. The test should at least account for all *usable* storage, which includes capacity kept empty for flood control. Lake Lanier’s usable storage consists of the top two tiers of the reservoir, whereas conservation storage includes only the middle tier. *See supra* n.11. *SeFPC*’s approach creates an arbitrary distinction between reallocations from hydropower to water supply (both facilitated by the middle tier) and reallocations from the top flood-control tier to water supply.

so long as the “operational change” needed to accommodate the allocation would not be “major.” 43 U.S.C. §390b(d). Whether and how a particular allocation will affect the *operation* of the Buford Dam project is a highly technical, fact-bound question requiring the expert judgment of the Corps, and must account for numerous complex factors including the interrelationships among the various elements of the river system, and changing circumstances over time.

The Corps has prepared a formal legal analysis, the 2009 Stockdale Memo, confirming that the WSA should be interpreted functionally and in a manner affording the Corps substantial discretion. *See* RE115-RE148. The Corps prepared the 2009 Stockdale Memo to articulate its view of its authority under the WSA in light of the *SeFPC* decision. It concluded that a major operational change is one that “fundamentally depart[s] from the operational scheme that Congress envisioned when it authorized the project,” which can only be determined through a project-specific analysis; it also noted that the raw size of the reallocation “generally is not dispositive of the question of whether a modification is authorized under the WSA and should not be considered in isolation from other information that may be relevant to the specific limitations set forth in the WSA.” RE127. The Memo also applied the standards it articulated to the Corps’ past and present allocation of water to the Georgia Parties and concluded that the Corps has acted within its authority under the WSA in meeting the Georgia Parties’ water-supply

needs. RE127-RE128. Although the 2009 Memo was issued after the administrative record was closed and the district court refused to allow the Corps to supplement the record with it (RE350), the Memo is persuasively argued and its conclusion that Corps has substantial discretionary authority is wholly consistent with the language of the statute and congressional intent.<sup>34</sup>

Finally, it bears emphasis that the Corps' authority under the WSA is entirely supplemental to any authority stemming from Buford Dam's authorizing legislation. Were this Court to interpret the 1946 RHA as providing the Corps authority to modify operations to meet water-supply needs, even if that authority is not by itself sufficient to support the so-called "de facto reallocations," that authority is still pertinent to the WSA analysis because it helps establish the relevant baseline. If, for example, this Court were to conclude that the RHA gives the Corps the authority to increase off-peak releases as necessary to accommodate downstream water supply, the relevant inquiry (for the Corps, in the first instance) under the WSA would then be whether the reallocation needed for lake

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<sup>34</sup> The district court mistakenly stated that the 2009 Stockdale Memo represents a shift in the Corps' position from that taken in the 2002 Stockdale memo. *See* RE349. In fact, the 2002 Memo stated that "the agency does have the discretionary authority to meet the current water supply needs of the municipalities surrounding the reservoir." RE156 n.2. That statement is consistent with the Corps' conclusion that it lacked authority to make the *larger* allocation sought in the request that is the subject of *Georgia*.

withdrawals would effect a major operational change or would seriously affect project purposes.

**B. Because Alabama Filed Suit Before The Challenged Action Even Occurred, The Factual Record Is Undeveloped And The District Court Should Not Have Reached The Merits Of The Plaintiffs' Challenge**

Alabama initially filed its lawsuit in 1990, alleging that the Corps was attempting to implement the draft PAC Report without complying with certain environmental regulatory requirements and that it was preparing to execute new contracts to replace the contracts executed in 1986. RE327. If finalized, the PAC Report would have recommended the permanent allocation of storage in Lake Lanier to water supply. RE268. But the draft report, along with the draft contracts, was withdrawn by agreement in 1992. R-231:SUPPAR035537-38 ¶2. Nevertheless, Alabama's suit has remained pending, and as a consequence, the Corps has effectively been prevented from taking formal action to address the Georgia Parties' water needs, such as entering into new water-supply contracts and providing a definitive analysis of how much water the WSA allows the Corps to provide under such contracts.

The *Alabama* plaintiffs now claim that the Corps violated the WSA through the “de facto reallocation” of storage resulting from the Corps' continuation of water supply operations even after the 1986 contracts expired. The court agreed, deeming the Corps to be acting in accordance with “holdover” contracts—i.e., the

four agreements intended to serve as a temporary means to provide for the Georgia Parties' water needs during the late 1980s. Those agreements had been a stopgap measure to cover the period while the Corps was undertaking the steps needed to implement the permanent solution recommended in the MAAWRS Study. *See supra* p. 21. The contracts expired in 1990 and do not provide an ongoing source of authority for providing water supply.

Rather, from 1992 until August 2003, the Corps provided water to the Georgia Parties under "live-and-let-live" provisions, signed by Florida and Alabama, designed to maintain the status quo (and accommodate reasonable increases) while the parties sought to resolve the dispute outside litigation. *See supra* pp. 22. Since expiration of the second live-and-let-live provision, the Corps has provided storage without contracts. The Corps proposed storage contracts to meet present and future needs, but those contracts were invalidated by the decision in *SeFPC*. That decision and the pendency of the other present lawsuits have effectively prevented the Corps from entering into water-supply contracts or otherwise taking new, considered final action.

