No. 08-199

In the

Supreme Court of the United States

STATE OF GEORGIA,
Petitioner,

v.

STATE OF FLORIDA AND STATE OF ALABAMA, et al.,
Respondents.

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

BRIEF OF STATE OF ALABAMA AND STATE OF FLORIDA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counsel for State of Florida

Bill McCollum
Attorney General
Scott D. Makar
Solicitor General
STATE OF FLORIDA
Attorney General's Office
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050

Counsel for State of Alabama

Matthew H. Lembke
Counsel of Record
Kevin C. Newsom
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue N.
Birmingham, AL 35203
(205) 521-8000

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Additional Counsel Listed on Inside Cover

ADDITIONAL COUNSEL

For State of Florida

James T. Banks
Parker D. Thomson
H. Christopher Bartolomucci
HOGAN & HARTSON, LLP
555 13th Street, N.W.
Washington, D.C. 20004

Jonathan A. Glogau
Chief, Complex Litigation
Attorney General's Office
The Capitol, Suite PL-01
Tallahassee, FL 32399

Christopher M. Kise
FOLEY & LARDNER LLP
106 East College Avenue
Suite 900
Tallahassee, FL 32301

For State of Alabama

Troy King
Attorney General
Robert Tambling
Assistant Attorney General
STATE OF ALABAMA
Attorney General's Office
11 South Union Street
Montgomery, AL 36130

William S. Cox, III
W. Larkin Radney IV
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th Street North
Birmingham, AL 35203

QUESTIONS PRESENTED

1. Did the D.C. Circuit properly determine that water storage reallocation, implemented through contracts that would be in effect for up to twenty years, at a federal reservoir operated by the Corps of Engineers involved a major operational change requiring congressional approval under Section 301 of the Water Supply Act of 1958, 43 U.S.C. § 390b(d), when the Corps conceded that the contracts would involve major operational change if they were implemented on a permanent basis?

2. Did the D.C. Circuit correctly conclude that Alabama and Florida have standing to pursue the major-operational-change issue when it applied the standing analysis in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to the facts of this case?

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INTRODUCTION

At issue in Georgia's petition is the ruling by the circuit court that the U.S. Army Corps of Engineers lacked the authority to reallocate 240,858 acre-feet of storage at Lake Lanier, a federal reservoir near Atlanta, to a water supply purpose without congressional approval. Section 301 of the Water Supply Act of 1958, 43 U.S.C. § 390b(d), requires congressional approval of such reallocations that involve major operational changes. Significantly, neither the Corps nor the individual federal officials who were its co-defendants in the case have petitioned for a writ of certiorari. The federal defendants' decision not to seek review – and now to oppose Georgia's request for review – is hardly surprising because this case comes nowhere close to meeting the standards for certiorari review by this Court.

The first question presented by Georgia – whether the circuit court improperly decided the major-operational-change issue – does not involve a certworthy issue for several reasons. First, by Georgia's own admission, the legal standard for when a circuit court can address points not ruled upon by a district court is settled, and there is no conflict among the circuits concerning this question. Accordingly, resolution of the question involves nothing more than the factbound application of settled law. Second, Georgia premises its argument on the assertion that Alabama and Florida never raised the major-operational-change argument in the district court – an assertion that is objectively and verifiably false. Third, the record evidence presented to the district court by Alabama and Florida, particularly when combined with two key concessions made by the

federal defendants at oral argument before the D.C. Circuit, left only one possible conclusion for that court to reach, namely that the specific reallocation at issue in this case involved major operational change and thus required congressional approval. In light of these substantial shortcomings, there can be little surprise that the Solicitor General in his brief opposing certiorari agrees that the first question does not present an issue worthy of this Court's review.

Nor does Georgia's second question presented merit this Court's review. Georgia frames the question as whether this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), excuses a State from having to meet the requirements for standing set out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). But, as the Solicitor General notes in his brief, the D.C. Circuit did not excuse Alabama and Florida from meeting the *Lujan* standard – and indeed cited and relied on *Lujan*. Moreover, the circuit split alleged by Georgia on the question is entirely illusory. In any event, in the D.C. Circuit, Georgia expressly conceded that Alabama and Florida have standing to pursue the major-operational-change argument. Georgia's sudden turnabout here, at the very least, makes this the poorest of poor vehicles for exploring *Massachusetts*' implications.

STATEMENT OF THE CASE

Geography and Background

The Chattahoochee River originates in northern Georgia, flows southward to become part of the border between Georgia and Alabama, and then joins the Flint River to become the Apalachicola River, which flows through northern Florida into Apalachicola Bay. These

three interconnected river systems make up the Apalachicola-Chattahoochee-Flint (ACF) Basin. The ACF Basin includes counties within Alabama and Florida. Pet. App. 3a-4a.

Lake Lanier is a federally owned and operated reservoir formed in the 1950s by the construction of Buford Dam on the Chattahoochee River some 50 miles above Atlanta. Congress authorized federal expenditures to construct Lake Lanier for the purposes of flood control, navigation support, and hydropower generation. *See Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1122 (11th Cir. 2005). Congress has never allocated any portion of the conservation storage pool[1] at Lake Lanier for water supply purposes. *Id.*; Pet. App. 15a.

Litigation History

The Early Stages of the Litigation

This case began in 2000 as a challenge to the actions of the U.S. Army Corps of Engineers ("Corps") and individual federal officers (collectively, the "Federal Defendants") in operating Buford Dam at Lake Lanier. C.A. App. 32-69. The plaintiff, Southeastern Federal Power Customers, Inc. ("Power Customers"), filed suit

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[1] Lake Lanier is divided into three parts. At the top is the flood storage pool, the portion of the reservoir's storage capacity that is kept empty so that it is available to hold water in the event of floods. Next is the conservation storage pool, which is the portion of the reservoir's capacity that is used to make releases for hydropower generation and downstream navigation support. Finally, at the bottom of the lake is the inactive storage pool, which is the portion of the reservoir's capacity that is not designed for any specific use.

in the United States District Court for the District of Columbia claiming, among other things, that the Federal Defendants had undertaken major operational change at Buford Dam without seeking congressional approval as required by the Water Supply Act. *Id.* at 58.

The Power Customers' lawsuit paralleled an action that had been filed against the Corps and certain federal officials in the United States District Court for the Northern District of Alabama in 1990. C.A. App. 255. In that case, the State of Alabama had challenged the Corps' proposed reallocation of 207,000 acre-feet of storage in Lake Lanier for water supply. The State of Florida moved to intervene on the side of Alabama, and Georgia moved to intervene on the side of the Corps. *Alabama*, 424 F.3d at 1123 & n.7. Like the Power Customers in this case, Alabama and Florida have alleged in the Alabama case that the Corps has violated federal laws, including the Water Supply Act, and exceeded its authority in operating Buford Dam. *Id.* at 1125 n.11.

Shortly after the Alabama lawsuit began, the parties filed a joint motion to stay the proceedings. The Corps agreed not to execute "any [water withdrawal] contracts or agreements" implicated by the Alabama complaint without the written consent of Alabama and Florida. *Id.* at 1123. The Alabama district court memorialized the terms of the stay in a 1990 order. *Id.* With that stay order in place, the three States and the Corps conducted negotiations that led to the passage in 1997 of the Apalachicola-Chattahoochee-Flint River Basin Compact ("Compact") to "facilitate water storage allocation, planning and dispute resolution for the ACF Basin." Pet. App. 5a (citing Pub. L. No. 105-104, 111

Stat. 2219). In essence, the Compact established a process for the three States to reach agreement on an allocation of water within the ACF Basin.

The Settlement Agreement

While negotiations under the Compact were ongoing, the Power Customers filed this suit. The D.C. district court referred the parties to mediation. C.A. App. 147. The mediation was private, and participation was by invitation only. The Corps committed to the district court that it would ensure participation by "all stakeholders with a real interest" in the litigation. Doc. 27 at 3. Neither Alabama nor Florida, however, was ever invited to participate. Moreover, even though Compact negotiations were ongoing, neither the Corps nor Georgia ever informed Alabama or Florida that a detailed agreement to reallocate storage in Lake Lanier was being negotiated outside the ACF Compact process.

As a result of this private mediation, the Corps signed a Settlement Agreement on January 9, 2003. Pet. App. 54a. The other signatories included the Power Customers, Georgia, and several Atlanta-area water supply providers. *Id.* at 54a, 57a. The Agreement committed the Corps to enter into 10-year water supply and storage contracts with three of those water supply providers, and it provided for an automatic 10-year renewal of the contracts. *Id.* at 60a-61a, 70a; C.A. App. 383-466. The contracts would furthermore have obliged the Corps to reallocate for water supply 240,858 acre-feet of storage in Lake Lanier, and even more if that amount of storage did not yield a guaranteed 537 million gallons per day. Pet. App. 61a-62a, 65a. The Agreement specified that Lake Lanier's total conservation storage

was 1,049,400 acre-feet, so this reallocation would have involved nearly one-fourth of that storage capacity.[2] *Id.* at 62a. The Agreement required this reallocation without congressional approval. *Id.* at 71a-72a.[3]

Alabama and Florida's Challenge to the Settlement Agreement in the District Court

When Alabama and Florida learned of the Settlement Agreement after the fact, both States moved to intervene in the D.C. district court to challenge the Agreement's legality.[4] C.A. App. 189, 197. The Federal

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[2] In a table attached to the Settlement Agreement, the parties to the Agreement calculated the percentage of storage being allocated to water supply by using 1,049,400 acre-feet as the denominator. C.A. App. 399.

[3] The Settlement Agreement provided that the contracts would be executed unless the Corps determined that the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, "precluded" the Corps from entering into the contracts. C.A. App. 360. Contrary to the present position of the Solicitor General, Fed. Defendants' Br. in Opp. 5, nothing in the Settlement Agreement suggested that the Corps would analyze any aspect of the Water Supply Act, including the major-operational-change issue, prior to execution of the contracts. Indeed, the Settlement Agreement recited that the Corps had determined that it had authority to enter into the Agreement under the Water Supply Act and two other federal statutes, Pet. App. 71a. Before the D.C. Circuit, the Federal Defendants and other appellees abandoned reliance on any statute other than the Water Supply Act. Appellees' C.A. Red Br. 27-29. Moreover, in their brief to the D.C. Circuit, the Federal Defendants never suggested that analysis of the major-operational-change issue would occur as part of the NEPA process.

[4] While Georgia had filed a motion to intervene prior to its participation in the mediation, the district court did not grant Georgia's motion until after the Settlement Agreement had been executed. Doc. 10, 114. The Court issued its order allowing Georgia

Defendants did not oppose those intervention motions, which the district court granted. Doc. 92; Doc 114.

Alabama and Florida also filed motions in the Alabama case seeking entry of an injunction against the Corps' implementation of the Settlement Agreement on the ground that the Corps' execution of the Agreement violated the Alabama district court's 1990 stay order. *Alabama*, 424 F.3d at 1124. On October 15, 2003, the Alabama district court entered a preliminary injunction precluding the Corps from implementing the Agreement. *Id.* at 1125.

Notwithstanding that injunction, the district court in this case proceeded with consideration of Alabama's and Florida's objections to the Settlement Agreement. Because Georgia has staked its petition almost entirely on its assertion that "[i]n the district court, Alabama and Florida did not argue that the Settlement Agreement would involve 'major structural or operational changes'" (Pet. 10), it will be useful to canvass the district court's proceedings in some detail.

Contrary to Georgia's repeated suggestions, Alabama and Florida squarely argued in the district court that the reallocation of storage required by the Settlement Agreement amounted to major operational change under the Water Supply Act and thus required congressional approval. Florida quoted the statutory language, underlining the words "major operational changes," in its principal brief in the district court, Doc. 85 at 18, and then discussed the fact that the Settlement

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to intervene at the same time it permitted intervention by Alabama and Florida.

Agreement would involve a major operational change, *id.* at 18-22. Florida returned to the topic in its supplemental memorandum to the district court. Doc. 149 at 23-27. While Georgia correctly notes in its petition that Alabama did not directly discuss the major-operational-change point in its district court briefing, Georgia ignores the fact that Alabama expressly incorporated the arguments made by its co-party Florida. Doc. 147 at 1, n.1.

Georgia also fails to acknowledge in its petition that the parties discussed the major-operational-change issue at oral argument in the district court. At the hearing conducted by the district court, Alabama and Florida repeatedly addressed the issue of major operational change and the effect of the Settlement Agreement on reservoir operations. C.A. App. 1655-56, 1664, 1675-85, 1755, 1757-59. Counsel for the Federal Defendants also participated, arguing that the Settlement Agreement did not involve major operational change only because water supply was an existing use. *Id.* at 1698. Finally, counsel for the water supply providers told the district court that it needed to decide whether "the interim contracts involve major structural or operational changes." *Id.* at 1716.

Far from relying only on written and oral arguments, Alabama and Florida also submitted evidence to the district court that proves that the Settlement Agreement would involve major operational change. This evidence included two key documents prepared by the Federal Government: (1) the 1989 Post Authorization Change Notification Report for the Reallocation of Storage from Hydropower to Water Supply at Lake Lanier, Georgia ("1989 PAC Report")

and (2) a 2002 legal memorandum prepared by the Office of the Army General Counsel ("2002 Army Legal Memorandum"). C.A. App. 324-336, 1549-1586. In the 1989 PAC Report, the Corps proposed to reallocate to water supply an amount of Lake Lanier's storage (207,000 acre-feet) slightly less than that contemplated under the Settlement Agreement. Pet. App. 13a; C.A. App. 1586. The report states that it was prepared under the authority of "Section 216 of the River and Harbor and Flood Control Act of 1970, which allows the Corps to report to Congress on recommendations to *significantly change the operation of an existing project*." C.A. App. 1560 (emphasis added). The report recognized that congressional approval "may be required," *id.* at 1571, and the Commander of the Corps' Mobile District later confirmed in writing that the Corps in 1989 intended to seek congressional authorization for the reallocation contemplated in the 1989 PAC Report, *id.* at 339.

In the 2002 Army Legal Memorandum, the Army's Office of General Counsel addressed Georgia's request for reallocation to water supply of approximately 35 percent of Lake Lanier's conservation storage pool. *Id.* at 324-36. The Memorandum included an acknowledgement that operational changes under the Water Supply Act include "reallocation of existing storage space from another purpose to a water supply purpose." *Id.* at 330. Recognizing that Congress had allocated no storage space to water supply at Lake Lanier, *id.* at 331 n.2, the Army counsel concluded that the proposed reallocation "would involve a major change in the project's operation" and thus required congressional approval. *Id.* at 331. Among the reasons for this conclusion was the fact that "releases that would normally be made at peak periods for hydropower

generation would be shifted to off-peak periods for the benefit of water supply." *Id.* at 332.

