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Reallocation of Water Storage at Federal Water Projects for Municipal and Industrial Water Supply

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Summary

Pursuant to congressional authorization, the U.S. Army Corps of Engineers (Corps) and the U.S. Bureau of Reclamation (Reclamation), the agencies with primary responsibility for federal water resources management, operate water projects for specified purposes. In the case of Corps dams and their related reservoirs, Congress generally has limited the use of such projects for municipal and industrial (M&I) water supply, but growing M&I demands have raised interest in—and concern about—changing current law and reservoir operations to give Corps facilities a greater role in M&I water storage. Reallocation of storage from a currently authorized purpose to M&I use would change the types of benefits produced by a facility and the stakeholders served, which has led to controversy over project operations at some federal projects.

The Corps and Reclamation, therefore, may be authorized to operate federal water projects for M&I use under the project-specific authorization statutes. Alternatively, the generally applicable Water Supply Act of 1958 (WSA) authorizes the Corps and Reclamation to include water storage for municipal and industrial use as a project purpose for new and existing projects. The WSA requires congressional approval if adding water supply storage would seriously affect the original project purposes or involve a major operational change for the project. However, the WSA does not define the extent to which the change in water supply storage must affect existing purposes or what constitutes a major operational change. This ambiguity has become a particular issue when severe drought raises the competition for water supply, and is an especially contentious issue in eastern riparian states where all users are affected by any drought. Because of such water shortages in some riparian basins with Corps projects, the Corps' reallocation of water storage at its discretion has been of particular interest.

This issue is at the center of ongoing litigation related to the Corps' activities in the Apalachicola-Chattahoochee-Flint River Basin (ACF). The scope of the Corps' authority under the WSA was the subject of a 2008 decision by the U.S. Court of Appeals for the D.C. Circuit (*Southeastern Federal Power Customers v. Geren*), as well as a 2011 decision by the U.S. Court of Appeals for the 11th Circuit (*In re* Tri-State Water Rights Litigation). The D.C. and 11th Circuits reached different results, and the U.S. Supreme Court declined a petition for its review of the issue in 2012. These cases each addressed a tri-state water dispute involving Lake Lanier, a Corps water project in the ACF basin, which includes parts of Alabama, Florida, and Georgia.

Using the Corps' reallocations of water storage for M&I use at Lake Lanier as an example, this report analyzes the legal and policy issues associated with reallocation under the WSA. Specifically, it examines Corps authority under the WSA, including limitations on modifications that constitute major operational changes. The report details data and examples regarding the Corps' reallocations under the WSA. It also analyzes various legal challenges of water supply storage at Lake Lanier, including courts' identification of congressionally authorized purposes, and discusses results of the litigation and options for Congress. Although the WSA provides authority to Reclamation as well, the application of the WSA to Reclamation is beyond the scope of the report.

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Introduction

Federal water projects operated by the U.S. Army Corps of Engineers (Corps) and the U.S. Bureau of Reclamation (Reclamation) may be operated for a variety of authorized purposes, which are identified by Congress at the time each project is authorized.[1] If applicable under these project-specific authorities, the Corps and Reclamation may provide storage for water supply at a given project. Additionally, the Corps and Reclamation have general authority under the Water Supply Act of 1958 (WSA) to include water storage for municipal and industrial (M&I) use as a project purpose for new and existing projects.[2] The WSA requires congressional approval of water storage if water supply storage would seriously affect the original project purposes or involve a major operational change for the project.[3] Although the WSA requires congressional approval for some modifications of federal water projects, the issue of what modifications may be made without approval has not been defined. This ambiguity has become a particular issue when severe drought raises the competition for water supply, and is an especially contentious issue in eastern riparian states where all users are affected by any drought.[4]

Increasing pressures on the quantity and quality of available water supplies are raising interest in—and concern about—changing operations at federal facilities to meet M&I demands. For example, the Corps is studying whether to reallocate storage to M&I use at dams in numerous states (e.g., Colorado, Kentucky, and Georgia), and Corps data indicate that more reallocation requests are forthcoming.[5] The tradeoffs inherent in such reallocations may garner controversy because a shift from a currently authorized purpose (e.g., hydropower, navigation, flood control) to M&I use changes the types of benefits produced by a dam and the stakeholders served.

This issue is also at the center of litigation related to the Corps' operation of Lake Lanier in the Apalachicola-Chattahoochee-Flint River Basin (ACF). Two federal appellate courts have examined questions related to water allocation at Lake Lanier, and each reached a different result. First, the issue was the subject of a 2008 decision by the U.S. Court of Appeals for the D.C. Circuit, *Southeastern Federal Power Customers v. Geren*.[6] Then, in 2011, the U.S. Court of Appeals for the 11th Circuit considered consolidated cases challenging related issues (*In re* Tri-State Water Rights Litigation).[7] Using the context of the Corps' reallocation of water in Lake

[1] The Corps and Reclamation are the primary federal agencies authorized to operate federal water projects. However, other agencies such as the Natural Resources Conservation Service of the U.S. Department of Agriculture, the Tennessee Valley Authority, and the International Boundary and Water Commission also have played roles in federal water resource development.

[2] P.L. 85-500, title III, §301 (July 3, 1958), 72 Stat. 319; P.L. 87-88, §10, (July 20, 1961), 75 Stat. 210; P.L. 99-662, title IX, §932(a), (November 17, 1986), 100 Stat. 4196.

[3] 43 U.S.C. §390b(d).

[4] The riparian doctrine of water rights, generally followed by eastern states, provides a right of reasonable use of water to any person who owns land that borders a watercourse, and each right is reduced proportionally in times of shortage. *See generally*, A. Dan Tarlock, Law of Water Rights and Resources, ch. 3 "Common Law of Riparian Rights." In contrast, western states generally follow the doctrine of prior appropriation, under which water rights are assigned to particular users under a seniority system, and in times of shortage, junior users can fill their water rights only after senior users have filled their rights. *See generally, id*. at ch. 5, "Prior Appropriation Doctrine."

[5] As part of an assessment of its water supply portfolio, the Corps identified 109 reallocation possibilities within 10 years. (Presentation titled *National Portfolio Assessment for Water Supply Reallocations*, by Ted Hillier, Corps Water Supply Business Line Manager, June 2009, *available at* http://www.corpsresults.us/docs/CleanWaterSupplyWorkshop/Ted%20Jun%2009%20workshop%20Portfolio%20%282%29.pdf.)

[6] 514 F.3d 1316 (D.C. Cir. 2008) (hereinafter *SeFPC v. Geren*).

[7] 644 F.3d 1160 (11th Cir. 2011).

Lanier, this report specifically analyzes the reallocation issues under the WSA, including the various legal challenges to the Corps' actions and outcomes of the litigation. It also analyzes data regarding the Corps' reallocations under the WSA in various projects and legislative options for Congress.[8] Although the WSA provides authority to Reclamation as well, the application of the WSA to Reclamation is beyond the scope of the report.

Use of Federal Reservoir Storage for M&I Water Supply

Although Congress has authorized federal agencies to operate projects for water supply storage in some cases, the federal role in M&I water supply development generally is constrained. Instead, Congress has recognized states and local entities as having the prominent role:

> It is hereby 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.[9]

Accordingly, the federal government's investments in water resources infrastructure have focused more heavily on other water resource missions such as flood control, navigation, irrigation, and hydropower.