As a result, the *Alabama* challenges lack the two things that are essential to any APA lawsuit: a considered agency decision and a record documenting the basis for that decision. The Corps' provision of water during the live-and-let-live period, and the period of limbo that has followed, resulted not from a considered

decision about how much water it may supply the Georgia Parties, but from an effort to maintain the status quo during the pendency of this litigation. And since the agency did not take considered action, the administrative record, though voluminous, contains only a post-hoc assemblage of materials related to Buford Dam, not “documents considered by the staff prior to the agency action.” *Preserve Endangered Areas of Cobb’s History, Inc. v. United States Army Corps of Eng’rs*, 87 F.3d 1242, 1247 n.2 (11th Cir. 1996).<sup>35</sup>

Similarly, the Corps had no occasion to offer a contemporaneous, reasoned explanation of how much water it may and would provide to the Georgia Parties. The Corps attempted to provide such an explanation in the 2009 Stockdale Memo, but the district court dismissed that out of hand as a document prepared for litigation. RE350. Even if the court correctly concluded that a litigation document should not be given weight, the court still should not have deprived the Corps of all opportunity to explain its reasoning. Rather, the court should have remanded the case to the agency and ordered the Corps to reexamine its authority and provide a reasoned explanation for the way it intended to go forward, including an articulation of the relevant legal standards and how providing water to the Georgia

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<sup>35</sup> For essentially the same reasons, the *Alabama* plaintiffs have not identified any final agency action by the Corps that is reviewable under the APA. That flaw deprived the district court of jurisdiction. *See National Parks Conservation Ass’n v. Norton*, 324 F.3d 1229, 1239-1240 (11th Cir. 2003). The district court erred in denying Georgia’s motion to dismiss on this ground. RE83g-83i.

Parties might fall within those standards. Even if the Corps *has not* adequately justified its provision of water supply, that does not mean that it *can never* justify providing water at current levels—or should never be allowed to proffer such a justification. *See Camp v. Pitts*, 411 U.S. 138, 142-143, 93 S. Ct. 1241, 1244 (1973) (“If ... there was such failure [by the agency] to explain administrative action as to frustrate effective judicial review,” the reviewing court should obtain from the agency “such additional explanation of the reasons for the agency decision as may prove necessary.”); *Florida Power & Light*, 470 U.S. at 744, 105 S. Ct. at 1607 (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

The inadequacy of the administrative record—and the consequent need for the court to remand rather than proceed to the merits—are particularly salient in this case. First, before the so-called “de facto reallocations,” the data in the record were never definitively reviewed by the Corps for accuracy, as would have happened in the normal course of taking final agency action. Second, the Corps did not have the opportunity to perform certain necessary calculations (such as translating levels of water usage into quantities of storage). And third, the Corps

was deprived of the opportunity to apply the law to the facts and make its own judgment about the effects of particular reallocations, and, therefore, the extent of its discretion under the WSA—a statute it is responsible for administering.

The district court should not have attempted to compensate for the administrative record as it did here, by engaging in *de novo* fact-finding and original technical analysis. As this Court has explained, “judges are ill-equipped to settle the delicate questions ... where long and complex factual histories ... require assessments better left to the expertise of an executive agency.” *Shoals Am. Indus., Inc. v. United States*, 877 F.2d 883, 888-889 (11th Cir. 1989) (internal quotation marks omitted). Although the APA empowers courts to ensure that agency decisions comply with the law and are not arbitrary or capricious, the reviewing court may not assume the role of the agency and perform original technical analysis for itself. As we now explain, when the court attempted to do that, it made serious mistakes.

**C. The District Court’s Analysis Of The Merits Of The *Alabama* Challenge Is Severely Flawed**

The district court’s efforts at resolving the merits of the *Alabama* plaintiffs’ challenge illustrate precisely why remand, rather than *de novo* fact-finding, was the proper course. Confronted with an incomplete and complicated record, and without the benefit of an analysis by the Corps, the district court made several erroneous assumptions and overlooked several factual complexities. Its

conclusions that the “de facto reallocation” both effected a “major operational change” and “substantially affected” hydropower production are fatally infected by those mistakes.

**1. The court’s “major operational change” analysis was predicated on numerous errors**

The district court’s conclusion that the Corps effected a “major operational change” without congressional approval rests entirely on its *de novo* finding that the Corps has effectively allocated 21.5% of Lake Lanier’s conservation storage to water supply. RE356-RE357. That finding allowed the court to treat this case as the functional equivalent of *SeFPC*, where the D.C. Circuit held a proposed 22% allocation invalid on its face. Yet the 21.5% figure appears nowhere in the record; it is based solely on original calculations performed by the district court. Notably, the Corps has calculated that Georgia’s present needs can be met with an allocation barely half as large—only 11.7% of conservation storage.<sup>36</sup> RE139. The district court’s figures also conflict with those of the D.C. Circuit, which stated that the rejected settlement would have added 9% of the conservation storage to water supply in the future, implying that only 13% of conservation storage had already been allocated to that purpose.<sup>37</sup> *See SeFPC*, 514 F.3d at 1320. The wide disparity

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<sup>36</sup> Even Alabama and Florida argued that the de facto reallocation was only 18%. R-191:24.

<sup>37</sup> In other words, the court below found *current* needs to require essentially the same amount of storage as the D.C. Circuit found to be at issue in the proposed

between the district court's *de novo* calculation and those others can be traced to a series of improper assumptions made by the court. Each had the effect of artificially inflating the "de facto reallocation."

***a. Understating freely available water supply***

In calculating how much storage has been allocated to water supply, the single most important factor is the amount of water that is incidentally available downstream as a result of hydropower operations. Confronted with a record with at least four Corps estimates of amounts of water it could provide, the court simply took the oldest and smallest figure, assumed it to be accurate, and misconstrued it as the maximum amount of water supply the Corps could provide downstream users, despite overwhelming evidence in the administrative record to the contrary.