Alabama and Florida also submitted additional evidence in the district court demonstrating that major changes in hydropower operations at Lake Lanier would result from the Settlement Agreement. The Agreement itself makes clear that hydropower customers will have to be compensated nearly $2.5 million per year to make up for the reduced hydropower operations at Buford Dam. *Id.* at 378. In the 1989 PAC Report, the Corps calculated that reallocation of a slightly lesser amount of storage for water supply would result in a reduction of annual dependable electric capacity of 21 megawatts and an annual energy loss of 23,500 megawatt-hours. *Id.* at 1573. The Corps valued this lost hydropower in terms of an updated cost of storage at more than $49 million. *Id.* at 1579. In addition to the 2002 Army Legal Memorandum, other evidence before the district court likewise indicated that major operational change would occur through the shifting of hydropower generation from peak to non-peak time periods. *Id.* at 332, 589, 1192. This shift would be significant because Buford Dam's hydropower operations have been conducted predominantly during periods of peak demand. *Id.* at 1110.

Contrary to Georgia's current contention that there was "no evidence in the record quantifying the reduction in 'flow through'" that would result from implementation of the Settlement Agreement, Pet. 9, Alabama submitted evidence showing that there would be a "substantial and significant impact to downstream

flows" if the Agreement took effect, C.A. App. 1615.[5] Indeed, Alabama presented evidence quantifying this impact as "an average drop of 1 foot and a maximum drop of 3 feet in the lake levels of West Point Lake, downstream of Atlanta." *Id.*[6] Similarly, Florida submitted evidence that "the Settlement Agreement poses a substantial threat to the magnitude, frequency, duration and timing of streamflows upon which Florida's ecosystem depend[s]." *Id.* at 482. Thus, Georgia's contention that it had submitted "uncontradicted evidence" that the Settlement Agreement's effects on flows at the Florida state line would be "nearly imperceptible" is simply false. Pet. 4.

Against that evidentiary backdrop, the district court entered an order conditionally approving the Settlement Agreement on February 10, 2004. Pet. App. 26a. The court rejected the several statutory challenges to the Agreement raised by Alabama and Florida. Although Alabama and Florida had squarely raised the question whether the Settlement Agreement involved major operational change under the Water Supply Act, the district court failed to address the issue. The district

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[5] In addition, it is self-evident that there is a reduction in flow below the dam when hydropower is reduced. The passage of water through turbines to create hydropower is the means by which water is released from the reservoir. When less hydropower is generated, it necessarily means that there is less flow going through the turbines.

[6] Georgia has repeatedly focused throughout this litigation on flow at the Florida state line. *See, e.g.,* Pet. 4. Georgia has offered no explanation as to why impacts to Alabama should be assessed at the Florida state line given that the Chattahoochee River runs along Alabama's eastern border southward from West Point Lake for well over 100 miles before it reaches the Florida state line.

court conditioned its approval of the Settlement Agreement on dissolution of the Alabama district court's injunction. *Id.* at 42a. Two days later, on February 12, 2004, the district court dismissed the case. *Southeast Federal Power Customers, Inc. v. Harvey*, 400 F.3d 1, 3 (D.C. Cir. 2005).

Proceedings Before the D.C. Circuit

Alabama and Florida appealed the district court's order to the D.C. Circuit. The D.C. Circuit dismissed that appeal on finality grounds in light of the conditional nature of the district court's approval of the Settlement Agreement. *Id.* at 5. Thereafter, the Eleventh Circuit dissolved the Alabama district court's injunction, *Alabama*, 424 F.3d at 1136, which led the district court in this case to enter a final judgment against Alabama and Florida on March 9, 2006. C.A. App. 2076. Alabama and Florida then appealed to the D.C. Circuit from that final judgment. *Id.* at 2080, 2084.

In their opening brief in the court of appeals, Alabama and Florida devoted a section in the argument to the major-operational-change issue. Appellants' C.A. Blue Brief 37-39. In particular, Alabama and Florida emphasized that "[t]he Corps has stated that 'operational changes' include 'reallocation of existing storage space . . . to a water supply purpose.'" *Id.* at 37. Alabama and Florida also clearly stated their position that the Settlement Agreement "provide[d] for the initial reallocation of 23 percent of the storage in Lake Lanier." *Id.* at 28. Notably, in its brief to the D.C. Circuit (filed jointly with the Federal Defendants), Georgia never claimed that Alabama and Florida had failed to raise the major-operational-change issue in the district court, nor

did Georgia take issue with the Corps' position that reallocation of existing water storage space to water supply itself constitutes operational change. Nor, finally, did Georgia contest the percentage of storage at issue in the Settlement Agreement.

Oral argument in the D.C. Circuit focused principally on the question whether the Settlement Agreement involved a major operational change. During the discussion, Georgia and the Federal Defendants each made a crucial concession – concessions that effectively resolved the very same two questions that Georgia now presents for this Court's review.

First, on the merits of the major-operational-change issue, the Federal Defendants acknowledged that the Settlement Agreement would require an additional 10 percent (approximately 100,000 acre-feet) of Lake Lanier's conservation storage pool to be allocated to water supply, Opp. App. 37a[7], and, further, that the shift "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval," Pet. App. at 15a. They then conceded that such a 10 percent change would constitute major operational change under Section 301 of the Water Supply Act if it were undertaken on a permanent, as opposed to an interim, basis. Opp. App. 45a. In other words, the Federal Defendants agreed that the 10 percent reallocation of Lake Lanier's conservation storage would amount to major operational change, but they argued that the 20-year "interim" nature of the contracts under the Settlement Agreement somehow

[7] The transcript of oral argument before the D.C. Circuit is attached as an appendix to this brief and will be cited as "Opp. App."

excused compliance with the Act's requirement of congressional authorization.[8]

Second, with respect to Alabama and Florida's standing to pursue the major-operational-change argument – the second question presented for review – Georgia itself conceded the issue. In a colloquy with Judge Silberman, counsel for Georgia initially denied that such standing existed, but then conceded the point, stating that Georgia "will accept that [Alabama and Florida] have standing to assert a claim to their injury at the State Line relating to water flows." *Id.* at 47-49.

In an opinion authored by Judge Rogers and joined by Judge Kavanaugh, the circuit court reversed the district court's approval of the Settlement Agreement. (Judge Silberman concurred separately.) The court first held that Alabama and Florida had standing to assert the major-operational-change claim. Although Georgia suggests (despite its earlier concession) that the court in its standing analysis relied

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[8] As to the total percentage of Lake Lanier's conservation storage that would be allocated to water supply under the Settlement Agreement, an issue Georgia now seeks to contest (Pet. 13-14), the Federal Defendants confirmed at oral argument that the number is 23 percent. Opp. App. 35. Counsel for Georgia discussed that percentage figure without disputing it, *id.* at 58a, 61a, and at another point indicated that the amount of water storage being reallocated under the Agreement was "not a contested issue," *id.* at 56a. This 23 percent figure is based on a total conservation pool of 1,049,000 acre-feet. Georgia's acceptance – or initial acceptance, anyway – of this figure was not surprising because the Settlement Agreement itself states, "All Water Supply Agreements shall be based on a share of the conservation storage space in Lake Lanier. Said storage space . . . is estimated to contain 1,049,400 acre-feet of storage after adjustments for sediment deposits. Pet. App. 62a.

on some ethereal "fear" of adverse downstream flow reductions resulting from the Settlement Agreement, Georgia overlooks the court's clear statement, consistent with the record evidence, that "[t]he Agreement does potentially reduce the amount of water flowing downstream" and that "the ACF Basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years." Pet. App. 12a. Furthermore, although Georgia's petition leaves the impression that the Court's standing conclusion turned solely on an application of *Massachusetts v. EPA*, 549 U.S. 497 (2007), the court, in fact, merely cited that as an "addition[al]" reason to conclude that standing existed. Pet. App. 12a. At the core of the standing analysis, the court, citing *Lujan*, concluded that Alabama and Florida had established imminent injury-in-fact, causation, and redressability. *Id.* at 12a-13a. Applying *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987), the court also concluded that Alabama and Florida had established prudential standing. Pet. App. 13a.

As for the merits, the D.C. Circuit concluded that the reallocation of water storage contemplated by the Settlement Agreement amounted to a major operational change for which congressional approval was required. Because no water storage at Lake Lanier had ever been allocated by Congress to water supply, the court determined that the appropriate baseline for measuring the impact of the reallocation was zero. *Id.* at 14a-15a. Accordingly, the change that had to be judged under the Water Supply Act was more than 240,000 acre-feet, or more than 22 percent of Lake Lanier's storage capacity. *Id.* Consistent with the Federal Defendants' concession that a 10 percent change would be a major operational

change if it were permanent, the court concluded that a reallocation of 22 percent was major operational change "[o]n its face." *Id.* at 14a.

The circuit court also rejected the Federal Defendants' argument that the technically non-permanent (*i.e.*, 20-year) nature of the reallocation rendered the congressional-approval requirement of the Water Supply Act inapplicable. The court stated that "it is unreasonable to believe that Congress intended to deny the Corps authority to make major operational changes without its assent, yet meant for the Corps to be able to use a loophole to allow these changes as long as they are limited to specific time frames which could theoretically span an infinite period." *Id.* at 16a. The court also focused on the past analyses undertaken by the Corps in the 1989 PAC Report and 2002 Army Legal Memorandum, which signaled the Corps' view that a reallocation of this magnitude would require congressional approval. *Id.* at 13a-14a, 16a.

Based on its conclusion that the reallocation contemplated by the Settlement Agreement would result in major operational change for which congressional approval would be required under the Water Supply Act, the court reversed the district court's approval of the Settlement Agreement.

Neither the Power Customers nor the Federal Defendants sought rehearing in the circuit court. Georgia did, however, file a petition for panel rehearing. In that petition, Georgia contended – notably, for the first time – that Alabama and Florida failed to present the major-operational-change argument in the district court. Jt. Pet. for Panel Rehearing at 4-6. Georgia also contended – again for the first time – that Alabama and

Florida had miscalculated the extent of the reallocation at 23 percent of Lake Lanier's conservation storage pool and that Alabama and Florida had misinterpreted the meaning of "major operational change." *Id.* at 8-9. Georgia admitted its failure to raise these arguments in its merits brief in the circuit court but argued, without citation to any authority, that these omissions were "inevitable" or "understandable." *Id.* at 7. Alabama and Florida countered in their rehearing response not only that Georgia's contentions were incorrect, but also that they were waived under longstanding D.C. Circuit precedent foreclosing arguments raised for the first time on rehearing. Alabama and Florida's Response in Opp. to Jt. Pet. for Panel Rehearing at 3-15. Consistent with its concession at oral argument, Georgia did not claim in its rehearing application, as it does now, that the court had erred in determining that Alabama and Florida had standing to challenge the Settlement Agreement as a major operational change.

Transfer of Case to Multidistrict Litigation Proceedings

Following denial of Georgia's rehearing petition, the Judicial Panel on Multidistrict Litigation ("JPMDL") transferred this case to the United States District Court for the Middle District of Florida. Doc. 223. In that forum, it has been joined with the six other cases raising challenges to the operations of the Corps in the ACF River Basin that had been previously transferred by the JPMDL for consolidated pretrial proceedings, including the aforementioned 1990 Alabama case.[9] The JPMDL

[9] The six cases that had previously been transferred by the JPMDL are as follows: *Alabama v. U.S. Army Corps of Engineers*, Case No. 1:90-1331 (N.D. Ala); *Georgia v. U.S. Army Corps of Engineers*,

designated Judge Paul Magnuson of the United States District Court for the District of Minnesota to preside over these MDL proceedings. Judge Magnuson recently issued a scheduling order indicating that the key issue of the Corps' compliance with applicable federal law in its operations at Lake Lanier will be ready for decision in March 2009.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny Certiorari on the First Question Presented Because It Involves the Factbound Application of Settled Legal Precedent and Because, Particularly in Light of Critical Concessions, the D.C. Circuit Correctly Decided It.

With the first question presented, Georgia seeks, at most, correction of an alleged error in the D.C. Circuit's application of settled law. The standard for when a circuit court may address factual questions not decided by the district court has, as the petition itself acknowledges, been settled for decades. There is not a hint of any conflict of authority among the lower federal courts concerning this issue. Based on an incorrect and incomplete recitation of the record before the circuit court, Georgia argues that the D.C. Circuit misapplied this settled legal standard in the particular circumstances of this case. Even if all of the premises

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Case No. 2:01-26 (N.D. Ga.); *Florida v. U.S. Fish & Wildlife Service*, Case No. 4:06-410 (N.D. Fla.); *Georgia v. U.S. Army Corps of Engineers*, Case No. 1:06-1473 (N.D. Ga.); *City of Columbus v. U.S. Army Corps of Engineers*, Case No. 4:07-cv-125 (M.D. Ga.); *City of Apalachicola v. U.S. Army Corps of Engineers*, Case No. 4:08cv23-RH/WCS (N.D. Fla.).

for Georgia's argument were true – which, as demonstrated herein, they are not – this would be a request for factbound error correction that is not the stuff of which cases before this Court are made. As the Solicitor General correctly notes in his brief, "the decision below does not present a question of substantial importance requiring this Court's review." Fed. Defendants' Br. in Opp. 10. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) ("To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions."). Apparently recognizing how far short it falls from the established grounds for review by this Court, Georgia refers in passing to the potential for summary reversal (without actually asking for such relief), *see* Pet. 17. But there is no basis for any expenditure of this Court's resources on this settled question, nor is there any error (let alone clear error) to be summarily reversed.

Georgia's request for review of its first question rests on a faulty premise. Throughout its petition, Georgia claims that Alabama and Florida never raised the issue of major operational change in the district court. Its argument in that regard is both waived and flatly wrong. As a threshold matter, Georgia waived this argument by failing to raise it in a timely fashion in the D.C. Circuit. It is undisputed that Alabama and Florida addressed the major-operational-change issue in their opening brief in the circuit court. In its answering brief, Georgia never so much as suggested that the issue had not been properly presented to the district court. Only after the circuit court ruled against Georgia on the merits did Georgia first contend in its petition for rehearing that Alabama and Florida had failed to raise

the issue. Under settled precedent – in the D.C. Circuit and elsewhere – an argument raised for the first time on rehearing is waived. *See, e.g., Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991); *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008); *Peter v. Hess Oil Virgin Islands Corp.*, 910 F.2d 1179, 1181 (3rd Cir.1990); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir.1985).

Even if Georgia had not waived the argument, its contention that Alabama and Florida failed to raise and present evidence on the major-operational-change point is objectively and verifiably false. As detailed above, Alabama and Florida raised the issue in their district court briefs, addressed it at the district court's oral argument, and submitted evidence in support of it. *See supra* at 7-11. Thus, the fundamental premise of Georgia's petition – that the circuit court just reached out and decided an issue that had never been argued in the district court – is wrong.