When Congress authorizes a federal role, it may do so through project-specific legislation or through generally applicable statutes. Each type of authority is distinct such that the Corps' general authority is supplemental to any legal authority provided in project authorization legislation.[10] The Corps has indicated that it will examine its existing authority for a particular project as well as its general authority when evaluating requests for water supply storage at its facilities.[11]

Project-Specific Authority for M&I Water Supply

Congress generally authorizes the Corps to undertake construction of dams and other water resources infrastructure through project-specific legislation. Each dam, and the reservoir it creates, is operated in large measure to meet the project's authorized purposes and for compliance with applicable federal laws. Project authority often is included in myriad water resources legislation, for example, Rivers and Harbors acts, Flood Control acts, and Water Resources Development acts. Under these authorizations, Congress may identify authorized purposes directly. That is, for each project (or set of projects in a basin), Congress may identify the principal purposes in the language authorizing project construction or may adopt and incorporate

[8] For broader legal and policy analysis of issues of interest to Congress related to the ACF, *see* CRS Report RL34326, *Apalachicola-Chattahoochee-Flint (ACF) Drought: Federal Water Management Issues*; CRS Report RL34440, *Apalachicola-Chattahoochee-Flint Drought: Species and Ecosystem Management*.

[9] 43 U.S.C. §390b(a).

[10] *See In re* Tri-State Water Rights Litigation, 644 F.3d 1160.

[11] Office of the Chief Counsel, *Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia*, U.S. Army Corps of Engineers (June 25, 2012), *available at* http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf.

supporting agency documents identifying project purposes. This type of authorization often is referred to as project-specific authority because congressional approval is limited only to the operation of a particular project and cannot be applied to other projects. In total, 133 Corps multi-purpose reservoirs in 26 states have 11.1 million acre-feet of storage space for M&I purposes.[12]

It is notable that construction of large federal dams has slowed markedly since the 1960s in response to their high cost, their ecological and social impacts, and the availability of appropriate sites. Reservoir planning in recent decades largely has focused on balancing competing objectives in operating existing reservoirs (as opposed to planning new projects), and in some cases on managing for new objectives.[13]

General Authority for M&I Water Supply

In addition to project-specific authority for M&I water supply, Congress has enacted some generally applicable legislation that authorizes the Corps to provide water supply for M&I use at any of its facilities. Because this type of authority does not differ on a project by project basis, it often is referred to as general authority. Legislation that provides general authority may be limited to temporary reallocations, or it may provide for permanent reallocations of M&I water supply. For example, section 6 of the Flood Control Act of 1944[14] provides the Corps some general, but limited, authority to enter contracts for the sale of surplus water from Corps reservoirs for temporary M&I use.[15]

Reliance on general authority often raises questions as to whether the provision of M&I use pursuant to that authority was contemplated by Congress, particularly if the Corps' exercise of its authority would reallocate storage permanently without specific consideration by Congress. This report focuses on the Corps' implementation of permanent M&I allocations under the WSA and how courts have applied the WSA to the Corps' actions regarding M&I use, rather than on the Corps' use of temporary (or emergency) water supply authorities.[16]

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[12] U.S. Army Corps of Engineers, Department of the Army, *U.S. Army Corps of Engineers Civil Works Program Five-Year Development Plan, Fiscal Year 2011 to Fiscal Year 2015*, Washington D.C. (2011), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/5yr_devplan/fy11_5yrplan.pdf.

[13] For example, actions to protect threatened or endangered species listed under the Endangered Species Act have changed many reservoir operating plans. Conflicting objectives for operating Missouri River dams—namely, maintaining flows for navigation and changing dam release regimes to protect seasonal needs of some bird and fish species—required controversial updates to the basin's reservoir control manual. Operational changes also are part of restoration efforts for salmon runs in the Sacramento and Columbia River basins and fish in the California Bay-Delta.

[14] 58 Stat. 890; 33 U.S.C. §708.

[15] The Corps has explained, "surplus water will be classified as one of the following:

- Water stored in a Department of the Army reservoir that is not required because the authorized need for the water never developed.
- [Water for which t]he need was reduced by changes that have occurred since authorization or construction.
- Water that would be more beneficially used as municipal or industrial water than for the authorized purposes that when withdrawn, would not significantly affect authorized purposes over some specific period."

Institute of Water Resources, U.S. Army Corps of Engineers, *2011 M&I Water Supply Database*, 2012-R-02 (April 2012), *available at* http://www.iwr.usace.army.mil/docs/iwrreports/2012-R-02.pdf.

[16] The Corps' implementation of this authority has become controversial since 2010. For more information on the controversy associated with the Corps' effort to use the 1944 authority to provide and charge a fee for the temporary provision of M&I water supply, primarily for the oil and gas industry for use in well development in North Dakota, see the water supply discussion in CRS Report R42032, *The Bakken Formation: Leading Unconventional Oil Development*.

Water Supply Act of 1958 (WSA)

Congress enacted the WSA to provide federal assistance to state and local interests for the development of water supplies for municipal and industrial use. The WSA authorized the Corps to include water storage in new and existing reservoir projects to meet M&I water needs. The WSA provides 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."[17]

Additionally, the WSA states that "the cost of any construction or modification authorized under the provisions of [the above] 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.... "[18]

Although the WSA provides broad authority to the Corps to provide storage space dedicated to M&I use, Congress placed limitations on the Corps' authority to modify existing projects to include such storage. Specifically, if a modification would (1) "seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed," or (2) "involve major structural or operational changes," the modification must be approved by Congress.[19] Significantly, however, Congress did not define "seriously affect" or "major structural or operational changes" under the WSA. As a result, the Corps generally has acted at its discretion to determine whether the modification may occur without congressional approval. One example of this legal ambiguity has been raised in the context of Lake Lanier, a reservoir operated by the Corps on the Chattahoochee River in Georgia, which is discussed later in this report.

After passage of the WSA, the Corps developed a guidance manual for implementing this authority.[20] In 1977, the Corps adopted as part of its manual the following provision for guiding when a reallocation was to be considered insignificant, thus not requiring congressional approval:

> Modifications of reservoir projects to allocate all or part of the storage serving any authorized purpose from such purpose to storage serving domestic, municipal, or industrial water supply purposes are considered insignificant if the total reallocation of storage that may be made for such water supply uses in the modified project is not greater than 15 per centum of total storage capacity allocated to all authorized purposes or 50,000 acre feet, whichever is less.[21]

Earlier guidance had not included numeric criteria. This guidance did not state that reallocations above those amounts automatically were deemed significant or major reallocations. However, as discussed later in this report, the Corps issued a legal memorandum in 2012 explaining that it would rely on "actual operational changes and impacts" rather than an amount or percentage of storage when evaluating its authority under the WSA.[22]

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[17] 43 U.S.C. §390b(b).

[18] *Id*.

[19] 43 U.S.C. §390b(d).

[20] U.S. Army Corps of Engineers, *Water Supply Storage in Corps of Engineers' Projects*, EM 1165-2-105, Washington, DC, September 18, 1961.

[21] This language was added in 1977 by attaching a page 8a to the 1961 manual (U.S. Army Corps of Engineers, *Change 15 to Water Supply Storage in Corps of Engineers' Projects*, EM 1165-2-105, Washington, DC, March 1, 1977.

[22] Office of the Chief Counsel, *Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia*, U.S. Army Corps of Engineers, at 38 (June 25, 2012), *available at* http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf.

Corps Reallocations Under the WSA

A total of 134 Corps reservoirs have roughly 11 million acre-feet (AF) of storage designated for M&I water.[23] Most of the M&I water stored is authorized under project-specific authorities. However, 44 reservoirs derive all or part of their M&I storage authority from the WSA (see **Table 1** for a list of the reservoirs). The WSA is the basis for less than 640,000 AF in reallocations to M&I of Corps storage.

Table 1 shows that the Corps has reallocated more than 50,000 AF of storage space for M&I use at only one reservoir, Lake Texoma (TX/OK). The Corps has used its discretionary authority to perform four reallocations at Lake Texoma—one for 77,400 AF (later revised to 84,099 AF) and three smaller reallocations, for a total of 103,003 AF. Other Texoma reallocations have been made with specific congressional approval.[24] The 77,400 AF reallocation from hydropower to M&I use was approved in a 1985 Corps document that included a compensation arrangement for lost hydropower, which had been negotiated among Lake Texoma stakeholders.[25] The Corps found that the reallocation would neither significantly harm the lake's authorized purposes (in part because of the compensation arrangement), nor require significant structural modifications. Thus, the Corps concluded that the transfer could be performed under the WSA without congressional approval, even though it exceeded the agency-established policy limiting reallocations without congressional approval to 50,000 AF.