All parties agree that a substantial amount of the water taken by the downstream river users is freely available as a result of hydropower releases. No storage in Lake Lanier is required to furnish the Georgia Parties with that water because it is released to generate power, not to provide water supply. Only water used by the Georgia Parties above that baseline amount can be said to have been kept in de facto storage for their benefit. Thus, without establishing the relevant baseline of freely available water, it is impossible to determine how much storage the Georgia Parties have used.

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settlement, which would have substantially increased water supply to the Georgia Parties in the *future*.

The Corps has repeatedly considered the amount of freely available water, and its conclusions have evolved over time. In 1975, the Corps determined that it could meet then-existing needs of 327 mgd in the summer, with an annual average of 230 mgd, without affecting hydropower generation. R-231:SUPPAR036976. In 1979, as needs increased, the Corps performed further calculations and concluded that it could operate Buford Dam to assure flows sufficient to withdraw an annual average of 266 mgd downstream by scheduling additional peak releases on weekends. R-106:ACF015500; R-231:SUPPAR036997-7002. In 1986, the Corps concluded that it could provide 327 mgd annually as an incident of hydropower production as a result of improved river management and monitoring. R-231:SUPPAR037002; R-106:ACF011981. And in the 1989 PAC Report, the Corps determined that at least 378 mgd could be available following peak releases and 200 mgd during off-peak times, for an average of 308 mgd. RE272-RE273; RE357-RE359. The 2009 Stockdale Memo adopts the 327 mgd figure. RE138.

Confronted with these different data points, the district court selected the lowest figure, 230 mgd.<sup>38</sup> RE356, RE359, RE362. Yet the Corps never found 230 mgd to be the limit of its ability to provide water through hydropower releases; in 1975, the Corps simply stated that it could guarantee that amount. When the Corps

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<sup>38</sup> Even in settling on the 1975 figure, the district court oversimplified matters, overlooking that 230 mgd was an annual average, with seasonal variation as high as 327 mgd (a figure the district court found implausible in the 1986 calculation).

reexamined the issue in 1986, it concluded that “[b]ased upon analysis of incremental flows and the implementation of the Water Management System, it is found that 327 mgd can be provided year-round with no impact on the Project.” R-106:ACF011981. The Corps has examined the question three times since 1975, and each time it has concluded that it could provide river users with substantially more than 230 mgd, even as an incidental benefit of hydropower generation. The 1989 PAC calculation (308 mgd) in particular was supported by a more refined analysis than had been used previously, in that it separately analyzed peak and off-peak releases. It was also specifically defended as being “borne out by recent experience.” RE272. The district court had no basis for rejecting the more recent values endorsed by the Corps.

But even were the court justified in rejecting the Corps’ later, more sophisticated calculations, its *de novo* adoption of the 1975 figure was still unwarranted. If the court had doubts about the higher figures, it should have remanded the case to the Corps to reassess this highly technical issue and better develop a record supporting whatever amount of water the Corps ultimately concluded it could supply. Instead, the court *itself* determined that the Corps could not provide river users with any amount of water greater than 230 mgd:

[T]he Court has determined that 327 million gallons per day are not available as incidental to the operations of Buford Dam as Congress, 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 normal operation of the Buford Dam.

RE362-RE363. But the district court had neither authority to make that finding of fact (much less on summary judgment, since material facts are plainly in dispute) nor the expertise necessary to do so; that function is reserved to the agency in the first instance, subject to later judicial review.<sup>39</sup> *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 823 (1971); *see also American Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008) (when an agency is evaluating “scientific data within its technical expertise,” the court “must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives.” (internal quotation marks omitted)).

The significance of the court’s selection and use of the 230 mgd figure cannot be overstated. The court found that the river users require an average of 316 mgd per day.<sup>40</sup> RE353. The difference between 230 mgd and 327 mgd being freely available is enormous—in effect, the difference between the Georgia Parties requiring only a nominal amount of storage for river withdrawals on high

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<sup>39</sup> Relatedly, the court performed its calculations based on the assumption that the conservation pool contains 1,049,400 acre-feet of storage (its winter capacity), even though the Corps has endorsed calculations based on a capacity of 1,087,600 acre-feet. RE360 n.29. *See supra* n.11.

<sup>40</sup> The 2009 Stockdale Memo uses a lower figure of 290.8 mgd. RE138-RE139.

consumption days, and needing to have nearly 30% of river users' municipal water supply separately stored in Lake Lanier.

***b. Overstating water usage***

Instead of examining this case in terms of the Georgia Parties' actual current water withdrawals, the district court redefined the relevant question as whether the Corps could legally allocate storage for the amount of water provided for under the expired 1986 "holdover" contracts. RE351. By focusing on the theoretical allocation under these defunct agreements, rather than actual usage, the court further inflated the size of the "de facto reallocation" and attenuated its analysis from the actual issue in this case.

The court justified charging the Georgia Parties with the full amounts theoretically available under the "holdover" contracts, rather than their actual usage, on the grounds that: (1) the Corps continues to provide water "pursuant to [those holdover] contracts today"; and (2) "the amount of water [Georgia entities] presently withdraw far exceeds the amount they were entitled to under the so-called 'holdover' contracts." RE351-RE352. Both statements are wrong. The first statement is incorrect because the water provided by the Corps has been given either pursuant to live-and-let-live agreements or, during the period of limbo engendered by this lawsuit, under no contract at all (not pursuant to expired agreements). The second assertion is equally wrong—a mere three pages later, the

court acknowledged that the holdover agreements entitled ARC to 50 mgd of water it has never used. RE354.