Waivers and misstatements aside, the petition for review of the first question also comes up short because the circuit court committed no error in deciding the major-operational-change issue. As Georgia acknowledges, a circuit court may rule on factual questions not resolved by the district court when "'the record permits only one resolution of the factual issue.'" Pet. 15 (quoting *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 n.3 (2008)). That is just what happened here. Based on the record before it and the critical concessions made by the Federal Defendants, it was entirely consistent with this Court's precedents for the D.C. Circuit to decide that the Settlement Agreement would result in major operational change.

In the D.C. Circuit, the Federal Defendants conceded that the reallocation of ten percent of Lake Lanier's conservation storage pool pursuant to the Settlement Agreement would be major operational change requiring congressional approval under Section 301 of the Water Supply Act if the reallocation were permanent.[10] In part of the D.C. Circuit's decision that Georgia does not challenge in its petition, the court of appeals correctly rejected the Federal Defendants' assertion that the technically non-permanent nature of the reallocation under the Settlement Agreement excused the need for congressional approval. Pet. App. 16a. Having rejected the sole basis on which the Federal Defendants had attempted to evade the requirement of Section 301, the D.C. Circuit was compelled by the Federal Defendants' concession to conclude that the Settlement Agreement violated Section 301.[11]

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[10] Although Georgia attacks the D.C. Circuit for making an "astonishingly simplistic comparison of the percentage of storage that would be shifted to water supply storage if the Settlement Agreement were implemented," Pet. 13, that analysis follows straightaway from the Corps' concession. Furthermore, Alabama and Florida had noted in their opening brief in the circuit court that the Corps viewed the reallocation of storage space to a water supply purpose in and of itself to be an operational change. Appellants' C.A. Blue Br. 37 (citing C.A. App. 330). Georgia (and the Federal Defendants) never disputed that until Georgia petitioned for rehearing in the circuit court and, thus, waived the argument.

[11] Counsel for the Federal Defendants sent a letter to the circuit court several weeks after the oral argument purporting to withdraw the concession as having been made "in error." Judge Silberman, in his concurring opinion, noted this effort to retract the concession, but stated that "the logic of this concession was ineluctable." Pet. App. 24a.

Indeed, the Federal Defendants made a second concession in the D.C. Circuit which, along with the record evidence, left the court with only one possible resolution of the major-operational-change question. At oral argument, the Federal Defendants admitted that no reallocation of this magnitude had ever been undertaken by the Corps without congressional approval. That concession squared with the record evidence, highlighted by the circuit court, that the Corps in the 1989 PAC Report and the 2002 Army Legal Memorandum had taken the view that "operational changes on a similar scale would require Congressional approval." Pet. App. 11a, 13a-14a; *see supra* at 8-10. Because the record before the court of appeals clearly "permit[ted] only one resolution" of the question whether the Settlement Agreement involved major operational change, *Sprint*, 128 S. Ct. at 1146 n.8, that court's decision fits hand-in-glove with this Court's precedents.

As a last-gasp argument in support of its position, Georgia incorrectly claims that the D.C. Circuit's ruling is "decidedly unfair" because Georgia "had no opportunity or need in the district court to build [its] own factual record on the issue." Pet. 11. There is no unfairness here. Georgia's decision not to present anything in response to the evidence put forward by Alabama and Florida was a tactical litigation decision for which Georgia must bear the consequences. Thus, Georgia's criticism of the circuit court for failing "to review or consider any computer modeling results" rings hollow; Georgia had every opportunity to introduce evidence on those points before the district court, but simply failed to do so. Pet. 12-13. What Georgia wants is a "do-over" – a chance to make a record on remand that it did not make the first time around. This Court's

certiorari jurisdiction should not be employed for such a purpose. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The [certiorari] jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.")

Finally, Georgia's assertion that the D.C. Circuit miscalculated the percentage of storage being reallocated under the Settlement Agreement amounts to a classic "bait and switch." In its petition, Georgia contends that the circuit court used the wrong denominator in calculating the reallocation percentage. The D.C. Circuit compared the 240,858 acre-feet being reallocated to the total conservation storage of 1,049,000 acre-feet to reach its 22 percent figure, while Georgia contends that the court should have compared the amount being reallocated against some number equaling the total storage in Lake Lanier.[12] Not only has Georgia waived this argument by failing to address it prior to rehearing in the circuit court, *see supra* at 20, but Georgia also affirmatively indicated its acceptance of the conservation storage pool as the proper denominator for the equation at least twice. First, in the Settlement Agreement itself, Georgia agreed that the conservation storage pool would be the number upon which the agreements arising from the Agreement would be based.

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[12] In its argument, Georgia claims that the total conservation storage space at Lake Lanier exceeds 2.5 million acre-feet, but there is no support for that contention anywhere in the record. Georgia also contends that "[t]he Corps has authoritatively confirmed" that the total storage capacity for project purposes is 1,685,400 acre-feet, but Georgia cites only to the response filed by the Federal Defendants to Georgia's rehearing application in the circuit court. Pet. 13. Like Georgia, the Federal Defendants never contested the correctness of the 22 percent calculation prior to rehearing.

Pet. App. 62a. Second, at oral argument in the D.C. Circuit, Georgia's counsel discussed the percentage figure on which the court ultimately relied without disputing it and, indeed, indicated that the amount of water storage being reallocated under the Agreement was "not a contested issue." Opp. App. 56a, 61a. Georgia's claim that a different denominator should be used in making these calculations, therefore, simply comes too late and provides no basis for granting the writ.[13]

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[13] The Solicitor General includes a discussion in his brief of what an appropriate remedy would be if Georgia were to prevail with its petition. Those issues of remedy, however, have no relevance to the questions presented in the petition. In his discussion of these points, the Solicitor General incorrectly suggests that the D.C. Circuit should have waited until the contracts under the Settlement Agreement were actually executed in order to reach the merits of the major-operational-change issue. Not only did the Federal Defendants fail to raise that point before the D.C. Circuit, *see supra* at 6 n.3, but the argument also flies in the face of settled precedent concerning the appropriate scope of review of a settlement agreement. As the D.C. Circuit recognized, Pet. App. 9a, and the Solicitor General concedes, Fed. Defendants' Br. in Opp. 9, a settlement agreement cannot be approved if it is illegal. Having determined based upon the record that there was no way that the actions of the Federal Defendants under the Settlement Agreement could possibly be legal under the Water Supply Act, the D.C. Circuit correctly found the Agreement to be invalid.

II. This Court Should Deny Certiorari as to the Second Question Presented Because Georgia Expressly Conceded in the D.C. Circuit That Alabama and Florida Have Standing and Because the Question Is Based Upon a Misstatement of the Circuit Court's Holding.

The second question presented does not warrant review because Georgia premises the question on a misstatement of the D.C. Circuit's standing analysis and because the alleged conflict of authority is illusory. The circuit court's decision involved a factbound application of this Court's settled standing jurisprudence as summarized in *Lujan*.

As the Solicitor General recognizes in his brief opposing Georgia's petition, Georgia grossly mischaracterizes the D.C. Circuit's ruling on standing in order to bolster its argument that a certworthy question exists. Contrary to Georgia's suggestion, the circuit court did not ignore the standing analysis set out in *Lujan*. Not even close. In fact, the circuit court cited *Lujan* and expressly stated that each of the three requirements for standing identified in *Lujan*—injury-in-fact, causation, and redressability—had been satisfied. Pet. App. 12a-13a. Ignoring the court's *Lujan* analysis, Georgia contends that the D.C. Circuit's standing conclusion was based entirely on *Massachusetts v. EPA*. But words can only be stretched so far, and Georgia has stretched the D.C. Circuit's words beyond the breaking point. Far from being the sole basis for the circuit court's standing conclusion, the reference to *Massachusetts v. EPA* is identified merely as an "addition[al]" reason – additional, that is, to its traditional *Lujan* analysis – to support the

determination that standing exists. *Id.* at 12a. The D.C. Circuit's fleeting citation to *Massachusetts v. EPA* broke no new ground and merely restated this Court's own words. *Compare Massacusetts v. EPA*, 127 S. Ct. at 1454-55 ("[T]he Commonwealth is entitled to special solicitude in our standing analysis.") *with* Pet. App. 12a ("In addition, the states' quasi-sovereign interests entitles them to special solicitude in standing analysis." (internal quotations omitted)).

Georgia's description of other key aspects of the D.C. Circuit's standing analysis is likewise misleading. Georgia engages in a selective reading of the opinion to bolster its argument that the court based its standing decision only on a view that Alabama and Florida feared downstream flow reductions. In fact, in the sentence immediately following the statement that Alabama and Florida "credibly claim to fear that the proposed reallocation of water storage will result in diminish[ed] [] flow of water reaching the downstream states," *Id.* at 11a-12a (quoting Appellants' Br. at 2), the circuit court stated that "[t]he Agreement does potentially reduce the amount of water flowing downstream, and the ACF Basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years." Pet. 12a (internal citations omitted). As explained above, this conclusion by the circuit court is entirely consistent with the record evidence. *See supra* at 10-11.[14] In sum, Georgia's description of the D.C.

[14] In a lengthy footnote, Georgia argues that evidence of diminished downstream flows in Alabama and Florida cannot be considered in the standing analysis without violating the Constitution's command that this Court have original jurisdiction of actions between two States. Pet. 19 n.14. The problem with Georgia's argument is that it fails to recognize that the diminished flows would result from the

Circuit's analysis of standing is a caricature. The reality is that the court applied the analysis of *Lujan* in reaching its sensible determination that standing exists.

When one takes a clear-eyed view of the standing analysis actually employed by the circuit court, the contrived nature of the second question presented by Georgia becomes apparent. This case presents no vehicle to consider "how and to what extent *Massachusetts v. EPA* excuses a state from proving – with evidence commensurate with the stage of the proceeding – the three elements of standing restated by the Court in *Lujan*." Pet. 18. The D.C. Circuit in no way suggested that it had "excuse[d]" Alabama and Florida from proving the three elements of *Lujan*. Georgia's contention that the circuit court "appeared to hold" that "*Massachusetts v. EPA* excuse[s] a state's failure to measure up to the *Lujan* test generally" is simply not true, Pet. 18, and the foundation for Georgia's argument collapses under the weight of its incorrect statement of the court's holding.

Georgia's suggestion of a circuit split cannot withstand scrutiny, in any event. The decision of the Seventh Circuit identified by Georgia – *Citizens Against*

Corps' failure to comply with applicable federal law, not from any dispute about the apportionment of flows between the States. Georgia made the same argument to the Eleventh Circuit in a parallel case, and the Eleventh Circuit rejected it, noting that "Alabama and Florida [were] not attempting to litigate their right to a certain amount of water in the ACF Basin," but were merely "seek[ing] to ensure the Corps' compliance with federal law governing the management of projects in the ACF Basin." *Alabama*, 424 F.3d at 1130; *accord Missouri v. Andrews*, 787 F.2d 270, 278 n.7 (8th Cir. 1986).

Ruining the Environment (CARE) v. EPA, 535 F.3d 670 (7th Cir. 2008) – does not conflict with the D.C. Circuit's decision in this case. The two decisions are entirely consistent in that they both apply *Lujan* to determine whether standing exists. *Id.* at 675-76. Furthermore, the application of *Massachusetts v. EPA* arose in *CARE* in entirely different circumstances. *CARE* involved "an internal conflict between an office and an agency under the executive branch of the same state government" over whether certain permits had been properly issued under the Clean Air Act – an unusual intra-branch dispute in which "standing was clearly going to be an uphill battle." *Id.* at 676. It was not one of the "many cases [in which] a petitioner's standing is self-evident." *Id.* at 675. The Illinois attorney general presented no evidence to support his standing argument, instead claiming that *Massachusetts v. EPA* established standing by itself. *Id.* at 675-76. The Seventh Circuit disagreed that *Massachusetts v. EPA* had such sweeping force. While recognizing that this Court had in *Massachusetts v. EPA* accepted that a State has standing to assert its rights under federal law if the injury is to the State itself, the Seventh Circuit determined that "the alleged injury [was] unclear" because there was no evidence of injury to one arm of the Illinois executive branch vis-à-vis another. *Id.* at 676. That is a long way from what happened in this case, where there is ample evidence in the record supporting the circuit court's standing decision. Thus, there is no conflict between the opinion below and *CARE*.

Far from any conflict of authority, there is actually a great consistency in circuit courts' holdings that downstream states have standing to challenge the Corps of Engineers' compliance with federal law in

operating upstream federal reservoirs. As the Solicitor General notes in his brief, in the parallel case to this one in which Alabama filed suit challenging the legality of the Corps' operations at Buford Dam, *see supra* at 4, the Eleventh Circuit likewise concluded that Alabama and Florida had standing to "seek to ensure the Corps' compliance with federal law governing the management of projects in the ACF Basin, particularly Lake Lanier." *Alabama*, 424 F.3d at 1130; *see also Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1250-56 (11th Cir. 2002) (holding in another parallel matter that Florida could intervene as of right in case filed by Georgia challenging Corps' refusal to reallocate water in Lake Lanier to Georgia). The Eleventh Circuit's decision in that case preceded *Massachusetts v. EPA*. The Eighth Circuit, too, affirmed downstream states' standing to challenge the actions of the Corps without relying on any perceived loosening of the standard for State standing. *See Missouri v. Andrews*, 787 F.2d 270, 276-77 (8th Cir. 1986).

As an additional indication of the thinness of the argument that a circuit split exists, Georgia indiscriminately mentions additional cases whose only apparent relevance is that *Massachusetts v. EPA* is cited somewhere in each case. In *National Association of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1226-28 (D.C. Cir. 2007), the D.C. Circuit went through a lengthy analysis explaining why the plaintiff satisfied the standing requirements in *Lujan*, and then, at the end of that analysis, used a "see also" cite to *Massachusetts v. EPA*. Similarly, the Tenth Circuit in *Utah Division of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 720-22 (10th Cir. 2008), cited the *Lujan* standard and described in detail the facts justifying the State's

standing in the case. As had the D.C. Circuit in *Clean Air Agencies*, the Tenth Circuit did cite to *Massachusetts v. EPA*, *id.* at 721, but there was nothing in either court's decision to suggest that it had affected the analysis in any way. In essence, Georgia's argument is that the mere citation of *Massachusetts v. EPA* without further discussion proves that there is widespread misunderstanding of the decision that compels certiorari review of it. If that were the standard for certiorari, the supply of cases worthy of review would of course be limitless.[15]

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[15] As part of this creative approach to arguing a circuit split, Georgia also cites three district court decisions to suggest that certiorari review is warranted. Given that *Massachusetts v. EPA* was only decided two years ago, it is not surprising that Georgia could not marshal more circuit court opinions in support of its position, and, to the extent that there is any uncertainty about the meaning of *Massachusetts v. EPA*, the need for further percolation of the issue in the circuit courts is self-evident. Even if the three district court decisions were relevant to considering whether there is a conflict of authority among the circuit courts, the three decisions do not support the claim that there is a certworthy question here. In one of the decisions cited by Georgia, the court discussed *Massachusetts v. EPA* in its analysis of whether the action before the court involved a nonjusticiable political question, not whether any party had standing. *See California v. General Motors Corp.*, 2007 WL 2726871, *10-12 (N.D. Calif. Sept. 17, 2007). In the other two decisions, the circumstances were quite different from those in this case because, unlike here, the courts determined that *Lujan* had not been satisfied, so the argument for standing turned entirely on *Massachusetts v. EPA*. *See Colorado v. Gonzales*, 558 F. Supp. 2d 1158, 1162-64 (D. Colo. 2007); *Louisiana Environmental Action Network v. McDaniel*, 2008 WL 803407, *3 (E.D. La. March 12, 2008). Even if one read the latter two decisions as limiting the application of *Massachusetts v. EPA* to situations where a federal statute accorded a procedural right to a State, Georgia does not cite a single court of appeals as having adopted that view.