Table 1 shows that the Corps stayed below the 15% of usable storage criterion, except at Cowanesque Lake (PA), where reallocated water supply represents almost 30% of storage. The Cowanesque Lake case is unusual in that it represents a mix of project-specific reallocation direction from Congress and use of the Corps' discretionary authority under the WSA. The Cowanesque reallocation was mentioned in P.L. 99-88, the Supplemental Appropriations Act of 1985, and was discussed as occurring under the Corps' WSA discretionary authority in the accompanying H.Rept. 99-236.[26]

The Corps is to evaluate whether reallocation would be subject to the limitations of the WSA when studying potential reallocations. Whether the studies used to support the reallocations shown in **Table 1** sufficiently evaluated how an M&I reallocation may affect authorized purposes or whether it may constitute a major operational change has been a general concern. An

[23] Data in this paragraph is derived from multiple sources, including data provided to CRS directly by Corps staff and data in U.S. Army Corps of Engineers, *Water Supply Database 2005 Update* (Alexandria, VA: Institute for Water Resources April 2006), *available at* http://www.swd.usace.army.mil/pcx/pdf/ Water_Supply_Database_2005_Update.pdf.

[24] For example, a Lake Texoma reallocation of 300,000 AF was authorized in Section 838 of WRDA 1986. P.L. 99-662.

[25] Originally this reallocation was for 77,400 AF, but a later updated sediment study resulted in the reallocation being increased to 84,099 AF (U.S. Army Corps of Engineers, *Letter Report Dennison Dam (Lake Texoma) North Texas Municipal Water District*, September 6, 1985). Select Members of Congress from Oklahoma and Texas were consulted and informed about the reallocation.

[26] H.Rept. 99-236 stated: "The modification of the existing project for water supply is authorized by the Flood Control Act of 1958 and would be accomplished under the discretionary authority of the chief of Engineers.... The proposed modification for water supply would enable two electric utility companies to meet their consumptive use make-up needs during drought conditions." The reallocation was made from flood control to M&I; the reallocation supports downstream flows for cooling water for electric utilities during drought. Few releases have been made for this industrial use. The reallocation was accompanied by the raising of the reservoir pool; the cost of the raising, the reallocated storage space, related operations and maintenance, and relocation of and improvements to recreation facilities were assigned to the M&I purpose.

evaluation of the sufficiency of Corps reallocation analyses is beyond the scope of this CRS report.

Table 1. Corps Reservoirs with M&I Water Supply Reallocated Using WSA Authority

Reservoir Name and State	Usable Reservoir Storage (AF)	Supply Reallocated Under WSA (AF)	% of Storage Reallocated Under WSA
Denison Dam, L. Texoma, OK & TX	4,012,113	103,003	2.57
Melvern Lake, KS	337,000	50,000	14.84
Stockton Lake, MO	1,649,000	50,000	3.03
Tuttle Creek Lake, KS	2,001,000	50,000	2.50
Waco Lake, TX	733,536	47,526	6.48
Pomona Lake, KS	240,331	32,500	13.52
Hartwell, GA & SC	899,400	26,574	2.95
Cowanesque, PA	86,650	25,600	29.54
Tenkiller Ferry Lake, OK	1,458,000	25,472	1.75
John H. Kerr, VA	2,308,400	21,115	0.91
Beaver Lake, AR	1,224,700	20,995	1.71
Allatoona, GA	230,593	19,511	8.46
J. Percy Priest Dam & Reservoir, TN	124,000	17,311	13.96
Wister Lake, OK	417,600	13,819	3.31
Kanopolis Lake, KS	418,752	12,500	2.99
Marion, OK	141,114	12,500	8.86
Greers Ferry Lake, AR	1,650,500	11,556	0.70
Mosquito Creek Lake, OH	76,300	11,000	14.42
Youghiogheny River Lake, PA	151,000	10,000	6.62
Elk City, OK	248,398	10,000	4.03
John Redmond, OK	574,918	10,000	1.74
Council Grove Lake, OK	112,882	8,000	7.09
Center Hill Lake, TN	492,000	7,212	1.47
Rathbun Lake, IA	528,000	6,680	1.27
Curwensville, PA	111,998	5,360	4.79
Enid, MS	602,400	4,500	0.75
Green River Lake, KY	53,825	3,460	6.43
John W. Flannagan, VA	85,000	3,360	3.95
J Strom Thurmond, GA & SC	1,045,000	3,327	0.32
Grayson Lake, KY	119,000	2,508	2.11
Dale Hollow Lake, TN & KY	496,000	2,211	0.45
Carr Creek Lake, KY	34,981	2,052	5.87
Blakey Mt. Dam, Lake Ouachita, AR	617,400	1,575	0.26

Reservoir Name and State	Usable Reservoir Storage (AF)	Supply Reallocated Under WSA (AF)	% of Storage Reallocated Under WSA
Blue Mountain Lake, AR	233,260	1,550	0.66
Norfork Lake, AR	1,438,000	900	0.06
Bull Shoals Lake, AR	3,363,000	880	0.03
Richard B. Russell, GA & SC	266,806	872	0.33
Carters, GA	230,593	818	0.35
Cave Run Lake, KY	47,000	802	1.71
Laurel River Lake, KY	185,000	519	0.28
Summersville Lake, WV	57,900	468	0.81
Rough River Lake, KY	90,210	402	0.45
Harry S Truman Dam & Res., MO	4,959,000	283	0.01
Nimrod Lake, AR	307,000	143	0.05
Lake Lanier, GA	NA	NA	NA

Source: CRS, modified from Corps data provided on December 17, 2009.

Notes: NA = not available; Lake Cumberland (KY) is not included because it currently does not have authorized M&I water supply storage under the WSA.

CRS included Lake Lanier in **Table 1**, but the quantities associated with supply reallocated under the WSA currently are not available. Lake Cumberland (KY) is not included, although M&I withdrawals occur there, because these withdrawals have not been authorized.[27] Enforcement action to stop the withdrawals at Lake Cumberland has not been taken. How many other unauthorized withdrawals and operational actions that support M&I uses occur at other Corps facilities is largely unknown as many Corps dams are decades old, often predating the WSA, and their operations have evolved incrementally over time.

Judicial and Administrative Opinions Related to the Corps' Reallocation of Water Storage

The question of when congressional authorization is required for modifications made under the WSA appears not to have been litigated prior to the dispute raised regarding Lake Lanier. However, a myriad of litigation dating to 1990 has resulted in two federal appellate decisions addressing the Corps' authority to reallocate storage at Lake Lanier under project-specific legislation and general legislation.

Congress first authorized construction of federal facilities for water resources development in the ACF in the Rivers and Harbors Acts of 1945 and 1946.[28] These project-specific authorities recognized various purposes, including navigation, hydropower generation, and flood control. Subsequent laws provided general authority (e.g., the WSA, Fish and Wildlife Coordination Act

[27] Telephone Conversation between CRS and Corps staff (December 17, 2009).

[28] Rivers and Harbors Act of 1945, 59 Stat. 10, 17 (March 2, 1945); Rivers and Harbors Act of 1946, 60 Stat. 634, 635 (July 24, 1946).

of 1958,[29] and Endangered Species Act[30]) and expanded what the Corps considers when making operating decisions. As a result, ACF reservoirs now operate with various other purposes, including fish and wildlife protection, water quality protection, and recreation, in addition to the original authorized purposes. Lake Lanier also supplies water to the Atlanta metropolitan area, but the degree to which the Corps may operate the reservoirs for water supply is disputed.