Focusing on the amount of water *theoretically available* under the holdover contracts rather than the amount *actually used* by the Georgia Parties was a mistake for two reasons. First, it turned the case into an academic exercise. It is entirely moot whether the Corps had authority to allocate the storage provided under the holdover agreements, for they expired twenty years ago. What matters is whether the Corps can allocate sufficient storage to meet current needs. The district court's opinion never addresses that question, for it analyzes the case under a theoretical framework built on flawed assumptions.<sup>41</sup>

Second, looking to “holdover contracts” led the court to deny the Georgia Parties credit for water they return to the system. The City of Gainesville, for example, withdraws a gross amount of about 18 mgd of water from Lake Lanier, but returns 10 mgd to the reservoir where it is available for hydropower generation.<sup>42</sup> R-106:ACF44241-42. These return flows directly offset withdrawals

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<sup>41</sup> The court's decision to charge ARC with using all the water that was available to it under the “holdover contract,” even though that amount exceeds actual usage by 50 mgd, is particularly consequential. The 50 mgd represents a substantial portion of the 21.5% allocation found by the district court, and without it, the court could not have described this case as a straightforward application of *SeFPC*.

<sup>42</sup> Appellant Gwinnett County has also undertaken to offset a significant portion of its water consumption with returns to Lake Lanier.

and are clearly relevant to the question of how much storage is required. Yet the court disregarded them entirely on the ground that they are voluntary and not guaranteed under the “holdover contracts.”<sup>43</sup> RE353 n.22.

*c. Ignoring technical complexities*

Finally, the district court attempted the extremely difficult undertaking of determining the quantity of storage needed to support downstream needs. RE356. In doing so, it assumed that the same formula that translates water withdrawn directly from Lake Lanier into storage is equally applicable to withdrawals made downstream. But as the Corps has recognized, it is “more difficult to determine” how much storage is needed to support a given quantity of water supply downstream than it is to calculate how much storage is needed to support that quantity of water when it is withdrawn directly from the lake.<sup>44</sup> RE271.

As the Corps has noted, many factors affect the relationship between the quantity of water available downstream and the amount of storage needed to

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<sup>43</sup> Ironically (and inconsistently), the court further penalized the Georgia Parties by looking to actual usage, rather than the holdover contracts, where usage exceeded the amounts provided for under the contract. RE356 (assuming lake withdrawals of 141 mgd based on actual usage, rather than the 85 mgd provided for under the contracts).

<sup>44</sup> This error contributed to the district court’s most egregious miscalculation: its conclusion that, in 2006, 566,300 acre-feet of storage were committed to water supply. *See* RE356. That value wildly overstates the amount of storage allocated to water supply; it is about 50% larger than the storage requested in the water supply request at issue in *Georgia*, which the Corps rejected as too large.

provide that water. RE272. First, the formula used by the district court does not account for the rate of inflows into the Chattahoochee from sources below Buford Dam but above Atlanta. Second, there is a smaller hydropower dam, Morgan Falls, between Buford and Atlanta. Although Morgan Falls' storage capacity is a fraction of that of Lake Lanier, it can reregulate peak releases from Buford Dam so as to provide a more even flow at Atlanta. Therefore, one of the facts needed to calculate the amount of water available downstream from hydropower releases is the amount of storage space in Morgan Falls. The administrative record contains conflicting calculations of this figure, and the court ignored this variable entirely in making its calculations. R-231:SUPPAR036669 n.14; R-106:ACF0036368; R-106:ACF042738. Third, the court overlooked the ways that coordination between projects as part of a River Management System can increase the quantity of water available downstream for water supply.

These are only three of the complexities the district court failed to recognize,<sup>45</sup> and it was only by glossing over these complexities, and making the mistaken assumptions about freely available water and the continued applicability of the holdover contracts, that the court could find that the "de facto reallocation" involved "more than 21.5% of Lake Lanier's total conservation storage." RE356-

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<sup>45</sup> Among the factors overlooked by the district court is that average flows can be raised through peak releases on weekends. *See infra* pp. 70-71.

RE357. Had the district court not employed those erroneous assumptions, a correct calculation of the percentage of total storage used by the Corps would have yielded a far lower figure, thereby preventing the court from describing the case as a straightforward application of the 22% standard from *SeFPC*. The determination whether the allocation at issue was within the Corps' authority would then have been much more complex and nuanced—and much more appropriate for the Corps to consider in the first instance.

**2. The court's conclusion that hydropower has been seriously affected is not supported by the administrative record**

The district court also found the “de facto reallocation” to be improper as “seriously affect[ing]” Buford Dam’s hydropower generation. RE361-RE365. That conclusion fails for several reasons.

First, the court’s analysis is predicated on the same improper fact-finding about the quantity of water incidentally available downstream as a result of hydropower generation that infects its “major operational change” analysis. RE362-RE363; *see supra* pp. 61-65.

Second, the decision is premised on what even the district court acknowledged to be disputed evidence regarding the harm to hydropower. *See* RE363 (“Now the Corps and the Georgia parties take issue with the SeFPC’s calculation of its damages.”). The court’s calculations appear to have been taken from the affidavit of SeFPC’s expert. *Compare* RE363, with *SeFPC-R-238B:17*.

Yet the court had previously ruled that it was excluding expert testimony at the summary judgment phase and refused to allow the Georgia Parties to submit their own expert testimony. *See* R-166. The court's reliance on evidence submitted by one party that another did not have the opportunity to rebut not only violated the Georgia Parties' procedural rights; it also contravened basic APA principles, which generally limit the court's review to the administrative record and do not permit the parties to compile an additional record in the district court. *See Florida Power & Light*, 470 U.S. at 744, 105 S. Ct. at 1606.