As a final matter, Georgia's decision to seek certiorari review on the standing of Alabama and Florida to assert the major-operational-change claim cannot be squared with Georgia's concession in the D.C. Circuit that Alabama and Florida in fact do have standing to assert the claim. *See supra* at 14. Asked point-blank by Judge Silberman, Georgia's counsel expressly "accept[ed]" that Alabama and Florida "have standing to assert a claim to their injury at the State line relating to water flows." Opp. App. 50a. While it is, of course, true that the question of standing can be raised at any point, it is highly anomalous for Georgia to seek this Court's review of a circuit court's holding that it invited.[16]

CONCLUSION

For these reasons, the Court should deny the petition.

[16] In Georgia's D.C. Circuit briefing, it never suggested that Alabama and Florida lacked standing to raise the major-operational-change issue, instead limiting its argument about standing to a separate legal claim advanced by Alabama and Florida.

Respectfully submitted,

Counsel for State of Florida

Bill McCollum
Attorney General
Scott D. Makar
Solicitor General
STATE OF FLORIDA
Attorney General's Office
The Capitol, Suite PL-01
Tallahassee, FL 32399

James T. Banks
Parker D. Thomson
H. Christopher Bartolomucci
HOGAN & HARTSON, LLP
555 13th Street, N.W.
Washington, D.C. 20004

Jonathan A. Glogau
Chief, Complex Litigation
Attorney General's Office
The Capitol, Suite PL-01
Tallahassee, FL 32399

Christopher M. Kise
FOLEY & LARDNER LLP
106 East College Avenue
Suite 900
Tallahassee, FL 32301

Counsel for State of Alabama

Matthew H. Lembke
Counsel of Record
Kevin C. Newsom
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue N.
Birmingham, AL 35203
(205) 521-8000

Troy King
Attorney General
Robert Tambling
Assistant Attorney General
STATE OF ALABAMA
Attorney General's Office
11 South Union Street
Montgomery, AL 36130

William S. Cox, III
W. Larkin Radney IV
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th Street North
Birmingham, AL 35203

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC., Appellee, v. FRANCIS J. HARVEY, et al., Appellees, v. STATE OF FLORIDA, STATE OF ALABAMA, et al., Appellants.	No. 06-5080 (consol.)

Friday, November 16, 2007

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES ROGERS AND KAVANAUGH AND SENIOR CIRCUIT JUDGE SILBERMAN

[2] APPEARANCES:

ON BEHALF OF APPELLANTS:

PARKER D. THOMSON, ESQ.

MATTHEW H. LEMBKE, ESQ.

ON BEHALF OF THE APPELLEE:

MICHAEL T. GRAY, ESQ. (DOJ)

BRUCE P. BROWN, ESQ.

CLINTON A. VINCE, ESQ.

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[4] PROCEEDINGS

THE CLERK: Case number 06-5080, et al. *Southeastern Federal Power Customers, Inc. v. Francis J. Harvey, Secretary of the U.S. Department of the Army, et al; State of Florida,* Appellant. Mr. Thomson for State of Florida; Mr. Lembke for Appellant State of Alabama; Mr. Gray for Appellees USA, et al.; Mr. Brown for Appellees State of Georgia, et al.; and Mr.

Vince Appellee Southeastern Federal Power Customers, Inc.

THE COURT: Good morning.

MR. THOMSON: Good morning, and may it please the Court, Parker Thomson for the State of Florida. I would first like to thank the Court for postponing the prior setting of this oral argument because of the hospitalization of my partner Jim Banks. Unfortunately his condition does not permit him to be here today.

It is my intention to utilize the full 10 minutes because it will take that long and Mr. Lembke will rebut for both of us. If in fact I have additional times of course I'll reserve it.

I wanted first to address the issue of the statutory authority. The original complaint brought by the SeFPC based its complaint on the applicable statutes for authorizing back in 1946 the Flood Control Act and the Water Supply Act. The settlement agreement was reached in this case in 3.1.7 asserts that the Corps has the authority to enter into that settlement [5] agreement based upon the same three components, the initial authorization of the Flood Control Act and the Water Supply Act. The interim contracts which are attached and are to be signed in accordance with the settlement agreement are the same three. The Corps has determined that it has authority under all three of the statutes.

THE COURT: Actually isn't that a gilding the lily a bit? Haven't all the parties to the agreement agreed that the Flood Control Statute is not relevant?

MR. THOMSON: No. The parties – Your Honor, correct. The parties to the agreement have, but they cannot deal with the fact that the Flood Control Act is the only authority given by Congress to make withdrawals. And withdrawals are authorized under the settlement agreement and therefore the Flood Control Act is in play despite the fact that having previously relied on it they now disavow it.

THE COURT: I thought the Flood Control Act only applied to surplus water.

MR. THOMSON: Well, that is correct, Your Honor. That's why the only permitted withdrawals other than with Congressional approval are of surplus water. There is no surplus water here. In fact, Congress determined some years ago that there was not surplus water. It had to give a withdrawal. It had to authorize a withdrawal for that County. There is no surplus water.

[6] THE COURT: Isn't it fair to say that your stronger argument is on the Water Supply Act?

MR. THOMSON: I would say, Your Honor, that both of them are strong arguments and for the reason that there are patent withdrawals under the settlement agreement. The Keylands, Your Honor, are those that are presented and are happening today. What happened yesterday. Will happen tomorrow and

they are covered by 3.1.3. They are precontract amount. They're continuations of contracts that existed and expired in 1989 and have been held in place by the Corps calling them sometimes holdover contracts or whatever. Those contracts have been continued at accelerated payment and water is being withdrawn under those contracts now.

THE COURT: But is that being withdrawn pursuant to State law?

MR. THOMSON: No, it is water that cannot be withdrawn by State law unless it is first granted storage.

THE COURT: That's my point. I thought part of the argument was that the settlement agreement simply moved the water into a new category, a storage for water supply and State law was going to control the actual withdrawing of the water for municipal use.

MR. THOMSON: No, withdrawal has to be permitted by the State to be sure. But under the settlement agreement it is likewise permitted by the Corps. It is permitting the [7] withdrawal of the water under the holdover contracts with the Corps, not with the State. They're waters that are being released because the Corps releases them. They're not, I am sure that there is a State permit as well.

THE COURT: Counsel, there is one thing I would like to ask as a favor. It seemed to me in the briefs there were a number of arguments presented

that were either not made to the District Court or were not in your reply brief weren't even made in the opening brief. If you're going to refer or you or your co-counsel are going to refer to any of those arguments no presented in the District Court or that are presented in your reply brief but not in your opening brief I wish you would label them as such and explain why we should listen to them.

MR. THOMSON: Fine, Your Honor. Withdrawals are defined in the settlement agreement under paragraph 2 as being water that is diverted for in lie water supply from the Lake Lanier Project or from the Chattahoochee River downstream from the dam and to south of Atlanta. Withdrawals are therefore defined as something that happens under the settlement agreement. 3.1.1 says that the storage is to accommodate these withdrawals. 3.1.1(a) for instance for Gwinnett says –

THE COURT: But they don't authorize withdrawals per se and that was Judge Rogers' question. Wasn't it?

MR. THOMSON: They authorize withdrawals per se under [8] 3.1.3. That is for the precontract amounts.

THE COURT: I'm confused about that. I understood the actual withdrawal had to take place only after Georgia, State of Georgia authorized it.

MR. THOMSON: No, as I said before, Your Honor, I assume that Georgia has authorized the

withdrawals because they're happening, yesterday, today and will happen tomorrow.

THE COURT: Well, but that's a separate question as to who has the legal authority to authorize withdrawals. My understanding the Government's position is that there agreement does not specifically authorize withdrawals. True or not true?

MR. THOMSON: Not true.

THE COURT: It specifically authorizes withdrawals?

MR. THOMSON: Certainly, specifically in 3.1.3 –

THE COURT: Which says?

MR. THOMSON: For precontract amounts.

THE COURT: In other words, I guess what we're focusing on is the fact that the water is being placed in storage for water supply. But if Georgia refused to issue a permit that water cannot be withdrawn.

MR. THOMSON: Georgia has already issued the permit.

THE COURT: No, I know but I mean just so we're all on the same page legally. Let me ask you though following up on Judge Silberman's question. One of the arguments made is [9] that you have weighed the argument about the Corps' authority to allow withdrawals. Is that correct?

MR. THOMSON: No, that is not correct.

THE COURT: And that is not correct because you have –

MR. THOMSON: We argued – objecting to the settlement agreement that the Corps did not have authority. We argue in our opening brief before this Court that they did not have authority. They didn't reply because they've abandoned the argument of compliance for the Flood Control Act.

Turning to the Flood Control Act the –

THE COURT: Are you going to spend a lot of time on that as opposed to the Water Supply Act?

MR. THOMSON: What did I say?

THE COURT: You said the Flood Control.

MR. THOMSON: I'm sorry, I apologize, Your Honor. Turning to the Water Supply Act, 390(b)(d) says that modification to change the purposes, add a purpose require Congressional approval. No Congressional approval was sought. There are two grounds on which you have to go to the Congress for approval that the modifications would seriously affect the purposes for which the project was authorized.

THE COURT: And which purpose are you referring to has been seriously affected?

[10] MR. THOMSON: I'm applying certainly hydro power is seriously affected.

THE COURT: And why –

MR. THOMSON: All of the downstream interests are affected.

THE COURT: Well no wait a minute. The downstream interests it seems to me gives Florida and Alabama standing at least on the EPA questions. But I don't see how Florida and Alabama have standing to and the only purpose is referred to in the project is the hydro power. The only relevant purpose for you is the hydro power and I don't see how you have standing to raise that issue when the companies that use the hydro power have settled and have agreed to the settlement.

MR. THOMSON: Congress said for purposes of hydro power it is clear from the statute. It is from the authorization documents that were in Congress and precipitated the law authorizing the building of the Buford Dam that the purposes of the hydro power itself were to take care of the downstream interests which are identified in this order as recreation, fish and wildlife management and water supply to the City of Atlanta.

THE COURT: Wait a minute, I don't see that at all, counsel. Where do you see the hydro power purpose as relating to fish?

MR. THOMSON: Because in the District, the Division [11] reports made as part of the Corps application –

THE COURT: You don't even make that argument in your brief.

MR. THOMSON: I believe, Your Honor, we do.

THE COURT: I didn't see anything about fish as part of hydro power.

MR. THOMSON: No, it is one of the incidental uses.

THE COURT: Did you make that argument in your brief anything about hydro power?

MR. THOMSON: Yes, we referred to the sections of the division documents, the history all of which are in the Joint Appendix which state the –

THE COURT: The answer to my question is no, you didn't refer to that in the brief and it's got nothing to do with the price of tea.

MR. THOMSON: Your Honor, well it certainly does. The Stockdale Report which we cited repeatedly describes in detail what the documents were that were before the Congress and stated the purpose. And they show –

THE COURT: Why don't you deal with my basic question which is why do you have standing to assert a violation of the purpose being the purpose being to provide hydro electric power downstream when the users of the hydro electric power have settled and they're the ones that have standing to raise that issue. I'm not saying that the states don't

have [12] standing in the case because you still may have a standing on the major structural operational changes. But on the purpose with – and standing has to be judged claim by claim. And with respect to they hydro electric power purposes I don't see how you have standing. Why am I wrong?

MR. THOMSON: Because the downstream states have their interests because water flows to them through hydro power. That's what takes the water downstream. It goes through the dam and goes downstream. If water isn't used for hydro power, if it is taken out of hydro power because the hydro power interests were willing to sell it, to sell it for $3,000,000 of cash, then they (indiscernible) cash which doesn't flow downstream for water which does flow downstream when it's used for hydro power. When they take out 23 percent and reassign it to storage held in the lake whether or not it is used. You asked me the question about Georgia withdrawals, held in the lake unless it is used then necessarily water does not flow downstream to serve the interests of the downstream states which are Alabama and Georgia.

THE COURT: In other words hydro power is against your interests. The use of hydro power is against your interests.

MR. THOMSON: No, the use of hydro power is in our interest. The sale of hydro power for $3,000,000 is definitely not in our interest.

[13] THE COURT: But not because of the hydro power purposes but because of separate purposes.

MR. THOMSON: No, because there is no hydro power to that extent.

THE COURT: All right.

MR. THOMSON: There can't be hydro power because they sold it.

THE COURT: I'm having difficulty understanding you on this but perhaps counsel for the other side will be able to explain it.

THE COURT: Well, on the operational change if you want to address that.

MR. THOMSON: Operational change, the Mr. Stockdale in his report for the Corps conceded that there are operational changes –

THE COURT: What's the baseline we measure major operational change against?

MR. THOMSON: Well, I think that some of it is just common sense. How much is 23 or 24 percent.

THE COURT: Yeah –

MR. THOMSON: How can essentially a quarter of the use be changed without it be a major operational change.

THE COURT: In measuring whether it's major do we look at what incremental changes have been made before, perhaps? Or do you just look at, start with zero as the [14] baseline?

MR. THOMSON: I think you should start with zero, but in fact –

THE COURT: Because otherwise be incremental.

MR. THOMSON: In fact the claim that has been made, this is just a substitution is flat out wrong. The Stockdale Report shows that the current withdrawals for water purposes are 145,000 acre feet. What's involved in the settlement agreement is 65, 66 percent more or 240,000 acre feet.

THE COURT: And what's the dividing line between major operational change and a minor operational change?

MR. THOMSON: There is no precise definition but common sense certainly says that –

THE COURT: Five percent, if five percent had been reallocated what do you think?

MR. THOMSON: Yeah, I think that five percent would have been a legitimate non minor although I'm not sure of that because what Mr. Stockdale points out is that when you go from hydro power to water storage you no longer deliver hydro power at peak periods. You're delivering it at essentially off peak. I think that in and of itself which

could be triggered at 5 percent. It could be triggered at 3 percent. I'm not sure. But that in itself would be a major operational change.

THE COURT: Counsel, if it isn't very clear where you draw the line, what is our scope of review of this settlement [15] agreement?

MR. THOMSON: The scope of the agreement, Your Honor, is –

THE COURT: No, our scope of review, counsel –

MR. THOMSON: Scope of review –

THE COURT: In other words if it's not clear where the line is to be drawn why can't, why shouldn't we defer to the settlement agreement between the parties?