In the 1970s and 1980s, Georgia officials became increasingly concerned with obtaining water supply for the Atlanta area's growing needs. In 1989, the Corps agreed to provide storage space for roughly twice as much M&I water in Lake Lanier by reallocating space from hydropower to water supply, citing its authority under the WSA, which led to the initial lawsuit in the ACF litigation challenging the impact such reallocation would have on the lower basin.[31] As discussed in detail below, several more cases related to the Corps' actions in the ACF have been filed in various federal district courts.[32]

One of the recurring issues in the ACF litigation is the determination of the authorized purposes of Lake Lanier.[33] Generally, each of the parties recognizes at least three authorized uses under project-specific authorities: flood control, hydropower, and navigation. Georgia has maintained that M&I use also was authorized.[34] Courts have disagreed on whether M&I water supply was an authorized purpose and consequently whether reallocation requires congressional approval.[35]

Historical Overview of the ACF Litigation

In 1990, Alabama and Florida filed suit (the Alabama case) against the Corps to stop the larger withdrawals it had approved for Georgia, based in part on the impact they would have on downstream users.[36] The suit alleged that the Corps exceeded its authority under the WSA by reallocating storage in the ACF reservoirs. In the 1990s, the parties attempted to negotiate a resolution. In 1992, Alabama, Florida, Georgia, and the Corps agreed to a Memorandum of

[29] *See* Act of March 10, 1934, 48 Stat. 401, as amended by P.L. 85-624, 72 Stat. 563.

[30] *See* P.L. 93-205, 87 Stat. 884.

[31] *See* Alabama v. U.S. Corps of Engineers, No. CV-90-H-01331-E (N.D. Ala., Eastern Division, filed June 29, 1990).

[32]Alabama v. U.S. Corps of Engineers, No. CV-90-H-01331-E (N.D. Ala., Eastern Division, filed June 29, 1990) (the Alabama case); Southeastern Federal Power Customers, Inc. v. U.S. Army Corps of Engineers, No. 1:OOCV02975 (D.D.C., filed on December 12, 2000) (the D.C. case); Georgia v. U.S. Army Corps of Engineers, No. CV 2:01-CV-26-RWS (N.D. Ga., Gainesville Division, filed on February 7, 2001) (the Georgia I case); Georgia v. U.S. Army Corps of Engineers, No. 06-CV-1473 (N.D. Ga., Atlanta Division, filed June 20, 2006) (the Georgia II case); Florida v. U.S. Fish and Wildlife Service, No. 06-CV-410 (N.D. Fla., filed September 6, 2006) (the Florida case); City of Columbus v. U.S. Army Corps of Engineers, No. 07-CV-125 (M.D. Ga., Columbus Division, filed August 13, 2007) (the City of Columbus case); City of Apalachicola v. U.S. Army Corps of Engineers, No. 4:08-CV-23-RH/WCS (N.D. Fla., filed January 15, 2008) (the City of Apalachicola case).

[33] The parties have cited various sources when alleging what purposes are authorized. See Rivers and Harbors Act of 1945; H.Doc. 342; Army Corps of Engineers, *Authorized and Operating Purposes of Corps of Engineers Reservoirs* (1992, revised 1994); 33 C.F.R. §222.5. One scholar provides a summary of the confusion, noting that the Corps has, at various times, offered between three and six authorized purposes. *See* George William Sherk, "*The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?,*" 12 *N.Y.U. ENVTL. L.J.* 764, 771 (2005).

[34] Georgia has relied on arguments that the legislative history indicates an understanding that water supply would be an incidental benefit of the project. *See In re* Tri-State Water Rights Litigation, 639 F.Supp.2d 1308 (M.D. Fla. 2009).

[35] *Compare SeFPC v. Geren*, 514 F.3d at 1323-25 (holding congressional authorization necessary to provide water supply to municipalities near the reservoir) *with In re* Tri-State Water Rights Litigation, 644 F.3d 1160 (finding that Congress had authorized use of Lake Lanier for water supply).

[36] Alabama v. U.S. Corps of Engineers, No. CV-90-H-01331-E (N.D. Ala., Eastern Division, filed June 29, 1990). Georgia joined the suit later as a defendant.

Agreement (MOA), which authorized a study of water supply issues. In 1997, the parties entered the Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact), which replaced the MOA and committed the parties to negotiate a resolution to the dispute among themselves.[37] A final agreement was never reached, despite several extensions of the original termination date, and the ACF Compact ultimately terminated in 2003.

In 2000, while the Alabama case was suspended pending compact negotiations, the Southeastern Federal Power Customers (SeFPC) sued the Corps (the D.C. case), alleging that the Corps' increased withdrawals exceeded the Corps' authority under the WSA.[38] In January 2003, the parties in the D.C. case, including Georgia and the Corps, reached a settlement agreement and requested the court's approval. Because the parties to the D.C. case attempted to implement a settlement agreement that would affect the use of the water at issue in the Alabama case, Alabama and Florida revived the Alabama case to challenge the settlement agreement. Alabama and Florida also intervened in the D.C. case to oppose the approval of the agreement as a violation of the suspension of proceedings in the Alabama case. In October 2003, the federal district court in the Alabama case granted Alabama and Florida's motion for a preliminary injunction, enjoining the Corps and Georgia from implementing the agreement in the D.C. case.[39] In 2004, the district court in the D.C. case approved the settlement agreement, but required that the injunction entered in the Alabama case be dissolved before the agreement could be implemented.[40] In 2005, the 11th Circuit Court of Appeals vacated the Alabama district court's injunction order, finding that Alabama and Florida did not establish an imminent threat of irreparable harm or a substantial likelihood of prevailing on the merits of the case.[41]

While the states were engaged in the Alabama and D.C. cases, the Governor of Georgia made a water supply request in 2000 asking the Corps to commit to making increased releases of water from the dam that forms Lake Lanier until the year 2030 in order to assure reliable M&I water supply to the Atlanta region. In 2001, after nine months without a reply to the request, Georgia sued the Corps to increase its water supply (the Georgia I case).[42] While the Alabama and D.C. cases were being litigated, Florida and SeFPC filed motions to intervene in the Georgia I case, but the motions were denied by the district court.[43] After this denial, the Corps denied Georgia's request, claiming that it lacked the "legal authority to grant Georgia's request without additional legislative authority, because the request would involve substantial effects on project purposes and major operational changes."[44] On appeal, the Court of Appeals for the 11th Circuit overturned

[37] P.L. 105-104 (1997). Through the ACF Compact, the parties intended "to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting the water quality, ecology and biodiversity of the ACF." *Id.* In other words, the Compact was an agreement to agree on allocations at some future date.

[38] Southeastern Federal Power Customers, Inc. v. U.S. Army Corps of Engineers, No. 1:OOCV02975 (D.D.C., filed on December 12, 2000).

[39] *See* Alabama v. United States Army Corps of Engineers, No. CV 90-BE-1332, Preliminary Injunction (N.D. Ala., entered October 15, 2003).

[40] Southeastern Federal Power Customers v. Caldera, 301 F.Supp.2d 26, 35 (D.D.C. 2004). Alabama and Florida appealed the court's decision. The Court of Appeals for the D.C. Circuit dismissed the appeal for lack of jurisdiction, noting that because the district court's decision was conditional, it lacked the finality required to proceed with an appeal. *See* Southeastern Federal Power Customers, Inc. v. Harvey, 400 F.3d 1, 4 (D.C. Cir. 2005).

[41] Alabama v. United States Army Corps of Engineers, 424 F.3d 1117, 1133 (11th Cir. 2005).

[42] Georgia v. U.S. Army Corps of Engineers, No. CV 2:01-CV-26-RWS (N.D. Ga., Gainesville Division, filed on February 7, 2001).

[43] *See* Georgia v. United States Army Corps of Engineers, 302 F.3d 1242, 1247-1250 (11th Cir. 2002).

[44] *See id*. at 1249.

the district court's decision in the Georgia I case.[45] The court permitted Florida and SeFPC to intervene and returned the case to the district court for further adjudication.[46] The district court, noting the similarity of the parties and the subject matter, found the case to be parallel to the Alabama case.[47] The court suspended the proceedings in the Georgia I case, pending resolution of the Alabama case.