Third, the administrative record shows that hydropower production has declined for reasons other than allocations of storage to water supply. *See, e.g.*, R-231:SUPPAR021666-67. In 2007, for example, massive releases were made for the benefit of neither hydropower nor water supply, but rather to support minimum downstream flow requirements imposed under the Corps' Interim Operating Procedures. *See* Letter from Carol A. Couch to Col. Byron Jorns, Oct. 12, 2007, at 2-3.<sup>46</sup>

Fourth, the court relied on increases in the percentage of power generated on the weekend, which it equated with off-peak releases made for the purpose of

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<sup>46</sup> The letter is available on the Corps' website at [http://www.sam.usace.army.mil/ACF%20Water%20Resources%20Management/ACFDrought\\_Consultation2007/Appendix\\_C\\_GAEPD\\_Req\\_for\\_immediate\\_alt\\_of\\_IOP\\_relas\\_10\\_12\\_07.pdf](http://www.sam.usace.army.mil/ACF%20Water%20Resources%20Management/ACFDrought_Consultation2007/Appendix_C_GAEPD_Req_for_immediate_alt_of_IOP_relas_10_12_07.pdf). Under a stipulation between the parties, it is part of the administrative record. R-160.

providing water supply. RE363-364. In doing so, the court proceeded from the assumption that “[f]rom the beginning of the Buford project, the purpose of weekend release was to support water supply.” RE363. But that premise is inaccurate; Buford Dam’s 1959 operating manual describes fifteen hours of Saturday and five hours of Sunday as peak times for releases. RE107. Thus, weekend releases cannot be equated to off-peak releases for water supply.

Finally, the court wrongly construed the WSA by rejecting the possibility that financial compensation to power interests can prevent the hydropower purpose of the dam from being “seriously affected.” Even SeFPC has agreed that reallocation of water storage is permissible if offsets are made to compensate SeFPC for diminished hydropower value. Although the D.C. Circuit concluded that the proposed *SeFPC* settlement would have brought about a “major operational change,” it did not conclude that the proposed settlement, which offered compensation to power interests, would have “seriously affected” Buford Dam’s hydropower purpose. There is no reason to conclude that a reallocation of water supply would “seriously affect” hydropower in violation of the WSA if that reallocation is acceptable to hydropower interests and if the Georgia Parties are willing to provide compensation for any impact to hydropower.

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In sum, the *Alabama* plaintiffs have not established that the Corps exceeded its substantial discretion under the WSA by meeting the Georgia Parties' current water needs. The district court's grant of summary judgment on the WSA claim rests on erroneous assumptions and highly contested "facts," and fails to heed the proper (and properly limited) scope of administrative review in an APA challenge. At a minimum, the Corps should have been given the opportunity, in the first instance, to articulate the proper legal standard governing its discretion under the WSA and to explain definitively how (if at all) its practice of meeting current water-supply needs might affect the operations or purposes of Buford Dam. By cutting off those inquiries, the district court exceeded its own authority.

### **III. THE REMEDY IMPOSED BY THE DISTRICT COURT IS AN ABUSE OF DISCRETION**

Even if the district court had been correct in concluding that the Corps acted without authority for decades in meeting the metropolitan Atlanta area's water-supply needs from Buford Dam, the court nonetheless abused its discretion in its choice of remedy. That "draconian" remedy (RE367) effectively prohibits the Corps from providing the Atlanta region with any more water than was furnished under the operating plan developed half a century ago (RE366).

The court's remedy is flawed in two crucial respects. First, it exceeds the proper scope of the court's authority when resolving an APA challenge by stripping the expert agency of an opportunity to develop a new plan consistent with

the law. Even if the Corps erred in its past responses to Georgia's water needs, it does not follow that the Corps has *no* authority to operate Buford Dam in a way that would at least partly meet those needs. The district court's order, however, effectively turns the purported original *baseline* for the Corps' provision of water to the Atlanta area into a *ceiling*, and inappropriately precludes the Corps from developing a remedial plan that would reconcile the various permissible purposes for Buford Dam within the strictures of the WSA.

The order also violates traditional equitable principles. The court did not engage in the balancing of the equities required for entry of any injunction, much less the "draconian" one entered here. A proper balancing of the equities points decisively in favor of maintaining the status quo or, at a minimum, to a far less intrusive remedy. Georgia's citizens have relied for decades on water supply provided by the Corps from Buford Dam and would be devastated by enforcement of the injunction imposed by the district court. Yet the district court would deny Georgia access to that water, even though Georgia's water usage has minimal effect on the downstream parties the injunction purports to protect, who never even demonstrated irreparable harm from the "de facto reallocation."

The district court remarked that "the separation of powers is fundamental to our federal government: a power reserved to one branch may not be usurped by another," and that "[t]his litigation presents a case study in the need for this

tripartite federal system.” RE368. However, under the doctrine of separation of powers, responsibility for operating Buford Dam and reconciling the various permissible purposes of the dam lies in the first instance with the Corps—not a district judge. *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 146, 60 S. Ct. 437, 443 (1940). After concluding that a violation of the law had occurred, the court should have allowed the agency to determine how best to operate within the confines of the law as newly articulated by the court. Instead, the court took the opposite tack, imposing an exacting remedy that not only exceeded the constraints imposed by the APA, but those of traditional equitable principles as well, cutting off water from millions of people who have been relying on it for decades. The court’s order is not only *ultra vires*, it is unjust.