MR. THOMSON: The scope of review, Your Honor, I submit is de novo because we're involved in statutory interpretation.

THE COURT: Yes. But shouldn't we, if it's not clear where you draw the line and you have a settlement agreement –

MR. THOMSON: I would think Your Honor, if it were questionable we might defer. But fail to see how a quarter of the entire water useable, water conservation pool being changed in purpose and thereby by the Corps own admission changing the operational nature of their operations of the lake

must be a major operational change. Whatever it does that.

THE COURT: So let me be –

MR. THOMSON: And I suggested to Judge Kavanaugh it could be a very small amount. It would depend on what it actually turned out to be. I'm sorry, Your Honor.

THE COURT: No, that's fine. I interrupted, sorry. [16] So if we were to be persuaded by your position what is left for the District Court to do? In other words your response to Judge Kavanaugh was that this is common sense.

MR. THOMSON: If the Court reverses the settlement agreement in order for these issues to be reviewed then the parties might try and both parties might try and concoct another settlement agreement or the –

THE COURT: What's before us is the District Court's approval of the settlement agreements. All right. And I understand our standard review is use of discretion but if there's an error of law that's de novo, but that's an abuse of discretion. So I just need to be clear. There's been a lot of chatter in the briefs about the record here and the District Court's failure to make certain findings. And I just want to be clear what you see would be the future proceeding in this case.

MR. THOMSON: The future proceeding would be for the District to start, District Court to

start by doing what it didn't do. And that is when you have an APA case you call for the Corps to present an administrative record. And I believe that administrative record would include all of the confidential mediated settlement agreements in this case which –

THE COURT: I thought your position was that this was a major operational change so how would any evidence of I mean [17] to just get Congressional approval. Right?

MR. THOMSON: They do have to get Congressional approval.

THE COURT: I don't understand what you're saying in response to Judge Rogers' question.

MR. THOMSON: She asked me what would happen to the record. And then there would be a record.

THE COURT: Okay.

THE COURT: The question is why haven't you put on any evidence in this case to establish that there was, what the baseline was and what the change was.

THE COURT: Well, Your Honor, my answer to that I guess is the Judge Jackson set the rule that they could go and mediate and come up with a settlement. And then it needed to be submitted to him for approval.

THE COURT: You had every opportunity – did you not have an opportunity to ask Judge Jackson to allow you to put on evidence?

MR. THOMSON: We asked for it.

THE COURT: And what did you ask for?

MR. THOMSON: We asked –

THE COURT: Did you proffer evidence?

MR. THOMSON: No, we didn't proffer evidence. We asked for the administrative record.

THE COURT: Yes, that's a separate question. You [18] treated this as if it was an APA review case.

MR. THOMSON: We proffered evidence, yes, Your Honor.

THE COURT: You, you –

MR. THOMSON: Yes, Your Honor, we proffered declarations, affidavits by a whole series of witnesses. And Alabama did likewise.

THE COURT: I'm not sure counsel, this was an APA review case. I don't know how you got it into that but it was a settlement agreement which you could have challenged by proffering evidence that there was a factual mistake or that there was a legal mistake based on certain facts that you would put into evidence and you did not take advantage of that.

MR. THOMSON: We did put in evidence, Your Honor, the declarations of the witnesses. In evidence as well is the Stockdale Report of the Corps of Engineers. In evidence is the white paper that the Corps of Engineers put together in 2000, all of those are in the record and they're cited in the brief or showing what the Corps' views are of what is an operational change and what is the amount of an operational change –

THE COURT: In other words your argument was in a – excuse me, counsel. Your argument was basically an estoppel argument against the Government. Right?

MR. THOMSON: I wouldn't have called it estoppel. [19] They're the ones that managed the –

THE COURT: Well, you tried to use their prior opinions. You tried to use their prior opinions. You tried to use –

MR. THOMSON: Absolutely.

THE COURT: – other factors that they had relied in the past to say this was an inconsistent position.

MR. THOMSON: Well, in part to answer your question –

THE COURT: But you did not put any evidence yourself as to what the change from the baseline situation was.

MR. THOMSON: That is correct, Your Honor –

THE COURT: Well –

THE COURT: All right –

MR. THOMSON: But in response to Judge Kavanaugh's question he asked what an operational change is and we submitted the Corps' position as to what an operational change was as the definition of an operational change. The only thing that was different said the Court between the Pack Report of 1989 and the settlement agreement both called for 240,000 acres. Both substituted for hydro power water supply.

THE COURT: All right. What's the payment? That was the difference they said.

MR. THOMSON: Well, there was the $3,000,000 – they were contemplating a payment of surprisingly $3,000,000. [20] That's what the Stockdale Report said identical with the one year. The difference is their legal position that somehow a permanent grant of water supply is different than an interim although the statute did not use either word. The regulations do not use either word.

THE COURT: All right. Counsel, I think we have your argument. I am correct, we're over time. All right.

MR. THOMSON: Thank you.

THE COURT: All right. Thank you. We'll hear from counsel for the State of Alabama.

MR. LEMBKE: Thank you, Your Honor. May it please the Court, I want to begin by referring to Judge Silberman's question about standing. The 11th Circuit confronted a very similar issue and it's at 1993 in the Joint Appendix. And what they said was that when the Corps management of Lake Lanier violates federal law, has adverse impacts downstream to the environment and the economy, that injures Alabama and Florida and creates standing. We think –

THE COURT: That is unquestionably true with respect to the major structural operational changes. But insofar as a purpose of this project was hydro electric power I fail to se why you have any standing to assert a violation of that purpose when the beneficiaries of that purpose, i.e., the hydro electric power companies say we're perfectly happy. We're settled.

[21] MR. LEMBKE: Yes, sir.

THE COURT: Now that is what 11th Circuit said you had standing with respect to the whole question of the flow which does go to the major structural operational changes. It does not go to the hydro electric purpose.

MR. LEMBKE: Well, with that I would respectfully disagree, Your Honor. Because –

THE COURT: You mean the 11th Circuit didn't specifically refer to the hydro electric –

MR. LEMBKE: No, they didn't.

THE COURT: So then you're not really disagreeing with me.

MR. LEMBKE: Well, I disagree with you in the sense that the creation of hydro power, the water goes through the dam and generates the flow. And so when there's a violation of the federal purpose of hydro power and there's less hydro power there's less flow. And the 11th Circuit contemplated that a violation of federal law in corporations, ie., inadequate generation of hydro power that leads to less flow and that leads to the downstream injury. So we submit we do have standing on that basis. Now with regard to the question that was asked about major operational change in the standard of review, I would note that Judge Jackson seems to have lost track of that in his opinion. There was no discussion whatsoever by Judge Jackson about major operational change. [22] He cited subsection (d) of the Water Supply Act but then said the crux of the matter is effects on project purposes, serious effects on project purposes. He didn't give any analysis of major operational change. And we submit not only does the Stockdale memo which was written less than a year before the settlement agreements were executed, it states what the baseline was of the current use was 145,000 acre feet and this was going to take it to 240,000 acre feet. Now, that just happens to be virtually the same amount that the Corps had proposed in the 1989 Pack Report which the Corps concluded –

THE COURT: It wasn't quite the same amount. It was much more. Wasn't it?

MR. LEMBKE: No, sir, the Georgia request in 2000 was for 34 percent but in 1989 it was 238,000. The settlement agreement is a little bit more at 240.

THE COURT: Yes.

MR. LEMBKE: And they recognized –

THE COURT: But it was the 330 that they referred to. Wasn't it?

MR. LEMBKE: I'm not sure where that number comes from, Your Honor, but the Norwood letter stated that the Corps recognized that the Pack Report was created because they had to go to Congress with that sort of reauthorization, reallocation of the reservoir.

THE COURT: And several arguments are made one of [23] which of course is the pay, the compensation which changes the purpose of question. And secondly the interim rather than permanent.

MR. LEMBKE: Yes, sir. And our response to that is on compensation. We do not believe that a privately brokered deal can override the Congressional intent. Congress said this is going to be for hydro power. And as the power of making recognized one of Congress' objectives was that it would drive down the electrics rates for all. Well the problem is it doesn't quite work out in this situation because now the hydro power preference customers are going to

have to go into the higher cost market and the law of supply and demand says that's not going to cause the price to go down. It's going to cause the price to go up for everyone else. And so you don't have the low cost clean hydro power being generated. You've got this private deal being cut without any consideration of the incidental beneficiaries downstream from the hydro power interests. And we submit that is exactly why Congress expressly reserved to itself the question of whether a change that will cause a serious effect on hydro power, whether that change is going to be made.

Now, the Power of Macon step right up and say. We agree it's a serious effect on hydro power. But it's been bought off. If this Court endorses this compensation mechanism in a privately brokered deal there would be nothing [24] to stop at least theoretically the water supply providers from buying off the downstream navigation interests and buying off the flood control interests and have a total reauthorization of Lake Lanier without ever going back to Congress. That's where this argument takes you and I believe Congress expressly reserved to itself that right in subsection (d) to make that sort of policy decision.

Now, I want to note –

THE COURT: If the hydro power customers are paid extra compensation to offset the loss of water coming through –

MR. LEMBKE: Yes, sir.

THE COURT: They can then purchase power and alternatively.

MR. LEMBKE: Yes.

THE COURT: Why should power be any more expensive then?

MR. LEMBKE: For them?

THE COURT: Well, first for them.

MR. LEMBKE: It won't be.

THE COURT: Right. Then why is it any more expensive to the consumer?

MR. LEMBKE: Well, for the –

THE COURT: First of all that argument was even presented. But secondly even if it was why would it be any [25] more expensive to the consumer if it's no more expensive to the hydro power company?

MR. LEMBKE: Well I think we do respond to that in our reply brief to what the Power of Macon said.

THE COURT: Okay.

MR. LEMBKE: But we submit, Your Honor, that it would be Congress as the Power of Macon argued had a broader objective to keep overall power, not just for the preference customers, overall power lower. The thought being that the low cost power from the hydro power will cause the higher cost power producers to reduce their prices to compete. Well, the

problem is when you've got now the hydro power preference customers not getting the hydro power, they're made economically whole, but they're going out and increasing the demand for the higher cost power. But the bigger point, Your Honor is we believe in subsection (d). Congress reserved to itself the right to make that sort of determination, not to a privately brokered deal.

THE COURT: You mean injury here is Congress' injury.

MR. LEMBKE: Well, I think the plain language of the statute says there's no dispute that there's a serious effect on hydro power. It's a $3,000,000 a year impact. The issue is can the private interests say well we're bought off that's okay. And we say Congress said no. It's going to be up to us if there is a serious effect on project purposes to make that [26] determination.

Now, the appellees can see and Judge Jackson stated that one of the criteria is that the settlement agreements had to be consistent with public policy. As we stated in our brief and then in our supplemental submission of authority on August 27th, the Judge now presiding over the Alabama case has reaffirmed the initial determination that the entry by the Corps into this settlement agreement was, involved affirmative misconduct and was a violation of the Alabama Courts 1990 stay order. We submit that it is in conceivable that Judge Jackson could have concluded that the settlement agreement was consistent with

public policy when the federal agency that entered into it entered into it in violation of a binding court order of the Northern District of Alabama.

THE COURT: Is that what the 11th Circuit said?

MR. LEMBKE: What the 11th Circuit had before it, Your Honor, was the 11th Circuit had Judge Boundary's preliminary injunction and Judge Boundary's preliminary injunction was overturned or vacated –

THE COURT: Vacated, vacated.

MR. LEMBKE: – vacated on procedural grounds. And at the time of our initial briefing that was the situation. It had been vacated. But now Judge Jackson has gone back and reaffirmed as law of the case –

THE COURT: You don't mean Judge Jackson do you?

[27] MR. LEMBKE: Excuse me, Judge Magnison who is the MVO Judge who has been appointed from the District of Minnesota to oversee the Alabama case and four other cases raising ACF challenges to the Corps' operations.

THE COURT: Now, we don't have the same parties in the Alabama cases we do here. Do we?

MR. LEMBKE: In fact, your Honor, I believe at least the power customers are now before the MBL proceedings which are being handled on a

consolidated basis. And I know when that county is before the MVO proceedings. But in oral argument before the District Court, counsel for Georgia said it's up to the Alabama Court to determine whether the agreement was violated. But it's up to the District Court in this case being the, whether the not the agreement, the stay order of 1990 was violated.

THE COURT: Stay order, right, right.

MR. LEMBKE: But it's up to this Court in this case to decide whether the standards for approval for the settlement agreement. The Alabama Court nor Judge Magnison in the MDL proceedings has never had before it the question of whether the settlement agreement is consistent with public policy. That's an issue that Judge Jackson had to address. Although he really didn't say much about it he apparently viewed as satisfied and we submit for the reasons we've stated that simply cannot be affirmed. A federal agency violating a [28] binding order of a sister federal court cannot settle a case in another federal court in violation of the first court's order and still be consistent with public policy.

THE COURT: What's your position on the baseline for major operational change?

MR. LEMBKE: Well, I think it ought to be zero –

THE COURT: Right.

MR. LEMBKE: – because if you don't have it be zero there was no allocation at all to water supply.

THE COURT: If you say well we're going to take a 145,000 acre feet you're endorsing what in de facto been going on which is at issue in the Alabama case at 145,000 which was inconsistency with the requirements of the Water Supply Act. So I think you have to go back to zero. And the Stockdale memo establishes that it was 145,000 in 2002 just before the settlement agreement was violated. This takes it to 240,000 and as Mr. Thompson noted the Corps in the Stockdale memo conceded that was major operational change because it was going to shift the generation of hydro power from the peak times of demand to off peak. And in fact at 582, 1162, 1192 and 1428 in the record there's affidavit testimony consistent with the Stockdale memo.

THE COURT: Can I just ask you one quick question?

MR. LEMBKE: Yes, Your Honor.

THE COURT: The Government is arguing that, one of [29] the arguments that has been weighed is the Corps authority to allocate. Is that correct?

MR. LEMBKE: I think what they're saying is the argument arising out of the 1963 Act and other authority the Court has absolutely no authority even if it satisfies the Water Supply Act to reallocate.

THE COURT: Well also I think the argument that's in the GAO –

MR. LEMBKE: That's right it's the GAO argument.

THE COURT: Right. Okay.

MR. LEMBKE: It's basically the GAO –

THE COURT: So that's all we're talking about.

MR. LEMBKE: That's all we're talking about.

THE COURT: All right.

MR. LEMBKE: They're not saying that we waived the essential water supply subsection (d) argument.

THE COURT: Right.

THE COURT: Thank you.

MR. LEMBKE: Yes, Your Honor.

THE COURT: Good morning, we'll hear from the Government.

MR. GRAY: May it please the Court, Michael Gray on behalf of the federal appellees. I've confirmed that the waiver argument –

THE COURT: Thank you.