In addition to these cases, four additional lawsuits were filed with similar claims since 2006.[48] As the various courts each considered the earlier cases and more cases continued to be filed, the litigation became very complex and resulted in all pending cases relating to the ACF dispute eventually being consolidated.[49] However, the D.C. case initially was excluded from this consolidation of proceedings because it had already reached the appellate court, whereas the cases that were consolidated remained in various federal district courts.[50]

The D.C. Circuit Decision Regarding Corps' Authority Under WSA

The D.C. case involved a dispute brought by Southeastern Federal Power Customers (SeFPC), a non-profit corporate consortium of rural electric cooperatives and municipal electric systems.[51] SeFPC alleged that the Corps' water storage contracts that provided for increased withdrawals from Lake Lanier exceeded the Corps' authority under the Water Supply Act of 1958. The increased withdrawals, it argued, diminished the flow-through by which hydropower is generated. SeFPC claimed that its members were paying for hydropower at prices disproportionate to their residual share of water stored in Lake Lanier devoted to power generation.[52]

Initially, the parties to the D.C. case attempted to resolve the dispute through mediation and negotiated a settlement agreement. The settlement agreement, entered by Georgia and the Corps, provided for two 10-year contracts that allocated storage space to Georgia for municipal use. The agreement required the Corps to allocate between 210,858 and 240,858 acre-feet of water storage to municipal and industrial uses for a period of 10 years, and allowed the action to be renewed once for another 10-year period.[53] These 10-year leases would "become permanent if Congress approves the change in use or a final court judgment holds that such approval is not necessary, and the Corps commits to recommending that Congress formally make the storage covered by the Interim Contracts available on a permanent basis."[54]

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[45] *Id*.

[46] *Id*. at 1252, 1258.

[47] Georgia v. United States Army Corps of Engineers, 223 F.R.D. 691, 696-699 (N.D. Ga. 2004).

[48] *Georgia v. U.S. Army Corps of Engineers*, No. 06-CV-1473 (N.D. Ga., Atlanta Division, filed June 20, 2006) (the Georgia II case); *Florida v. U.S. Fish and Wildlife Service*, No. 06-CV-410 (N.D. Fla., filed September 6, 2006) (the Florida case); *City of Apalachicola v. U.S. Army Corps of Engineers*, No. 4:08-CV-23-RH/WCS (N.D. Fla., filed January 15, 2008) (the City of Apalachicola case); *City of Columbus v. U.S. Army Corps of Engineers*, No. 07-CV-125 (M.D. Ga., Columbus Division, filed August 13, 2007)(the City of Columbus case).

[49] *See In re* Tri State Water Rights Litigation, 481 F.Supp.2d 1351, 1352 (Judicial Panel on Multidistrict Litigation 2007).

[50] *In re* Tri-State Water Rights Litigation, 481 F.Supp.2d 1351, 1352 (Judicial Panel on Multidistrict Litigation 2007).

[51] *See* Southeastern Federal Power Customers, Inc. v. U.S. Army Corps of Engineers, No. 1:OOCV02975 (D.D.C., filed on December 12, 2000).

[52] *See* Southeastern Federal Power Customers, Inc. v. Caldera, 301 F.Supp.2d 26, 30 (D.D.C. 2004). The Corps and Georgia were both named defendants in this suit.

[53] *SeFPC v. Geren*, 514 F.3d at 1319.

[54] *Id.* at 1320 (internal quotations and citations omitted).

In addition to agreeing to the terms of the settlement agreement that provided that the reallocation would require either congressional approval or judicial recognition that congressional approval is not necessary, the Corps acknowledged on at least two other occasions that the reallocation from hydropower to water supply may require Congressional approval. In 1989, the Corps recommended to Congress "that 207,000 acre-feet of storage in Lake Lanier be reallocated from hydropower to local consumption, noting that this might require Congressional approval."[55] In 2002, the Corps denied Georgia's request for reallocation of water because the "request involves substantial withdrawals from Lake Lanier and accommodating it would affect authorized project purposes," leading the Corps to conclude "that it cannot be accommodated without additional Congressional authorization."[56]

Citing these examples of the Corps' recognition of the limits on its discretion under the WSA, the D.C. Circuit reversed the district court's approval of the settlement agreement reached by the parties in the D.C. case.[57] The court noted that the requests that the Corps cited as possibly beyond its authority constituted approximately 20% and 35% of Lake Lanier's total storage, respectively.[58] The court explained that it was "unreasonable" to believe that Congress denied the Corps authority to make major modifications without congressional approval but intended to allow the Corps to make such changes for limited time frames that "could theoretically span an infinite period" or to make such changes gradually over time without approval.[59] According to the court, the terms of the agreement would allow the reallocation of "more than twenty-two percent (22%) of the total storage space in Lake Lanier."[60] The court also noted that the settlement agreement could not be upheld if it violated a statute.[61]

The D.C. Circuit held that "on its face, then, reallocating more than twenty-two percent (22%, approximately 241,000 acre feet) of Lake Lanier's storage capacity to local consumption uses constitutes the type of major operational change referenced by the WSA" and "the reallocation's limitation to a 'temporary' period of twenty years does not change this fact."[62] Because Congress did not authorize the change, the court ruled that the agreement could not be enforced.[63] The court rejected the argument that reallocation does not constitute a major operational change if it is done gradually, noting that even the nine percent (9%) change from the status quo was significant and "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval."[64] According to the court, "the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero, which was the amount allocated to storage space for water supply when the lake began operation."[65]

[55] *Id.* at 1318-19.

[56] *Id.* at 1319 (internal quotations omitted).

[57] *Id.* at 1324-25.

[58] *Id.* at 1323.

[59] *Id.*

[60] *Id.* at 1319-20.

[61] *Id.* at 1321.

[62] *Id.* at 1324 (internal citation omitted).

[63] *Id.* at 1325.

[64] *Id.* at 1324.

[65] *Id.*

The 11th Circuit's Decision in the Consolidated Cases Regarding Corps' Authority

In March 2007, the Alabama, Georgia I, Georgia II, and Florida cases were consolidated and transferred to the federal district court for the Middle District of Florida "to serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation."[66] The City of Columbus and City of Apalachicola cases were included in this litigation after they were filed. After the D.C. Circuit remanded the case to the district court, it also was included in the consolidated litigation.

In the initial decision for the consolidated cases, the district court echoed the D.C. Circuit's decision, finding that water supply was not an authorized purpose and that the Corps' actions constituted a major operational change.[67] It also considered whether the Corps' actions seriously affected project purposes in violation of the WSA, criticizing the Corps for using "the wrong baseline" and appearing to measure its actions in light of "incremental increases."[68] The district court held that the legal measure must be "the cumulative effect of all of the changes in operations at Lake Lanier"[69] and ordered the Corps to seek additional authorization from Congress or otherwise resolve the dispute within three years.[70] However, on appeal, the U.S. Court of Appeals for the 11th Circuit overturned the district court's decision in the consolidated cases.[71]

Water Supply as an Authorized Purpose of Lake Lanier

The 11th Circuit reviewed various administrative reports submitted to and adopted by Congress in the course of its authorization of Lake Lanier to determine the Corps' authority under project-specific authorizations. The Corps' initial report (known as the Park Report), which analyzed potential sites for facilities in the ACF, noted that the planned reservoir likely would provide increased water supply to the Atlanta region over time.[72] A second Corps report (known as the Newman Report) amending the project plans also recognized that the project would provide water supply to Atlanta. The court explained that like the first report, "only three value-calculated benefits were listed: power, navigation, and flood control. It is probable that Newman, like Park, deemed there to be no immediate benefit from water supply, rendering any benefit purely prospective and any valuation of this benefit entirely speculative."[73] Both the Park and Newman Reports were adopted in full by Congress in its authorizing legislation for Lake Lanier.[74]

Several other reports were relevant to the 11th Circuit's decision finding that water supply was an authorized purpose for Lake Lanier. The Corps' Definite Project Report, which detailed plans for the operation of Buford Dam and Lake Lanier, "referred to flood control, hydroelectric power,

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[66] *In re* Tri-State Water Rights Litigation, 481 F.Supp.2d 1351, 1352 (Judicial Panel on Multidistrict Litigation 2007).