**A. The District Court Exceeded Its Authority Under The APA And Imposed An Overbroad Remedy That Improperly Impinges On The Corps’ Discretion**

The district court concluded in *Alabama* that the Corps’ “de facto reallocations” violated the WSA because they amounted to “more than 21.5% of Lake Lanier’s total conservation storage” from a 1970s baseline, which constituted a “major operational change” without congressional authorization. RE356-RE357. But rather than remand the case to the Corps to determine in the first instance how much storage would be consistent with the Corps’ authority, the court decided that

the Corps could allocate zero storage, imposing a very restrictive remedy that robs the Corps of all of its WSA discretion. RE366.

In so doing, the court violated basic principles of administrative law. “[T]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare,” and “[a]t that point the matter once more goes to the [agency] for reconsideration.” *FPC v. Idaho Power Co.*, 344 U.S. 17, 20, 73 S. Ct. 85, 87 (1952); *see also Florida Power & Light*, 470 U.S. at 744, 105 S. Ct. at 1607; *Preserve Endangered Areas*, 87 F.3d at 1246.

But even if further instruction were appropriate, the district court’s remedy would still be impermissible because it robs the Corps of far more discretion than is necessary to rectify the purported violation. The court directed that for Atlanta and the communities surrounding Lake Lanier, “the operation of Buford Dam will return to the ‘baseline’ operations of the mid-1970s,” under which the Corps could maintain off-peak flow for water supply no higher than 600 cfs. RE366. But the Corps set that baseline using only its authority from the 1946 RHA, and it cannot be disputed that the Corps has *some* additional authority under the WSA. The district court provided no rationale for its decision to prohibit the Corps from making *any* changes from the original “baseline operations” to meet existing and future water supply needs under that authority.

“Injunctive relief should be limited in scope to the extent necessary to protect the interests of the parties.” *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003); *see also Miller v. Donald*, 541 F.3d 1091 (11th Cir. 2008); *Klay*, 376 F.3d at 1096. Since the court only established that a “de facto reallocation” in the amount effected by the “holdover contracts” was impermissible, it should have only prohibited the Corps from continuing to provide water supply in that amount and directed the Corps to determine, in the context of a remedial plan, whether contracts in some lesser amount could be executed. *Cf. Lewis v. Casey*, 518 U.S. 343, 361-362, 116 S. Ct. 2174, 2185 (1996) (federal courts must give state officials opportunity to develop remedial plan once constitutional violation has been established).

A narrower remedy would have been particularly appropriate in this case for two additional reasons. First, many complex, technical questions remain unresolved—such as the amount of water incidentally available downstream—and they must be answered before the outer limits of the Corps’ authority to provide water supply to the Georgia Parties can be determined. *See supra* Part II.C. Second, the ultimate decisions of whether and how much water is to be allocated to the Georgia Parties should be made in conjunction with the Corps’ updating of its operating manual for the river system, which is currently fifty years out of date. RE367. Only after assessing current conditions, rather than relying on decades-old

data, will the Corps be able to deploy its expertise and assess how best to fulfill its duties in the ACF basin, including for the provision of water supply. The overbroad injunction will hamstring the Corps and inhibit it from doing so.

**B. The District Court Erred By Imposing “Draconian” Injunctive Relief Not Justified By A Proper Balancing Of The Equities**

The district court has directed a drastic diminution in the amount of water that the Corps may make available to the Atlanta region for water-supply purposes. This harsh exercise of the court’s equitable power was unwarranted. Indeed, the court itself recognized that “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.” RE366. The court relied on that observation to stay its order for three years, but that delay does not salvage this grossly unfair imposition. The order imposes massive harm on Georgia’s citizens, while providing Alabama and Florida with *de minimis* benefits.<sup>47</sup>

An injunction is never available as a matter of right; “it does not follow from success on the merits as a matter of course.” *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 381 (2008). To the contrary, an injunction is an

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<sup>47</sup> The court announced its willingness to enter an inequitable injunction a full year in advance, stating at a July 21, 2008 status conference, “I’m going to make some decisions that are going to injure some people very badly and are going to help some people a little bit.” R-134:26.

“extraordinary remedy,” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798, 1803 (1982), and even if a violation of law has been established, an injunction should not issue unless the plaintiff shows that it has suffered “irreparable injury” and that, “considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006).

The district court made no effort even to suggest that those requirements had been met before imposing injunctive relief. RE364-RE365. Nor could it have done so, for it is beyond dispute that the injunction imposes devastating harm on the Georgia Parties, while the *Alabama* plaintiffs struggle to show any harm, irreparable or otherwise, let alone sufficient injury to counterbalance the injunction’s crippling effect on the Georgia Parties. Notably, the district court imposed the injunction without taking any evidence about the injunction’s impact, despite having given earlier assurances that, “should the Court find that the Corps acted beyond the scope of its authority in the ACF basin, the appropriate remedy must be carefully tailored in light of all the important and compelling interests at stake. It is not the Court’s intention to fashion a remedy without input from all affected parties.” R-166:4 (denying as premature the Georgia Parties’ motion to introduce evidence regarding potential remedies).

The prerequisites to an injunction that the district court overlooked are stringent. An injunctive order requires a balancing of hardships and consideration of the broader public interest, and where (as here) significant reliance interests have arisen based on the status quo, those interests cannot be set aside lightly. *See, e.g., Winter*, 129 S. Ct. at 381; *eBay*, 547 U.S. at 391, 126 S. Ct. at 1839; *Romero-Barcelo*, 456 U.S. at 312-313, 102 S. Ct. at 1803-1804. To the contrary, “[i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Prod. Co. v. City of Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396, 1402 (1987); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, 64 S. Ct. 587, 591-592 (1944).<sup>48</sup> “It is well settled that the imposition of an equitable remedy must not itself work an inequity,” *Van Wagner Advertising Corp. v. S&M Enters.*, 67 N.Y.2d 186, 195, 492 N.E.2d 756, 761 (1986), and “[a]n injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive.” *McClure v. Leaycraft*, 183 N.Y. 36, 44, 75 N.E. 961, 963 (1905).