[30] MR. GRAY: That's how we've done it. There are four things that I want to address: the Corps' role in this. The Corps' role in reviewing it; the operational change issue and then this issue of the Corps' bad faith.

First, it's very important to set the context of what the Corps actually does here. The Corps does not decide who gets how much water. It's not in the business of selling water. That's all a matter of state law. What the Corps provides and what it sells is access to water for which you already have an existing right to withdraw. So what this case is really about is a pricing dispute over that access to the water storage. It's not about who gets how much water. SeFPC sought in their complaint the precise remedy that the settlement agreement imposes which is higher price is paid for storage for this water in the reservoir to effectuate withdrawals which could be made regardless of the storage. They have the right to withdraw the water from the system. What they pay for is the ability to get it out from the Corps.

Now, the second thing is this Court is not reviewing an APA final agency action. Now what we have here is a settlement agreement and it's a limited review just for facial legality. The Corps made an initial determination that it has the authority to carry out the settlement agreement in full legally. But there's still the need for process to be undertaken and a full administrative process of the [31] administrative record created on these water supply act issues. And then there can be challenges –

THE COURT: What if 100 percent had been reallocated?

MR. GRAY: Well, I think if 100 percent had been reallocated, if for example, so this is a facial review and I think at that point the Court can say well clearly there's no authority to do that. And –

THE COURT: Why isn't that true with 25 percent? That's a quarter of the reservoir.

MR. GRAY: Because, well –

THE COURT: If you're conceding it with 100 which I think you have to.

MR. GRAY: There's, I think I'm conceding that the Court's review would allow for invalidation. I don't think that it, that the Court should invalidate in these circumstances for the reasons we've expressed that the contracts are interim in nature. There's a commitment to go to Congress built into the settlement agreement itself. There's no actual record –

THE COURT: Commitment to go to Congress but not to await for approval.

MR. GRAY: Well, what the settlement agreement sets up is a process by which these withdrawals had been happening. Under the lit agreement that was you know, passed by the three states and Congress in 1992. This situation was ongoing for [32] ten years before we got sued by the power customers and said you need to do something about this. And so what the Corps said this is a difficult problem.

We need to go to Congress. In the interim we need to formalize this relationship. And that's what these contracts would do. But again that's just an initial determination about the Corps authority. It's not a final determination. The Corps would still have to engage in administrative process, produce an administrative record and then at that point –

THE COURT: That gets you to the NEPA issue but we're still struggling with the major structural operational change.

MR. GRAY: No, I think it's –

THE COURT: Do you accept the proposition that there is a one third change here –

MR. GRAY: I think –

THE COURT: – from the existing baseline?

MR. GRAY: I think it's 23 percent is what they alleged from the baseline which was there –

THE COURT: And you accept that?

MR. GRAY: Well I think it's a little more difficult than just saying 23 percent. They go from a zero but you know, we have this dispute among the parties about what the original authorization was. The Corps' position is that at least there's an incidental benefit for water supply and that the water supply was at least an anticipated benefit of the [33] reservoir. And so you have to –

THE COURT: Assume we disagree with you on that, then what? What's your answer to Judge Silberman's question?

MR. GRAY: Well, I'm not sure on the numbers. I think it would be a little bit less than 23 –

THE COURT: What's the baseline?

MR. GRAY: The ba – I think the baseline, there's two. You have to look at both, right. You have to look at – you have to look at the original authorization but you also have to look at what the current status quo is. I mean I think the initial inquiry is is there a major change –

THE COURT: Well, let's look at the current status quo. What's the change? How does the agreement change the current status quo?

MR. GRAY: Okay. The current status quo, at the time the settlement agreement was signed –

THE COURT: Right.

MR. GRAY: All right. That was the live and let live agreement which was that people who had the ability to withdraw water retained the ability to withdraw that water with reasonable increases. That's exactly what the settlement agreement does. It just formalizes that agreement.

THE COURT: I thought the settlement agreement didn't deal with withdrawal of water, just the reserving the storing of water.

[34] MR. GRAY: They interrelated.

THE COURT: That's what their argument is.

THE COURT: Yeah.

MR. GRAY: Well, no I mean the withdrawal of water is permitted by the state.

THE COURT: Right.

MR. GRAY: Right. But the way the Corps figures out, I mean the parties, you know, these parties aren't interested in just having water sit in a reservoir. Right. I mean there's a reason they buy the storage and that's to effectuate the withdrawal.

THE COURT: Again, that's their argument. Yes, I understand that point.

MR. GRAY: Well, I think –

THE COURT: We're still trying to figure our what is your position with respect to the baseline? In your brief you say that the appellants here or the petitioner, the appellants never ever produced any evidence to show there was incremental change caused by this agreement.

MR. GRAY: That's true.

THE COURT: Yet it seems to me you're conceding flatly that there's a 23 percent change caused by the settlement agreement.

MR. GRAY: Well, no I think what we said is there's no evidence –

[35] THE COURT: No, what have you said, not we said. What have you said?

MR. GRAY: There is no evidence that a 23 percent change affects a major operational change in the reservoir. I – that's the position – that's the position –

THE COURT: So you conceded, you conceded there is a 23 percent change.

MR. GRAY: I think that's, I think that that's what the record shows.

THE COURT: Okay.

MR. GRAY: That the reservoir, there will be 23 – we concede that 23 percent of the reservoir will be allocated to storage under – if these agreements are taken out.

THE COURT: No, no, that's not – is that 23 percent more than was allocated before?

MR. GRAY: Our position on the original authorization is that there is no allocated storage space in the reservoir for municipal and industrial water supply. That's why we go into the Water Supply Act in the first place. What Water Supply was an incidental benefit of the project, an anticipated benefit.

THE COURT: Counsel, why am I having such difficulty here? I'm sure it's my defect. I'm trying to understand what is the incremental change that you concede has taken place by virtue of this settlement agreement with respect to the amount [36] of water stored before for withdrawal as compared to that which will be stored in the future for withdrawal by Georgia?

MR. GRAY: Okay. A couple of things, one the original authorization so the zero that they're talking about. There's no allocation for storage. Now –

THE COURT: Counsel, I'm not asking you what –

THE COURT: Answer his question.

THE COURT: Counsel –

MR. GRAY: I'm really trying to answer the question.

THE COURT: No, you're not. No, you're not, counsel. The question is simply under what is the status quo at the time of the settlement agreement –

MR. GRAY: Okay.

THE COURT: – as to the amount of the water that is stored for withdrawal for Georgia –

MR. GRAY: Okay.

THE COURT: – as compared to the amount that is reserved for Georgia after the settlement agreement?

MR. GRAY: I believe that the status quo at the time of the settlement agreement was about 145,000 acre feet.

THE COURT: Right.

MR. GRAY: Okay. And that the settlement agreement itself I'm not, it's 240,000. So I think it's a 100,000 increase from that status quo until – I'm sorry, I misunderstood the question. That's all.

[37] THE COURT: So it's 100,000 increase?

MR. GRAY: Yes.

THE COURT: Out of a total storage of what?

MR. GRAY: The total storage in the lake is about a 1,000,000 acre feet.

THE COURT: So it's 10 percent?

MR. GRAY: Yes.

THE COURT: There's a 10 percent change.

THE COURT: Do you think the Court can do a series of five percent changes, that it might be minor that end up with a 25 percent change, 50 percent change and thereby not get Congressional approval for something that in the end is a major change?

MR. GRAY: I think at some point the Court is going to have to go to Congress. Right. I don't think that the Court can continually –

THE COURT: Well that's the question –

MR. GRAY: – do that.

THE COURT: – at some point, yeah.

MR. GRAY: No, I understand it is a question in this case and the Court has said it's going to go to Congress. Right? Set up an interim, you know, arrangement to deal with this until the Corps does go to Congress.

THE COURT: Counsel, counsel, that's not a response because under the statute you have to go to Congress before [38] you take the action, not afterwards.

MR. GRAY: Well, essentially it says is only if there is a serious effect or a major operational change. Our position is that because there's no permanent rights that's at the end of this period and coupled with that we're going to Congress that those that major change isn't going to happen and there's not a serious impact. That's how it relates. I'm not sure – well on the bad faith question –

THE COURT: Has the Corps ever approved anything of this size that for storage that wasn't in a reservoir that wasn't originally authorized for local water supply without the approval of Congress?

MR. GRAY: I only know the acre of footage of the largest which I think is 75,000 acre feet.

THE COURT: So this is the largest ever that's been done without –

MR. GRAY: On an acre foot basis. I'm not sure on a percentage basis. I think it is on a percentage of the reservoir basis too, but I'm not sure about that. It's definitely the largest acre foot reallocation. But I want to be sure that, you know I make one more point which is that, this, we've assumed now that the settlement agreement lacks to be carried out. But there is a NEPA procedure and these reallocations may never happen. And the Corps ought to be given an opportunity to –

[39] THE COURT: Counsel, the NEPA procedure doesn't strike me as your more serious problem. The problem you're having here at least with several of the Judges is trying to explain to us why this is not a major operational change.

MR. GRAY: No, my only point is that there's sort of a –

THE COURT: I must say I was a little more persuaded by your brief than I am by your oral argument.

MR. GRAY: Well I apologize for that. I – what I'm trying to say is that there's sort of two conceptions of the settlement agreement, competing conceptions. Right. One is in Alabama and Florida's world the settlement agreement equals a reallocation

of storage. In our world it doesn't equal a reallocation of storage. All right. We made an initial determination that we can reallocate storage but we still have to engage in the administrative process including the NEPA process and make all these determinations.

THE COURT: Counsel, counsel, just one question. If we conclude that this is a major operational change then appellants win. Isn't that correct?

MR. GRAY: If you conclude that per se on its face the Corps cannot, there are no set of facts under which the Corps can engage in this –

THE COURT: Wait a minute, you've given the facts. You've given us the facts. You said it changes from 145,000 [40] to 240,000 which is a change of 10 percent of the water in the reservoir.

MR. GRAY: And it does that on an interim basis –

THE COURT: On an inter –

MR. GRAY: If you determine on those facts that it's a major operational change then I think that's right.

THE COURT: Then you lose.

MR. GRAY: I think that's right.

THE COURT: And is it your position that 10 percent is not a major operational change?

MR. GRAY: Ten percent in the context of this settlement agreement is not a major operational change.

THE COURT: Why is 10 percent not a major operational change? Is it because it's interim or is it because 10 percent is not that high on the mount?

MR. GRAY: Well, it's because it's interim for one. In the circumstances in which it's interim that we've already committed to go to Congress and because –

THE COURT: Wait a minute, wait, wait, counsel, I don't understand why you keep saying we've committed to going to Congress. That doesn't help your position at all.

MR. GRAY: Well, I will not say that.

THE COURT: No, no, but do you understand why I say it doesn't help your position because if your opponents are correct you had to go to Congress before you did this, not [41] afterwards.

MR. GRAY: Well, if they're correct, that's true. I think –

THE COURT: So I don't understand why you're constantly telling us you're going to go to Congress.

MR. GRAY: Well –

THE COURT: The question is whether the settlement agreement is to be approved or not.

MR. GRAY: That's correct. It ties into our view of what a major change is and what –

THE COURT: It's not a major change because you're going to go to Congress.

MR. GRAY: It's not a major change because it's only an interim change and no permanent storage rights would vest at the end of the periods. That's our interim argument and that is set up so that we have certainty while we go to Congress. That's why I keep saying that.

THE COURT: If this was permanent it would be a major operational change then.

MR. GRAY: I think that the Corps has said at this level if it was permanent we would need to go to Congress. We committed to go to Congress in the settlement agreement.

THE COURT: Counsel, counsel, you have to go to Congress beforehand, not afterwards. Right?

MR. GRAY: That's correct. I mean and –

[42] THE COURT: So, so –

THE COURT: – you're trying to make it look like we're close to the statute therefore it's okay. But the statute requires approval, not going.

MR. GRAY: It requires approval if it's a major change.

THE COURT: Right.

MR. GRAY: A major operational change.

THE COURT: So you would agree with me then 10 percent would be major operational if it was permanent.

MR. GRAY: The amount of storage set aside, that's right. If it were permanent I think we would – the Court has taken the position –

THE COURT: So your case –

MR. GRAY: – that would be –

THE COURT: Your whole case depends then on the proposition that this is interim rather than permanent.

MR. GRAY: Well and the compensation mechanism also –

THE COURT: Well the compensation mechanism is relevant for the purposes question.

THE COURT: Yes.

THE COURT: It's not relevant for the major structural change, is it? Or major operational change or is it?

[43] MR. GRAY: Well, no it is.

THE COURT: Okay.

MR. GRAY: It is relevant because you're talking about how you operate the reservoir and how you operate the reservoir is for the purposes and so the compensation mechanism does relate to the operating – I mean their argument is that there's an operational change because we're holding water – you shift the water releases, right. You shift it from you know peak times for hydro power production and water release –

THE COURT: No, no, no, wait a minute, counsel. Look at the statute. It says which would seriously affect the purposes for which the project was authorized or which would involve –

MR. GRAY: Sure.

THE COURT: – major structural or operational changes. So operational changes is a separate concept from seriously affecting the –

MR. GRAY: But you have to look at how you operate the reservoir and how they operate the reservoir is for, you know, hydro power generation, for flood control. I mean they're interrelated and in the operation of the reservoir here –

THE COURT: Well reading that statute you could have a situation that did not seriously affect the purposes but [44] which did have a major operational change. And then in which case you –

MR. GRAY: No, you could have that. That's right. But I still think –

THE COURT: So then therefore your major operational change if I understand it your argument basically is 10 percent would be – you concede with counsel is a major operational change but for the fact that it's interim.

MR. GRAY: I think that's what the Corps' position has been, yes.

THE COURT: How interim is interim?

MR. GRAY: Well, interim in this case is 10 year contracts set at 20, 13 levels for reasonable increases to that with a renewal for 10 years. And so that no rights, that's at the end of those contract periods. Normally what happens is if you have a contract for water storage at the end of a 30 year payment period that's amortized over a 30 year period you get a permanent right to storage in the reservoir. So what we say is if Congress for example said no, this is no good, well then at the end of the contract periods the storage rights would vest back to the Corps.

THE COURT: You can do temporary major operational changes for 30 years without the approval of Congress?

MR. GRAY: I think on the yeah, on the 20 year period that we have –

[45] THE COURT: Yes?

MR. GRAY: – I think only coupled with in this, you know, this is a very difficult situation that

the Corps is trying to come up with a creative solution to, you know getting Congress to act is a dicey proposition and so to go to Congress I think it has, the two have to be coupled together. I don't think the Corps could just you know, continually say well we're only doing this on an interim basis and therefore we can avoid going to Congress. But I think in the context of this agreement is a creative solution that the Corps came up with.

THE COURT: Do you know off hand –

MR. GRAY: And it doesn't facially violate the Water Supply Act.

THE COURT: Anything further?

MR. GRAY: No, Your Honor.

THE COURT: I just had a question. Are you with the Justice Department?

MR. GRAY: Yes.