[67] *In re* Tri-State Water Rights Litigation, 639 F.Supp.2d 1308 (M.D. Fla. 2009), *overruled by In re* Tri-State Water Rights Litigation, 644 F.3d 1160.

[68] *Id*. at 1352-53.

[69] *Id*.

[70] *Id*. at 1355.

[71] *In re* Tri-State Water Rights Litigation, 644 F.3d 1160.

[72] *Id*. at 1167.

[73] *Id*. at 1168 (internal citation omitted).

[74] *See id*. at 1167-68. The reports were adopted in the Rivers and Harbors Acts of 1945 and 1946, respectively. *See* P.L. 79-14, 59 Stat. 10 (1945); P.L. 79-525, 60 Stat. 634 (1946).

navigation, and an increased water supply for Atlanta as 'the primary purposes of the Buford Project'" and reiterated these uses throughout the report, also noting that water supply was treated separately because of the speculative nature of the estimation of its benefits.[75] The court also examined the regulation manual (the Buford Manual) for the project which provides descriptions and operations of the project, including quantified releases to maintain a minimum flow near Atlanta, and noted that the manual "has not been updated and remains in effect today."[76] Over time, the localities increased water use, but remained below the minimum flow authorized in the Buford Manual.[77] As Congress and the Corps considered options to address Atlanta's growing water supply needs, the Corps prepared a draft report (known as the PAC Report) that included a draft updated manual to replace the Buford Manual.[78] Relying on the Corps' authority under the WSA, the PAC Report recommended reallocation of storage space in Lake Lanier for water supply, but was never finalized "due to resistance and the initiation of the lawsuit by the State of Alabama."[79]

Lack of Final Agency Action in Alabama, D.C., and Apalachicola Cases

Based on these findings, the 11th Circuit determined that the challenges to the Corps' actions in some of the consolidated cases (Alabama, D.C., and Apalachicola) were not ripe for judicial review under the Administrative Procedure Act because the Corps had not taken final agency action.[80] In other words, before the court can review the agency's actions, there must be a "final agency action for which there is no other adequate remedy."[81] An action is final if (1) it "marks the 'consummation' of the agency's decisionmaking process" and (2) it is "one by which rights or obligations have been determined, or from which legal consequences will flow."[82]

The court found that the Corps was unable to finalize its decision making process despite its legitimate efforts to do so and that the temporary nature of its allocations did not qualify as actions from which rights were determined or consequences would result.[83] Rejecting arguments that the Corps' continual use of temporary agreements and adjustments indicated an intent that the Corps was evading judicial review, the 11th Circuit recognized that "the Corps has been attempting to reach a final decision on water storage allocations … since at least the mid-1980s, when it became aware that a permanent determination of water supply needs was vital."[84] The court noted that the parties' commitments under the 1992 MOA and the ACF Compact required the Corps to withdraw the PAC Report and refrain from further action outside of the agreements.[85] The court also recognized that the various steps in the ongoing litigation interfered with the Corps' ability to take final agency action.[86] Accordingly, the 11th Circuit vacated the

[75] *In re* Tri-State Water Rights Litigation, 644 F.3d at 1169.

[76] *Id*. at 1171.

[77] *See id*.

[78] *Id*. at 1173.

[79] *Id*.

[80] *Id.* at 1181.

[81] 5 U.S.C. §704.

[82] Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted).

[83] *See In re* Tri-State Water Rights Litigation, 644 F.3d at 1184-85.

[84] *Id*. at 1182.

[85] *Id*. at 1182-83 ("Thus, from 1992 to 2003 the Corps was operating under agreements signed by all three states that denied it the ability to make any permanent water supply allocations.").

[86] For example, the Corps notified the parties of its intent to update the water control plans and manuals in 2005 but "abandoned its plans" following opposition from the parties waiting for judicial resolution of claims in the Alabama

district court's order with respect to the temporary water withdrawals challenged in the Alabama, D.C. and Apalachicola cases and remanded that issue to the Corps, meaning that until the Corps makes final determinations on its current water storage policy, those cases cannot be considered in court.[87]

Corps' Authority to Accommodate Increased Releases for M&I Use (Georgia I)

The 11th Circuit concluded that the district court did have jurisdiction over the Georgia case because the Corps' rejection of Georgia's 2000 request for increased releases from Lake Lanier constituted a final agency action. The 11th Circuit emphasized that the Corps erred when it rejected Georgia's request based on the agency's finding that water supply was not an authorized purpose.[88]

Rejecting arguments that water supply was contemplated only as "a mere incidental benefit," the court explained that the study and authorization of the project anticipated growing water supply requirements for Atlanta.[89] It noted that the authorization's reference to water supply as an incidental benefit related to where the then-proposed project would be placed, not its status as a project purpose. The Newman Report stated that if the 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."[90] According to the 11th Circuit, "this single reference to water supply as an 'incidental benefit' was an explanation for why the dam would be built above Atlanta and was not meant to confer a subordinate status."[91]

The court also explained that the report's discussion of water supply in a list of *benefits* that would not harm *other purposes* did not mean that water supply was not also such a purpose, noting that flood control was listed as another such benefit.[92] According to the court, the Corps' discussion "cannot be construed to mean that water supply was intended to be a subordinate use because flood control is referred to in the same manner in the sentence" and all parties conceded that flood control was an authorized purpose.[93] Similarly, responding to arguments that the lack of storage allocated for water supply indicated that such storage was not an authorized purpose, the court explained that "no storage allocation was specified for navigation in the Newman Report even though navigation is universally accepted as an authorized purpose…."[94]

In response to arguments that M&I users did not contribute under the WSA's requirement that costs be shared among authorized uses, the court explained that requesting Georgia to contribute "would not have made sense. It would have meant asking the state to pay for a service that the

case. *Id*. at 1183. In another example, the Corps initiated updating its manuals following the D.C. Circuit decision and issued a memorandum in 2009 clarifying its authority. The district court rejected the 2009 memorandum as evidence of the administrative process. *See id*.

[87] *Id*. at 1185.

[88] *Id*. at 1187-88 (noting that "the original authorizing legislation expressly contemplated a very substantial increase in the operation of the Buford Project to satisfy the water supply needs of the Atlanta area").

[89] *Id*. at 1188-89.

[90] *Id*. at 1189.

[91] *Id*.

[92] *Id*. at 1190.

[93] *Id*.

[94] *Id*. at 1191.