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<sup>48</sup> Although some of the discussion in the Supreme Court’s decisions in *Winter*, *Amoco*, and *Romero-Barcelo* involved a preliminary injunction, the Supreme Court has made clear that “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” *Amoco*, 480 U.S. at 546 n.12, 103 S. Ct. at 1404 n.12; *see Winter*, 129 S. Ct. at 381.

Thus, this Court held in *Micosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *vacated on other grounds*, 541 U.S. 95, 124 S. Ct. 1537 (2004), that an injunction against the operation of a pump in the Everglades was unwarranted even though the plaintiff had established that the pumping station added pollutants to the navigable waters without a permit, in violation of the Clean Water Act. In that case, as in this one, the district court did not balance the equities or consider the public interest, which would have required it to recognize that “the cessation of the ... pump would cause substantial flooding ... which, in turn, would cause damage to and displacement of a significant number of people.” *Id.* at 1369-1370. This Court concluded that an injunction could not issue in such circumstances, for the drastic consequences that would be visited upon Florida residents by the injunction “far outweigh the continued addition of low levels of phosphorus to [the waterway] without a[] ... permit.” *Id.* at 1370-1371.

This case presents similar circumstances. The metropolitan Atlanta area has been developed in reliance on the Corps’ assurances over the years that it would provide Georgians with sufficient water for their needs. The development of metropolitan Atlanta has not been a secret. Nonetheless, Alabama and Florida did not bring their lawsuit until 1990, long after the Atlanta area had become highly developed. To require the Corps, as the district court did, to wind back the clock to

the 1970s, as though none of Georgia's subsequent growth had ever occurred, is incompatible with the "flexibility" and "practicality," *Hecht Co.*, 321 U.S. at 329, 64 S. Ct. at 592, that are the hallmarks of equity. Even if Alabama and Florida had established that Buford Dam is being operated in violation of the WSA, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Romero-Barcelo*, 456 U.S. at 313, 102 S. Ct. at 1803.

The district court's failure to abide by its promise to receive "input from all affected parties" (R-166:4) before fashioning a remedy has prevented the Georgia Parties from making a full record of the devastating impact that this injunction poses to the people of Georgia. There can be no question, though, that the effect will be monumental. In 1970, the Atlanta region had a population of less than 1.5 million; the metropolitan area's population is over five million today, most of whom receive their water from the Chattahoochee and Lake Lanier. R-231:SUPPAR012455; SUPPAR009001-9002 ¶30. Congressional testimony given in 1990 estimated 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. R-231:SUPPAR005230. The Georgia Parties have also submitted an affidavit in this Court from Carol Couch, then-Director of the Georgia

Environmental Protection Division, which makes clear that the “economic, social, and environmental costs [of the injunction] will be staggering,” consuming billions of dollars and drastically reducing the quantity of water available to the three million affected Georgia residents. 10/19/2009 Ga. Parties’ Resp. Mot. to Dismiss, Couch Aff. ¶¶11-12. Whatever the exact losses it imposes, there can be no dispute that the injunction would be crippling to the people of Georgia.

In stark contrast, the *Alabama* plaintiffs struggled to show any irreparable harm at all. SeFPC, the party actually affected by reallocations from hydropower to water supply, declined to request an injunction against such allocations.

RE1221-RE1224. The district court also made no determination that Alabama or Florida would be irreparably harmed unless the water supply available to metropolitan Atlanta were drastically reduced. Indeed, the court had to resort to presumptions even to find that Alabama and Florida had suffered sufficient injury to support standing.<sup>49</sup> RE338-RE340. The court acknowledged that Georgia had

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<sup>49</sup> In concluding that Alabama and Florida had standing to pursue this action, the district court pointed to a U.S. Fish and Wildlife Service Biological Opinion stating that “low flows in the Apalachicola River are at least to some extent caused by the Corps’ 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.” RE339. But those conclusions are disputed by the Georgia Parties, and the district court recognized that material facts on standing were in dispute. RE338. In light of that dispute, the district court erred by reaching the merits and thus effectively resolving the standing issue on summary judgment. For Alabama and Florida to be entitled to summary judgment in *Alabama*, they had to show the absence of any disputed issue of fact on all issues, including their own

presented evidence that the Corps' operation of Buford Dam had not resulted in "any 'discernable reduction in flows downstream in Alabama or Florida'" (RE338), and specifically declined "to weigh the evidence and determine which evidence to credit" (RE339). Whether or not this approach was sufficient to find standing, irreparable harm cannot be presumed based on one party's untested contentions; rather, the complaining party must establish that it will be irreparably harmed if a permanent injunction is not granted.<sup>50</sup>

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standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136-2137 (1992). Moreover, even if the Fish and Wildlife Service opinion were sufficient to establish standing, it is inadequate to establish irreparable harm (and it is not even relevant to Alabama). The snippet cited by the court does not establish: (a) what portion of the reduction in flow in the Apalachicola is attributable to the Corps' alleged de facto allocation of storage to water supply; (b) how or whether the additional water-supply storage increased net consumption of water in Georgia; (c) the extent or severity of the harm experienced by the unspecified "creatures" in the river; (d) any connection between particular levels of river flow and harm to aquatic life; or (e) whether that harm is sufficiently grave or important as to constitute irreparable injury to Alabama and Florida. The material relied on by the district court thus fell far short of establishing that Alabama and Florida would suffer irreparable harm absent its drastic injunction.