THE COURT: Thank you. We'll hear from counsel for the State of Georgia.

MR. BROWN: Thank you, Your Honor. My name is Bruce Brown and I represent the State of Georgia and am speaking today on behalf of the State of Georgia and the water supply providers. Let me go straight to the point on hydro power and [46] major operational change affected by the settlement agreement. With respect to hydro power Judge Silberman is absolutely correct is that there's simply no connection necessary for prudential standing between

Florida's injury that they have articulated and the hydro power interests, absolutely none at all.

THE COURT: So if all the water stops flowing to Florida?

MR. BROWN: Then they go to the Supreme Court, Your Honor, for an equitable (indiscernible) change. I didn't mean to be quip with that –

THE COURT: No, no, no, I hear you.

MR. BROWN: But that is the remedy. That is a remedy. The interest that they're serving at the state line is an interest that only one court in this nation can address. It cannot as a matter of law provide standing for any other court and in any other injury. That is why this is such a mess.

THE COURT: Well now wait a minute. I'm inclined to agree with you with respect to the purpose question. But are you suggesting that Florida and Alabama have no standing to assert there's a violation of agreement because of major operational change?

MR. BROWN: Your Honor, the major operational change – I am. And –

[47] THE COURT: You're saying that? There's nothing in your brief, anybody's brief to suggest that.

MR. BROWN: Well, that's because there's nothing on operational change.

THE COURT: Now wait, wait, wait, counsel, hold it.

THE COURT: That's not true.

THE COURT: There's a lot on operational change. No one has argued before us that Florida and Alabama have no standing here to assert a violation of the agreement based on major structural operational change. Now standing of course is an issue we can take up ourselves. But I don't see that that argument has been presented at all.

MR. BROWN: Your Honor, you're correct. The focus has been on hydro power interest. Where we're talking past each other is the definition of operational change.

THE COURT: Would you concede that Florida and Alabama have a standing to assert a violation of the agreement based on major structural operational change.

MR. BROWN: Not in the least, Your Honor. We're not conceding that. Operational change is operational change to Lake Lanier.

THE COURT: Yes.

MR. BROWN: Not to the system. It's a federal reservoir –

THE COURT: Right.

[48] MR. BROWN: That is in the State of Georgia.

THE COURT: Right.

MR. BROWN: And what operational changes are they talking about? Are they talking about –

THE COURT: No, no, no we're talking about standing now for a moment. Not there, we'll get to the operational change for a moment. I – they have standing because they have a right to assert that there is a diminution in the water flow that's coming to Florida and Alabama.

MR. BROWN: Your Honor, we don't interpret –

THE COURT: Not the hydro electric power.

MR. BROWN: Okay.

THE COURT: That's a separate issue.

MR. BROWN: Okay.

THE COURT: But they certainly have standing to claim that there's a diminution of flow of water for fish, for recreation for any reason.

MR. BROWN: Your Honor, we have never viewed operational change as being the same thing or even anything close to the hyrograph at the Florida State Line, 300 miles downstream. We have never thought that when Congress said operational change of this reservoir –

THE COURT: Counsel, why are you not – will you accept they have standing to raise the argument. Now you can go to the merits of the argument.

[49] MR. BROWN: Yes, we will accept that they have standing to assert a claim to their injury at the State Line relating to water flows.

THE COURT: Okay. Fine –

MR. BROWN: We don't think –

THE COURT: Okay. Now let's go to Judge Kavanaugh and my, all three of our question on major operational changes. If I understand it the Government concedes that this agreement causes a 10 percent change in the amount of water reserved for Georgia or for the M&I.

MR. BROWN: Yes, Your Honor.

THE COURT: Why is that not a major operational change?

MR. BROWN: By operational the way we have interpreted operational is it changes the way the Corps operates the reservoir, just as it says. It also says major structural change.

THE COURT: Right.

MR. BROWN: So I'm talking about the structure of the river basin. It's talking about the physical –

THE COURT: We're not arguing structural –

MR. BROWN: I know but it's talking about the physical structure of that reservoir. That reservoir is 300 miles upstream. There's three other federal reservoirs between them. There's the state of Georgia that actually [50] controls how much water is being withdrawn, not the Corps. We permit that water. No water gets out of there unless the State of Georgia says it's okay. So there is a firewall between the operation of Lake Lanier.

THE COURT: Counsel, what's that got to do with the price of tea? We're still trying to figure out whether this is a major operational change.

MR. BROWN: Your Honor, we have not been able to – Florida's entire argument on operational change is they don't define what they think operational change is. They don't say it.

THE COURT: They say reallocations are operational changes and this is a significant one so it's major.

MR. BROWN: We think that Congress, if Congress wanted to say that reallocation of storage, the percentages of storage reserved is the trigger they would have said that, but they didn't say that. What did they say? They said –

THE COURT: They said modifications to include storage need Congressional approval if they involve major operational changes.

MR. BROWN: And our definition of operation is now the Corps operates that reservoir, how it does the hydro power.

THE COURT: You don't think setting aside a quarter of it for storage for local supply is operational?

[51] MR. BROWN: I do not. I think –

THE COURT: Well what is an operational change?

MR. BROWN: What you just described, Your Honor, would be looking at the fact upon project purposes, that remnant, not the major operational change.

THE COURT: Counsel, I'm trying – having a little difficulty seeing where this argument was presented.

MR. BROWN: We're the appellee, Your Honor.

THE COURT: Yes.

MR. BROWN: Okay. The major operational changes, they said in a conclusory fashion –

THE COURT: No where is the oper– the argument you're presenting now, where is it presented in any brief?

MR. BROWN: Your Honor, I'm responding to –

THE COURT: Counsel, where is this argument presented in your brief?

MR. BROWN: Repeatedly we have said that there's absolutely no evidence in the record.

THE COURT: Where? What brief? I'm mystified. I didn't see –

MR. BROWN: Page 24 in our brief we say there's no record evidence of operational change.

THE COURT: That's a separate question –

THE COURT: Yeah.

THE COURT: Yeah.

[52] THE COURT: – from a definitional issue.

MR. BROWN: Well –

THE COURT: The definitional issue you're raising now is brand new as far as I can tell.

MR. BROWN: Your Honor, it's in response in a way to your questions which suggested –

THE COURT: I know, it's all my fault.

MR. BROWN: No, it's not. It was equating operational change to the flow regime downstream.

THE COURT: Well that's exactly what their whole argument has always been. If you were going to respond to that it seems to me you might respond to it in a brief.

MR. BROWN: Well, we responded to it in spades. And another thing that we've responded –

THE COURT: No, you haven't responded on the definitional point. I mean I'm interested in this argument but it's not in the brief.

MR. BROWN: Well, Your Honor, the –

THE COURT: I'm trying also to figure out what do you mean by operational change? Can you give me some examples? If this is not an operational change.

MR. BROWN: How you run the dam.

THE COURT: How you run the dam, okay.

MR. BROWN: How you run the dam. What gages you have. What boats you need, all of those things might be –

[53] THE COURT: No, no, no, no, but you don't think or do you think Congress thought that it had to approve what gage the Corps used?

MR. BROWN: No, but it did, if it was major or major structural. So if it was a major structural change they did. So yes, I think they, what we have, the way we view it –

THE COURT: But if you set aside a 100 percent because under your theory if a 100 percent were set aside it's still not a major operational change.

MR. BROWN: It would be, it would probably have a serious effect on project purposes. That's the way we found it. It's that the shift in –

THE COURT: No, no, no, no not if you paid the hydro electric people enough under your theory, there would be no effect on purpose 'cause they would get enough money to buy power elsewhere.

MR. BROWN: Well certainly there may be a matter of degree and the Court has driven the line of where it has.

THE COURT: So you can't answer Judge Kavanaugh's question as you did. The question is would you still take the position that a 100 percent change was not an operational change? A 100 percent change in storage.

MR. BROWN: You would look at what is the effect upon the authorized project purposes. And if it had a serious effect on project purposes then of course it would be –

[54] THE COURT: So now you're back to accepting their view that they have a right to challenge the project purposes.

MR. BROWN: Not in the least, Your Honor. Their interest is in the amount of flow that they get at the State Line. That was their –

THE COURT: You want to funnel operational changes into serious purposes and then say they don't have understanding –

MR. BROWN: I'd like to say something else about the assumption. The assumption that this has anything to do with Florida. Even if you give – even if you concede all these things this is a graph. They didn't put up any evidence showing what the flows really happened if the settlement agreement is executed. This is the graph that our experts put in showing the difference, the delta between executing the interim contract and not –

THE COURT: They don't have to put in any more evidence. The Government has conceded that this agreement will have a 10 percent impact in changing the amount of water reserved to Georgia.

MR. BROWN: Your Honor, in change – the –

THE COURT: So if the Government concedes that why do they need any more evidence?

MR. BROWN: Your Honor, the agreement unquestionably is for water storage. And the water storage is in the interim [55] contracts. They're right there in black and white. It's not a contested issue about how much water storage this settlement –

THE COURT: No, but I thought it was contested what the baseline was but apparently it's not contested either.

MR. BROWN: The baseline I think is very interesting. And the baseline issue has not been developed.

THE COURT: It doesn't have to be. They conceded it. The Government conceded it.

MR. BROWN: Well, you know, I'm not a potted plant and we haven't conceded the baseline issue. And if it's the baseline you're talking about that is a very thick wicket because if you want to go back to the baseline the actual, if you – you would have to go back to how much power Congress actually authorized for Buford Dam in 1946. I believe it's 60,000 kilowatts. After Congress funded Lake Lanier the Corps built bigger turbines. And now you're going to be rationing back a little bit from that. So the baseline may be – the baseline –

THE COURT: The baseline is how much storage was authorized.

MR. BROWN: Well, if it's project purposes – if the baseline is considering what's the effect of project purposes –

THE COURT: Okay.

[56] MR. BROWN: – then the baseline would be what's the effect on hydro power. It doesn't say serious impact upon percentages of storage. It doesn't say that.

THE COURT: On project purposes that might be the baseline and the major operational change when you're talking about storage why isn't the baseline zero since storage was contemplated at the beginning?

MR. BROWN: If the ope – we of course disagree with the notion of operational changes –

THE COURT: I understand.

MR. BROWN: – is that. But I think what I can argue is the facts. Is that it's the interim contracts if executed would grant storage where there was none before. So I mean I think that's conceded and what legal consequence that has I think is up to interpretation of the statute. We would say, we would say that the whole 10 percent, 23 percent misses the point because Congress didn't use that metric. Congress said and used the general term that would give it to the Court to have some discretion in interpreting not –

THE COURT: Hasn't the Court in the past used this metric?

MR. BROWN: The amount of water storage?

THE COURT: Uh-huh.

MR. BROWN: It looks at a lot of things. It looks at the hydro –

[57] THE COURT: Is the answer to my question yes?

MR. BROWN: I believe it has, yes. And it uses the – and to answer it further –

THE COURT: Yeah.

MR. BROWN: – although this doesn't –

THE COURT: No, you can explain it, but I think it's yes.

MR. BROWN: They actually use, they use percent to govern who in their organization has to approve a withdrawal. So yes, it's not an irrelevant thing and it's one rule of thumb. But in looking at the statute and from the Court trying to address what's the best way to interpret it? The easiest way is to look at the words of Congress and to say serious effect upon hydro power. And then the first question is are these people here to raise it? Clearly not. Serious impact on operations is not redundant to the serious effect. It's something different and it's also in the same clause as structure.

THE COURT: Incidentally you just made an interest – you made an interesting point at the beginning on which I agree with you. This is not an APA review. Right?

MR. BROWN: That's correct.

THE COURT: This is not an APA review. But keeping that in mind you just suggested we should defer to the Corps' definition of operational change. Didn't you? You just [58] suggested that in answer to Judge Kavanaugh. Congress entrusted the Corps with the definition. You don't really mean that, do you? Because this is not an APA case.

MR. BROWN: I do in a different way.

THE COURT: In a different way?

MR. BROWN: In a different way, Your Honor.

THE COURT: What do you mean in a different way?

MR. BROWN: Congress chose those words.

THE COURT: I'll buy that.

MR. BROWN: Congress chose general words.

THE COURT: Yes.

MR. BROWN: And you have to look at the words they chose. They chose words that are by the nature matters of degree.

THE COURT: True.

MR. BROWN: And it does not give anyone a private cause of action. It's talking about what the Corps may or may not do.

THE COURT: Right.

MR. BROWN: I don't think it needs to be a strict APA case for our presumptions about what agency – the role between the Court and the agency to be respected. I'm not sure of that.

THE COURT: The Government has not asserted that they're entitled to deference with respect to interpretation [59] of operational change.

MR. BROWN: My argument is not based upon the Corps' interpretation of their statute. My argument is based upon a good legal interpretation of Congressional intent.

THE COURT: So then we shouldn't defer to anybody. We should make our own judgment.

MR. BROWN: Well, I think that if the Corps has determined along a continuum a particular interpretation of the statute and if as an Alabama and Florida concede, concede they have no evidence to the contrary. Then you have to affirm. What this case is about from our perspective is what is the burden in this circuit for a party challenging not just an agency but us and any other defendant. On page 14 of their brief they say, one of the most startling things you could read and that is Alabama and Florida had no obligation to develop a record. Now no trial lawyer has ever –

THE COURT: Because their theory is 25 percent change is a major operational change or it seriously affects the purposes on its face. I mean I think that's their –

MR. BROWN: Yeah, it's a facial attack.

THE COURT: Or to put another way as a matter of law.

THE COURT: Right.

MR. BROWN: Well the 25 percent of storage they use, a number of different pieces of reasoning that

you need to get between 25 percent of storage to major operational change.

[60] THE COURT: Can I clarify one thing. I actually you disagree with the way the Corps in the past has read the meaning of the word operational 'cause the Corps in the past has indicated that allocation, reallocation for storage changing that is an operational change.

MR. BROWN: They may have.

THE COURT: Do you agree with that or not?

MR. BROWN: The Corps a lot of times looks at them together. I think in the Stockdale memo –

THE COURT: Right.

MR. BROWN: – which has been referred to.

THE COURT: Yes.

MR. BROWN: Mr. Stockdale does lump them together. And we would not interpret it that way, but also in the Stockdale memo he distinguishes this particular agreement in that footnote.

THE COURT: Uh-huh.

MR. BROWN: So if that's the authority then you have to live with it. And if –

THE COURT: This is not the famous footnote 2, is it?

MR. BROWN: That's correct. And if it's –

THE COURT: But there's no authority cited in footnote 2.

MR. BROWN: But the whole –

THE COURT: It's just an assertion.

[61] THE COURT: It's an assertion. But what is in is in the single document that they're using. And they're saying Government you're stopped because you said something different someplace else. And what we're saying is no you're not.

THE COURT: Actually the law is fairly clear on that. The Government is never estopped or virtually never stopped. Justice Kenny wrote an opinion and said almost never. But they hadn't, he couldn't think of any case in which there would be estop, so –

MR. BROWN: They are never estopped until they are.