Corps could provide essentially without cost."[95] Because Georgia's use of water supply was approximately the same as the water it was using before the project was built, the court found that it was "not likely that the Corps or Congress would have thought it appropriate to charge Atlanta for construction costs of a project that merely replaced its currently available water supply."[96] The speculative nature of valuing the benefits from water supply might have led to "misleading results," which, according to the court, further explained why the lack of valuation of water supply should not be interpreted to mean that it was not an authorized purpose.[97]

Although the Corps claimed its interpretation of its authority for the project was entitled to deference from the court, the 11th Circuit declined under what is known as the *Chevron* doctrine, explaining that such deference would "ignore the plain and express will of Congress, especially where, as here, the Corps' interpretation has not been consistent."[98] *Chevron* analysis requires a court reviewing an agency's interpretation of a statute to first determine whether Congress has clearly expressed its intent regarding the question at issue.[99] If so, the court must give effect to that intent. If Congress has not addressed the question, the court must determine if "the agency's answer is based on a permissible construction of the statute."[100] The 11th Circuit explained that such analysis "fails at both steps because Congress made clear its intention that water supply was an authorized purpose of the Buford Project" making "the Corps' contrary interpretation … erroneous."[101] The court noted that the Corps' had not applied its interpretation consistently, as it had identified water supply as an authorized purpose in 1949, 1987, and 1994, then reversed its interpretation in 2002.[102] Additionally, the court recognized that "the Corps' views regarding its authority to allocate storage in Lake Lanier to water supply are evolving and that it has not come to a final, determinative decision regarding the issues underlying this authority."[103] Specifically, the Corps continually had revised its calculations of storage allocations and the court suggested that the varying projections may affect the Corps' determination of it authority.[104]

Accordingly, the court remanded the issue to the Corps to "reexamine [Georgia's] request in light of its combined authorization under the [Newman Report adopted in the Rivers and Harbors Act] and WSA."[105] The 11th Circuit instructed the Corps to consider the appropriate balance under its project specific authority for Lake Lanier that would be required to assure Atlanta's water supply while minimizing the impact on power.[106] After identifying its authority under specific authorizing legislation, the Corps must determine what additional authority it may have under WSA. The court identified a number of unanswered questions that should be addressed by the Corps, including (1) "a firm calculation" of water supply available to Atlanta as a byproduct of hydropower generation; (2) the impact of increasing water supply on hydropower; (3) the appropriate standard to identify "major operational changes"; or (4) whether to account for return

[95] *Id*.

[96] *Id*.

[97] *Id*. at 1191-92.

[98] *Id*. at 1193.

[99] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

[100] *Id*.

[101] *In re* Tri-State Water Rights Litigation, 644 F.3d at 1193.

[102] *Id.* at 1194.

[103] *Id*. at 1196.

[104] *Id*.

[105] *Id*. at 1197.

[106] *Id*. at 1200.

flows.[107] The court indicated that the Corps' analysis of its water supply authority should be defined regardless of whether the outcome is sufficient to grant Georgia's request in this instance, in order to provide future guidance for the parties.

Effect of D.C. Circuit Decision on Consolidated Cases

Although the D.C. Circuit had addressed some of the questions presented in the consolidated cases already, other courts are not necessarily bound by the decision. Generally, the consolidated cases, being litigated in a different jurisdiction, are not controlled by decisions in the D.C. Circuit and therefore may interpret the same issues differently.[108] However, courts in different jurisdictions may still be bound by decisions in other jurisdictions under a legal principle known as collateral estoppel. The principle of collateral estoppel prevents parties from raising issues that have already been resolved in previous legal proceedings in later cases under certain circumstances.[109] Generally, for collateral estoppel to apply, there must be an identical issue that was actually litigated as a necessary part of a prior proceeding, and the parties must have had the opportunity to litigate the issue fully in the prior proceeding.[110] If a court determines that these elements have been met, the ruling from the prior proceeding stands.

The 11th Circuit clarified the preclusive effect of the D.C. Circuit decision and affirmed that the WSA applied to the interim reallocations of storage challenged in that case.[111] However, the 11th Circuit expressly declined to address whether the D.C. Circuit's decision that a reallocation of 22% was improper under the WSA would be binding in the 11th Circuit. After noting that the D.C. Circuit's decision only considered authority under the WSA, the 11th Circuit emphasized that authority to provide storage for water supply under the project-specific authorities is separate from authority to do so under the WSA.[112] Therefore, according to the court, the water supply authorized under the project specific authorities "would not count against the [D.C. Circuit's] 22% limit" and the analysis may change entirely.[113] Furthermore, the 11th Circuit explained that the issue of measuring operational change was not precluded "because the parties [and the D.C. Circuit] merely assumed that percent reallocation was the appropriate measure" and was not actually litigated.[114] Therefore, the Corps may choose to apply a different measure in its evaluation.[115]

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[107] *Id*. at 1201.

[108] The federal court system is three-tiered: the trial court (federal district courts), the appellate court (federal circuit courts), and the U.S. Supreme Court. Under this system, district courts are bound only by decisions of the circuit court under which the district court sits and decisions of the U.S. Supreme Court. Circuit courts are bound only by their own prior decisions and decisions of the U.S. Supreme Court. The circuit courts may, but are not required to, follow decisions of other circuit courts when considering similar issues.

[109] *See* Allen v. McCurry, 449 U.S. 90, 94 (1980); I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

[110] *In re* Held, 734 F.2d 628, 629 (11th Cir. 1984). *See also* Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998); Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000).

[111] *In re* Tri-State Water Rights Litigation, 644 F.3d at 1202.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 1203-04.

[115] Similarly, the court noted that the Corps was not bound to use conservation storage as its reference for comparing modification in use. *Id*. at 1204.

Corps' Legal Authority to Provide M&I Storage at Lake Lanier

Recognizing the exhaustive history of the dispute at issue in the consolidated cases, the 11th Circuit instructed the Corps to complete its analysis and issue a final judgment on its authority under project-specific legislation and the WSA within one year.[116] The Corps issued a legal opinion in June 2012, concluding that the agency "has the legal authority to exercise its discretion" to accommodate fully Georgia's 2000 request for increased withdrawals.[117] However, the Corps noted that despite finding that it has the legal authority to accommodate withdrawals, it "has made no final decision to continue current operations" and will not do so until the conclusion of the updating process for the operations manual.[118] Notably, the Corps announced plans in October 2012 to proceed with the updating process.[119]

The Corps' opinion claimed authority to accommodate Georgia's request for downstream withdrawals under its project-specific authorities for Lake Lanier.[120] It explained that Congress delegated authority to balance the hydropower and water supply purposes of the project and expected increased releases over time. According to the Corps, Georgia's request for increased water supply would reduce hydropower generation by less than one percent.[121] Additionally, the Corps claimed authority to grant Georgia's request for direct withdrawals from Lake Lanier under relocation agreements reached with users during project construction and general authorities, including the WSA.[122] The Corps interpreted the WSA's prohibition on modifications that would involve major operational changes or significantly affect project purposes "to mean changes and effects that fundamentally depart from Congressional expectations for a project."[123] The Corps anticipated that even after accommodating Georgia's request, there would be "sufficient storage capacity" to continue the operation of ACF projects in accordance with congressional expectations, meaning that the WSA would not be violated by Georgia's request.[124]

The Corps also identified its process for evaluating requests for water supply under the WSA. First, it must examine the request "in its totality" and "in light of the Congressional intent for the project."[125] That is, the Corps considers whether the reservoir has capacity to accommodate the withdrawals and any associated return flows contemplated by the request and whether such operation would fit with Congressional expectations. If the request is feasible and authorized

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[116] *Id*. at 1205.

[117] Office of the Chief Counsel, *Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia,* U.S. Army Corps of Engineers (June 25, 2012), *available at* http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf. The opinion addressed only the Corps' authority to accommodate Georgia's request, and explicitly noted that any decision to exercise that authority was beyond the scope of the June 2012 opinion.

[118] *Id*. at 43-44.

[119] *Corps to Reopen Public Scoping for Updating Water Control Plans and Manuals for the Apalachicola-Chattahoochee-Flint River Basin Water Control Manual,* U.S. Army Corps of Engineers (October 12, 2012), *available at* http://www.sam.usace.army.mil/DistrictHomePage/Lastest%20News/12-29%20USACE%20rescoping.pdf.

[120] Office of the Chief Counsel, *Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia,* at 3, U.S. Army Corps of Engineers (June 25, 2012), *available at* http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf.

[121] *Id*.