<sup>50</sup> At a minimum, the district court was required to accept evidence from the parties, to hold a hearing, and to explain why it believed Alabama's and Florida's evidence is more persuasive than Georgia's and why the harms complained of are both attributable to the operation of Buford Dam and irreparable. The district court did none of that, and so abused its discretion. "Where conflicting factual information places in serious dispute issues central to a party's claims and much depends upon the accurate presentation of numerous facts, the trial court errs in not holding an evidentiary hearing[.]" *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003) (alterations and internal quotation marks omitted); *see United States v. Microsoft Corp.*, 253 F.3d

The alleged harm to Alabama and Florida, even if minimally sufficient to satisfy the irreparable-injury requirement, falls monumentally short of offsetting the harm to the Georgia Parties. Evidence introduced by Georgia showed that more than half of the water used by the Atlanta Metropolitan Area is returned to the Chattahoochee River downstream of Atlanta. R-231:SUPPAR000353 ¶35. Because there are huge inflows of water into the Chattahoochee at points below Atlanta, in an average year, the Atlanta area's net withdrawals amount to about 1% of the water flowing from Georgia into the Apalachicola River (rising to about 3.4% during the extreme drought year of 2000). R-197 Ex. 1:8-9 ¶¶22-24. The effect on power customers of retaining the status quo would also be limited: The Corps estimates that meeting Georgia's present water-supply needs from Buford Dam reduces total power generation by only one percent. *See* RE141.

The district court order's severe adverse effect on Georgia citizens' current water needs thus far outweighs any limited benefit that the other parties might obtain from the injunction. Given this lopsided result of the balancing of the equities, the order is an abuse of discretion. *See Winter*, 129 S. Ct. at 381.

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34, 101 (D.C. Cir. 2001) ("Other than a temporary restraining order, no injunctive relief may be entered without a hearing.").

## **CONCLUSION**

This Court should reverse the district court and hold that the Corps has authority under the 1946 RHA to operate Buford Dam for the purpose of water supply, and order the Corps to reassess Georgia's water-supply request in light of that holding. Regardless of whether it so construes the 1946 RHA, this Court should reverse the ruling that the Corps has violated the WSA, and order the case remanded to the Corps with instructions to reexamine how much water should be made available to meet the current and future water needs of the Georgia Parties. Finally, even if this Court sustains the WSA ruling, it should vacate the inequitable remedy imposed below.

Respectfully submitted.

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**STATUTORY  
ADDENDUM**

**River and Harbor Act of 1946, Pub. L. No. 79-525, 60 Stat. 634**

AN ACT

Authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated: *Provided,* That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission, and such recommendations shall be based upon consideration of the proper utilization and conservation in the public interest of the resources of the region: *Provided,* That the provisions of section 1 of the River and Harbor Act approved March 2, 1945 (Public, Numbered 14, Seventy-ninth Congress, first session), shall govern with respect to projects herein authorized; and the procedures therein set forth with respect to plans, proposals, or reports for works of improvement for navigation or flood control and for irrigation and purposes incidental thereto shall apply as if herein set forth in full: *And provided further,* That the word “navigation” appearing in paragraph (b) of section I of the River and Harbor Act approved March 2, 1945 (Public, Numbered 14, Seventy-ninth Congress, first session), shall in respect to the Arkansas River and tributaries include the use of water herein referred to for power purposes:

\* \* \*

Apalachicola, Chattahoochee and Flint Rivers, Georgia and Florida; in accordance with the report of the Chief of Engineers, dated May 13, 1946: *Provided,* That the proposed dam referred to in such report as Junction Dam shall, upon its completion, be known and designated on the public records as the Jim Woodruff Dam;

\* \* \*

**43 U.S.C. § 390b. Development of water supplies for domestic, municipal, industrial, and other purposes**

(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.

(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, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *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, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further*, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further*, That (1) for Corps of Engineers projects, not to exceed 30 percent of the total estimated cost of any project may be allocated to anticipated future demands, and, (2) for Bureau of Reclamation projects, not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further*, That for Corps of Engineers projects, the Secretary of the Army may permit the full non-Federal contribution to be made, without interest, during construction of the project, or, with interest, over a period of not more than thirty years from the date of completion, with repayment contracts providing for recalculation of the interest rate at, five-year intervals, and for

Bureau of Reclamation projects, the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. For Corps of Engineers projects, all annual operation, maintenance, and replacement costs for municipal and industrial water supply storage under the provisions of this section shall be reimbursed from State or local interests on an annual basis. For Corps of Engineers projects, any repayment by a State or local interest shall be made with interest at a rate to be determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the reimbursement period, during the month preceding the fiscal year in which costs for the construction of the project are first incurred (or, when a recalculation is made), plus a premium of one-eighth of one percentage point for transaction costs. For Bureau of Reclamation projects, the interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 (53 Stat. 1187) relating to the same subject.

(c) Application to other laws

The provisions of this section shall not be construed to modify the provisions of section 701-1 of Title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

(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.

## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I caused a copy of the foregoing Brief for Appellants Georgia Parties to be filed with the Clerk of the Court, electronically and by Federal Express, and served via Federal Express upon:

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March 31, 2010

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief for Appellants Georgia Parties complies with the type-volume limitation specified in this Court's Order of February 25, 2010.

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 20,901 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/

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