THE COURT: No, no, no, no, they're not estopped. The Government is not estopped.

MR. BROWN: But the notion is what is it – what does it take for a litigant to set aside agency action or to set – or to bear the burden of any claim against the defendant. And what is the role of the appellate court in reviewing the record. All these questions that you have asked are great questions about a lot of issues that were never developed by

Alabama and Florida in the Court below. They made a facial attack. They didn't present any evidence.

THE COURT: The District Court didn't address major operational change at all.

THE COURT: At all.

MR. BROWN: Did not and it's a reflection of the dominance that it had in the hearing, very little. I mean [62] there were a lot of other issues. There were a number of other issues. It's easy to say now in looking at the trial court that he missed one. He did. But he was also dealing with this secret, the dominating theme was that this was some copt up secret agreement and they're still bringing it out. Three time losers on that issue and they're still bring it out. Why? Because they didn't put out any other evidence. That's why. And so the decision for the Court of Appeals is that when parties challenging any defendants, not just the agency but any defendants conduct what do they have to prove? And what is the role of the appellate court in reviewing the record at the time the District Court made that decision. And if the plaintiff doesn't make his case he loses. It doesn't matter if the defendant was wrong or not. He loses every single time and that's the only way to manage the appellate process. The only way to manage the District Court. The only way to keep this Court in its proper role with respect to agency.

THE COURT: Anything further?

MR. BROWN: No, Your Honor.

THE COURT: Thank you.

MR. BROWN: Thank you.

THE COURT: All right. We'll hear from counsel from Southeastern Federal Power Customers.

MR. VINCE: Good morning, Your Honors. My name is [63] Clint Vince representing the Southeastern Federal Power Customers. We're the hydro power customers. What I'd like to try to do is directly address the questions that Judge Silberman and other members of the Court have asked us.

First of all on pages 23 and the top of 24 of our brief we point out that there's no evidence. The plaintiffs did not present evidence on the major structural or operational changes. And then in the next sentence, sentence down we point out that we're the only party that has standing on these issues and a little further –

THE COURT: Which issues? Which issues?

MR. VINCE: It's right here, Your Honor.

THE COURT: No, but isn't it fair to say you may be the only party that has standing with respect to the purpose issue.

MR. VINCE: Yes, I agree with –

THE COURT: But it's not fair to say that you're the only party that has standing with respect to structural or operational changes.

MR. VINCE: I would respectfully differ, Your Honor. I agree with you exactly on the we're the only party with standing to argue project purposes. We've also stated in our brief and I would also say I argued the 11th Circuit case for hydro power. I think your interpretation is exactly right that they have standing to argue downstream impact and we're [64] not taking that position. Where we differ respectfully with the Court is we do not believe that Florida and Alabama have standing to argue the operational change and we do not believe they have standing. We do not believe they've put in any evidence –

THE COURT: Wait a minute. Why do they not have standing to argue operational change? If it can affect downstream water supply?

MR. VINCE: It's –

THE COURT: Water flow.

MR. VINCE: To the extent it affects downstream water flow we believe they have standing.

THE COURT: That's what I thought.

MR. VINCE: With respect to the impact downstream.

THE COURT: Right. So that means they have standing to claim that this is a major operational change that hurts us.

MR. VINCE: Your Honor, part of the problem we have here – let me move off that point.

THE COURT: Maybe you should go to the merits. Why is this not a major operational change?

MR. VINCE: It's not a major operational change because nothing in the project is changing in terms of how –

THE COURT: What about Judge Kavanaugh's question, suppose there's a 100 percent storage pulled aside for Georgia [65] –

MR. VINCE: My sense is if there was a 100 percent storage pulled aside, Your Honor, that a Court would facially look at that and say that's a serious problem.

THE COURT: Would they say it's a major operational change?

MR. VINCE: Yes, of course.

THE COURT: Well then why is 10 percent not a major operational change?

MR. VINCE: Because what's really happening at these projects right now is there's very little change at all. This water's been falling – this water's been used –

THE COURT: You're saying there's no change.

MR. VINCE: There is very –

THE COURT: Well the Government says there's 10 percent change.

MR. VINCE: Your Honor, we do not agree with the Government's concessions. On page 37 of our brief we talked about the major operational changes and the fact that basically what's happening now operationally is de facto recognition of the status quo. Under the live and let live clause, etc., this water was already going to the recipients of it. The huge problem we're having here today is we're arguing about factual evidence that's not in the record. If this had all been presented by the appellants –

[66] THE COURT: Yeah, but the Government has conceded that there's a 10 percent change.

MR. VINCE: We disagree with the Government's –

THE COURT: How can we disagree with the Government's concession?

MR. VINCE: I think you have to look at the – that's a real dilemma for me, Your Honor. As the plaintiff in this case I'm sorry the Government did that. We are, we settled this case four years ago. We did it after two years of Court mediation, Court ordered mediation. We settled it on the basis that we essentially asked for in our complaint which was compensation of hydro power. At that time this water was already being used by the Atlanta region.

THE COURT: So assume there's not a concession. Let's just argue it straight up.

MR. VINCE: Thank you so much.

THE COURT: I just want to –

MR. VINCE: We would point to page 37 –

THE COURT: I just want to try to get your argument without that coloring it for a second. Why isn't the baseline zero? Why can incremental de facto, ad hoc, whatever changes over time become the baseline against which you measure this new set of contracts?

MR. VINCE: Your Honor, my best answer to that is that under the live and let live provisions of the MOU which [67] is an after 556 in the Joint Appendix that that was taking place pursuant to a interstate compact among the three states. When we sued the Corps it was already happening. The operations haven't changed.

THE COURT: So this is what I'm getting at. A series of minor operational changes that don't require Congressional approval could add up if you add them together over a series of years to what would obviously be a major operational change. And is it your position that that therefore means the Corps does not need Congressional approval?

MR. VINCE: No.

THE COURT: So if they kind of go, you know, from 1 to 2 to 3 they can do it. But if they go from 0 to 3 they can't do it?

MR. VINCE: No, I think the Justice Department attorney was correct that there has to be

ultimately these are interim contracts designed to deal with the status quo right now and I think ultimately –

THE COURT: I'm not sure I got your answer to my question.

MR. VINCE: Yes, there should ultimately be Congressional approval if there's a permanence to this or if there's a subterfuge –

THE COURT: So you're resting everything on interim?

MR. VINCE: Not everything, but I think it's [68] critically important. I think that distinction –

THE COURT: In 30 years or –

MR. VINCE: 20 –

THE COURT: 20 years –

MR. VINCE: Actually 10 –

THE COURT: 10 –

MR. VINCE: The first – am I interrupting you?

THE COURT: No, go ahead.

MR. VINCE: The first contract is 10 years. Southeastern then gets to sue after that 10 year period. If we don't sue they can be rolled over for an additional 10 year period.

THE COURT: And where do you get the authority in the statutory language for a 10 year major operational change without Congressional approval?

MR. VINCE: I do not concede that the 10 year change is a major operational change.

THE COURT: I know, but assume it's major – I thought we were agreeing that it otherwise would be a major operational change but it's interim and therefore – an interim and therefore is not major.

MR. VINCE: It also doesn't change the – what has actually been going on at that reservoir for –

THE COURT: That's a different argument.

MR. VINCE: Yes, Your Honor. Could you repeat your [69] earlier question?

THE COURT: Yeah I think what you're saying, you got two different things going on about the baseline and the interim. But my earlier question was can you do a series of interim additions that add up to a major change but somehow evade Congressional approval because you've done it in interim steps as opposed to going from step A to step Z in one fell swoop in which case you –

MR. VINCE: I think –

THE COURT: – would need Congressional approval.

MR. VINCE: – there's a tipping point. That Congress did not state it with precision what a major – didn't define it with precision what a major operational change is. But I think that –

THE COURT: How do we go about trying to define it? There's no agency record. There's no agency determination to which we can look. We have to decide on our own. It's a question of law. Isn't it? We can't –

MR. VINCE: I would have submitted that it's a failure of presentation of evidence too. I don't think this is an administrate case, administrative procedure act case. I think –

THE COURT: No, it's clearly not administrative but why – isn't – don't we have before us inevitably the question what does major operational change mean?

[70] MR. VINCE: I don't think you reach it because I don't think the plaintiff's – excuse me – the appellants in the case below gave you an evidentiary basis that you could review and I think that's a failure of proof.

THE COURT: But they're entitled to rely on the Corps' documents. Are they not?

MR. VINCE: They are but they are extrapolating in a way that's incorrect –

THE COURT: No, but I mean I understand that the Government's attempt and it's free to distinguish

but the 1989 pack and even the 2002 determination isn't that indicating at least heretofore what the Corps has had in mind?

MR. VINCE: No, there are two critical distinctions that came about we think by our lawsuit. One is those requests were for permanent allocations not interim. And interim isn't the last word but it's extremely important. And the second thing is there was no provision in that 1989 pact report for compensation to the hydro power purpose which is a really critical point. And also without record evidence and frankly sandbagging us in their reply brief. Their statement about hydro power benefits, etc. are completely false. We get the, Your Honor, Judge Silberman was exactly right. We get the replacement power costs. We're not for profit. We flow that right back through and the benchmark competition which they conflated in their reply brief is that our retail rates [71] are lower and that causes competing private utilities to keep them down. We're faithful to that. It's important too that the independent government agency that reviews our contracts oversees them, the Southeastern Power Administration is also a signatory to this agreement and gave their (indiscernible) to what we were doing. They're not a litigant but they looked independently at what was happening here and did not believe it to be a subterfuge. That's the agency that should be protecting the Treasury and the taxpayer.

The, we feel part of the reason that we're having this controversy here today is that absence of proof.

We never got to argue. We never got to present to the District Court the counter arguments to these arguments that we're arguing here at the appellate level on what was the status quo. What was the bench line. What were the operational changes. We cite in our brief also at – and it's in the Joint Appendix at 1449, paragraph 33. Florida's own expert conceded in testimony "I have not seen any analysis of cost to hydro power." There is not diminution in the hydro power here going to Judge Silberman's question about the project purpose. It just – there was no diminution and there's no record evidence whatsoever to suggest there was.

On operational change, Judge, the District Court –

THE COURT: I don't need to understand. I just need to be clear on that.

[72] MR. VINCE: Yes.

THE COURT: If at least 23 percent of the water is now going into storage –

MR. VINCE: We do not –

THE COURT: You're saying the same amount of water flows downstream?

MR. VINCE: No. We don't concede the 23 percent. I think our people thought it was 18.

THE COURT: Well say 10.

MR. VINCE: But let's, but if we assume 23 percent the same amount does not flow downstream. But there is evidence that was presented by Georgia in this case that the downstream impact was imperceptible. It's in the administrative record. There is no countervailing evidence by the appellants that no, there is a huge impact downstream. And this is what we –

THE COURT: All they have to have is a minor impact downstream to have standing. Then they can argue the operational change. All you need is an identifiable trifle.

MR. VINCE: Your Honor, they have not presented what their –

THE COURT: Oh gosh, all you have to do is say there's some diminution in the water flowing downstream and Alabama and Florida have standing particularly on the recent Supreme Court cases.

[73] MR. VINCE: But the dilemma on proof of the operational change is –

THE COURT: That's a separate issue –

THE COURT: Yeah, that's on the merits.

THE COURT: Yeah, I think you –

THE COURT: Anything further, counsel?

MR. VINCE: No, thank you so much.

THE COURT: Thank you very much.

THE COURT: Thank you.

THE COURT: All right, we'll hear from appellate Alabama.

MR. LEMBKE: Thank you, Your Honor. I'd like to focus on the three very significant concessions that were made, one each by the three people arguing for the appellees which I believe compel reversal of the District Court.

The first and biggest concession is by the United States. That if, that the amount of operational change taking place as a result of this agreement is major. That's the concession. The only effort they made to try to save it is to say but somehow it's different because this is a interim two consecutive 10 year terms for this as opposed to permanent. But you can look long and hard at subsection (d) of Section 390(b) of the Water Supply Act and see where Congress drew that sort of fine distinction. If there is a major operational change it has to be approved by Congress. Thus [74] the concession required shows that Congressional approval is required.

Second concession was made just a minute ago by Mr. Vince to Judge Rogers' question. And that was do you concede that Alabama and Florida could rely on those Corps documents? Yes, that was the concession. The Corps said in those documents dating back to 1989 that this is something and the Norwood letter going along with the 1989 Pack report, this is major,

something major that has to be taken to Congress. They understood that.

Third concession –

THE COURT: That was a concession made by Georgia, not by the Government.

MR. LEMBKE: But that was actually a concession made by SeFPC.

THE COURT: Yeah, I mean SeFPC.

MR. LEMBKE: Yes, sir.

THE COURT: They can't concede for the Government.

MR. LEMBKE: Okay. The third concession made by Georgia, Your Honor, was when you asked them the question about compensation. And this goes to the hydro power purpose. He said well if we try to take a 100 percent well that's a matter of degree so that might work to get around having to go to Congress. I don't see how either the compensation mechanism can override it or not. And by saying that well if [75] you get up to too high a level of the storage being reallocated the water supply from hydro power then you have to go to Congress. I think that takes away any foundation to the argument that if compensation won't work at 100, or 90 or 80 and you have to go to Congress, it can't work at 30, or 20 or 10.

You also asked, Judge Silberman, a very direct question to the Government lawyer. How much water

was allocated to the water supply before this agreement was signed. There is a very clear answer to that question and I never heard it. Zero, zero water. It is clearly conceded in the record and it's clear, zero water was ever allocated or is still allocated –

THE COURT: You mean de juris or de facto?

MR. LEMBKE: I mean de facto, both from the beginning and at any point up until this settlement agreement not one drop of storage has been allocated to water supply at Lake Lanier. It's zero. So we're going from zero to 23 percent. And there's been a lot of talk about the live and let live clause and that arose out of the agreements of the states and was memorialized in the 1997 ACF Compact. And what that said for purposes of allowing the parties to try to negotiate a resolution, Alabama and Florida said we'll allow reasonable increases in the withdrawals as the negotiations take place. But they forgot to tell you the but. But if the ACF Compact [76] collapses there will be no vested rights whatsoever to those increases. The ACF Compact expired on July 31, 2003 and so any, there are no vested rights. And so they can't come in and say well live and let live is the status quo but forget to tell you the kicker which is as a matter of federal law and enacted by three states there was no vested entitlement to that.

I also want to briefly refer to somebody said in their presentation that there was no evidence of any downstream effect. Alabama presented the affidavit

of Tray Glenn at Joint Appendix 1516 showing the effects downstream so that is in the record.

We believe in light of those concessions and the arguments contained in our brief the District Court must be reversed.

THE COURT: Thank you.

MR. LEMBKE: Thank you.

THE COURT: The Court will take the case under advisement.

(Recess.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Caroline G Gibson
Caroline G Gibson
DEPOSITION SERVICES, INC.

November 26, 2007