[122] *Id*. at 4.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 36.

under the WSA, the Corps then identifies the quantity and terms for water storage contracts.[126] It noted that as a general practice, it contracts for "an amount of storage that is expected to provide, during the critical period (i.e., during the worst drought on record), a yield equal to the water supply withdrawals that are requested."[127] Also as a general practice of accounting for flows, the Corps credits any flows into the reservoir, whether inflows or return flows, to be applied to all users' storage accounts proportionately.[128] The Corps explained that regardless of the calculation method, it would not rely on the amount or percent of storage contracted under the WSA when determining the impact a request would have on the project.[129] The Corps' focus, instead, would be directed to the "actual operational changes and impacts to project purposes that would result from accommodating [requests]" in order to determine whether "the request would fundamentally departs from Congressional intent for the project in question."[130] In other words, the benchmark set by the Corps in WSA analysis is the "actual, net removal of water" including withdrawals and returns, not the percent or amount of storage.[131]

Potential Future Actions and the Congressional Role

The legal dispute regarding the Corps' actions in the ACF is ongoing. The decisions issued in the consolidated cases addressed questions included in what is referred to as "Phase 1" of the litigation, which addressed the Corps' operational authority with regard to Lake Lanier and Buford Dam. Phase 2 of the litigation involves environmental claims, including claims under the Endangered Species Act and the National Environmental Policy Act, which were addressed separately and are beyond the scope of this report.[132] The parties may also seek a legislative solution to resolve these issues under the WSA. These options are examined below.

Review by the U.S. Supreme Court

The U.S. Supreme Court has not addressed the issues raised by the WSA. Unless a case is filed by one state against another state, review by the Supreme Court is at the Court's discretion. In June 2006, the Court declined to review an 11th Circuit decision in the Alabama case.[133] The underlying 11th Circuit opinion held that the action did not involve a controversy between states, which would have to be heard by the U.S. Supreme Court, but instead involved a dispute between states and a federal agency, which was heard properly by the lower federal courts.[134] Therefore, the Court would only hear arguments regarding the ACF dispute if a new lawsuit is filed by one state against another state or when a party to one of the lawsuits appeals a circuit court's decision and the Court accepts the case for review.

[126] *Id*.

[127] *Id*.

[128] *Id*. at 37.

[129] *Id*.

[130] *Id*. at 38.

[131] *Id*.

[132] The district court issued a decision in Phase 2 on July 21, 2010, which can be found at http://www.sam.usace.army.mil/pa/acf-wcm/pdf/072110court_ruling.pdf.

[133] *See* Alabama v. United States Army Corps of Engineers, 547 U.S. 1192 (2006).

[134] Alabama v. United States Army Corps of Engineers, 424 F.3d 1117, 1130 (11th Cir. 2005).

The Court declined to review the D.C. case in January 2009, allowing the D.C. Circuit decision to stand.[135] Likewise, it also declined to review the 11th Circuit's decision in the consolidated cases in June 2012.[136] Generally, the Court is more likely to consider the merits of a dispute if the decisions differ between the circuit courts as occurred in the ACF decisions. Given the stark contrast between the decisions reached in each of the circuit court cases, it appeared that the Court may be inclined to accept the case for review in order to provide clarity. The Court provided no comment explaining its decision not to intervene in the case, but it may be noted that the U.S. Department of Justice (DOJ) opposed review by the Court at this time.[137] The Solicitor General argued that review "would be premature…before the [Corps] brings its judgment and discretion to bear on the pending request for agency action."[138] In its brief to the Court, DOJ argued that "the court did not definitively pronounce the scope of the Corps' authority under the Water Supply Act" and such questions are more "properly addressed to Congress … or to this Court in the exercise of its original jurisdiction" (over cases between states as parties).[139]

Potential Congressional Resolution

Regardless of the judicial decisions or the potential involvement of the Supreme Court, the authority and limitations provided under the WSA are statutory issues, meaning that Congress retains control over its terms.

If Congress seeks to clarify its authorization of water supply at federal water projects, it may do so generally by amending the WSA. For example, Congress may amend the WSA to clarify the meaning of changes that seriously affect project purposes or to define what constitutes a major structural or operational change. This legislation would provide more specific guidance on the parameters of agency discretion to reallocate water under the WSA. However, amending a general authority for reallocation, if that amendment is intended to reach a specific solution at a particular project, may create unintended consequences when the standard is applied under the circumstances of a different project. Alternatively, Congress may pursue project-specific legislation to address reallocation on a project-by-project basis. That is, Congress may amend the authorized purposes of particular projects, such as Lake Lanier, to clarify whether water supply is an appropriate allocation of storage.

Potential amendments that Congress may enact would trump any court's interpretation of the meaning of the current statutory language in the WSA or particular project authorities.[140] For instance, if a court would determine that reallocation of a certain percentage or quantity of water

[135] Georgia v. Florida, 555 U.S. 1097 (2009).

[136] *See* Florida v. Georgia, 80 U.S.L.W. 3708 (2012); Alabama v. Georgia, 80 U.S. L.W. 3708 (2012); Southeastern Federal Power v. Georgia, 80 U.S.L.W. 3708(2012).

[137] *See* Brief for the Federal Respondents in Opposition, Florida v. Georgia, Nos. 11-999, 11-1006, 11-1007 (U.S. filed May 7, 2012), *available at* http://www.justice.gov/osg/briefs/2011/0responses/2011-0999.resp.pdf (hereinafter *Brief for the Federal Respondents*). The Court often requests input from the Solicitor General when evaluating petitions for certiorari and, according to one study, the Court has followed the Solicitor's recommendation (whether to grant or deny) approximately 80% of the time. *See* David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 276 (2009).

[138] *Brief for the Federal Respondents*, at 16.

[139] *Id*. at 16-17.

[140] Neal v. United States, 516 U.S. 284, 295 (1996) ("Congress is free to change this Court's interpretation of its legislation" (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); Shepard v. United States, 544 U.S. 13, 23 (2005).

would by definition constitute a major operational change, a legislative amendment to the WSA enacting a different definition or percentage would render the court's interpretation obsolete.

Questions and Challenges for M&I Water Supply Storage at Federal Reservoirs

To date, the Corps' operation of Lake Lanier for M&I water supply has constituted the agency's most controversial provision of permanent M&I water supply. The ACF litigation raised numerous concerns, including the possibility that previous reallocations at other Corps facilities could be disputed, and uncertainty about how future reallocation at Corps facilities will be evaluated and performed. Thus far, most Corps reallocations have taken place without the national attention or litigation of Lake Lanier, either using the Corps' delegated authority or through specific congressional legislative direction.

As shown in **Table 1**, existing reallocations under the WSA, with few exceptions, were within the numeric criteria that the Corps established for implementing its discretionary authority. Whether Congress agrees with the Corps' interpretation and use of its discretionary authority is a policy issue of increasing relevance as interest grows in M&I reallocation at federal facilities. Other issues raised by current use of the discretionary authority and reservoir operations include whether multiple reallocations in a single basin are to be treated separately or on a watershed basis, how much discretion the agency should have in making reallocation agreements with stakeholders, including financial charging and crediting arrangements, and how the agency should handle ongoing unauthorized withdrawals.

Current policies on M&I reallocations at Corps facilities reflect numerous decisions and tradeoffs that may be reexamined as more reallocations are requested. For example, if permanent reallocations to M&I are made, how is the transition to be carried out, given that stakeholders, such as recreation interests and hydropower customers, have developed around existing operations? How should the federal government charge for the M&I storage space provided?[141] Should the federal government credit for return flows (i.e., water not consumed by M&I uses that is returned to a Corps reservoir)?

M&I water supply at Corps facilities also is part of several broader water policy questions for Congress. For example, what is the appropriate federal role in municipal water supply? Should that role change if a community's existing water supply is reduced by potential climate change effects, such as extended drought? Do current water resources infrastructure operations, laws, divisions of responsibilities, and institutions reflect the national interest and present challenges? Addressing these questions is complicated by the wide range of opinions on the proper response and the difficulty of enacting any change to how federal facilities are operated, other than incremental change or project-specific measures, because of the many affected constituencies.

[141] Much of the current Corps practice on charging for M&I storage and crediting for lost benefits (e.g., lost hydropower) during reallocations has evolved over decades and is not set out in statute. The current guidance results in a fairly complicated evaluation and is judged by some stakeholders as unsatisfactory (e.g., insufficient credit for lost hydropower to offset cost to purchase replacement power).

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