

September 2013

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Recommended Citation

Lewis Jones, John Fortuna & Karen Johnston, *Updating Twentieth Century Water Projects to Meet Twenty-First Century Needs: Lessons from the Tri-State Water Wars*, 29 GA. ST. U. L. REV. (2013).

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UPDATING TWENTIETH CENTURY WATER PROJECTS TO MEET TWENTY-FIRST CENTURY NEEDS: LESSONS FROM THE TRI-STATE WATER WARS

Lewis B. Jones, John L. Fortuna, Karen M. Johnston

INTRODUCTION

As populations grow and water supplies dwindle, communities throughout the United States are looking for ways to fill the gap between supply and demand. In many cases, the water resources exist but are tied up in storage projects operated by the United States Army Corps of Engineers, which operates 136 multipurpose projects storing 9.8 million acre-feet of water (1.24 trillion gallons).¹ As a result of outdated authorizations, under-developed laws, and dysfunctional politics, however, this water has all too often proved incredibly difficult to access.

The “Tri-State Water Wars” among Alabama, Florida, and Georgia are a case in point. Metropolitan Atlanta, with a population of over five million people, lies in the Piedmont Region of North Georgia, where groundwater is scarce and surface water is limited to small, headwater streams with highly variable flows.² As a result, Metropolitan Atlanta depends heavily on storage reservoirs—and in particular on two large Corps projects known as Lake Lanier and Allatoona Lake, which together provide over ninety percent of its water supply.³ No practical alternatives to these reservoirs exist, and

1. Benedykt Dziegielewski & Jack C. Kiefer, U.S. Army Corp of Eng’rs, Water Resources Outlook 8 (2006), available at <http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2007-R-03.pdf>.

2. Metro. N. Ga. Water Planning Dist., Water Supply and Water Conservation Management Plan 1–13 (2009), available at http://documents.northgeorgiawater.org/Water_Supply_Water_Conservation_Plan_May2009.pdf (explaining that Atlanta developed in the headwaters of six different river basins); *id.* at 2-5 (“Groundwater sources make up less than one percent of the total available water supply in the Metro Water District due to bedrock geology.”).

3. *Id.* at 2-1 (explaining that the Chattahoochee River system, which includes Lake Lanier, is the “most significant water supply source for the region,” alone accounting “for approximately 73 percent of the permitted available water supply in the Metro Water District”); *id.* at 2-2 tbl.2-1 (showing proportion of withdrawals made available by Lake Lanier and Allatoona Lake, respectively).

the entire Metropolitan Atlanta region has developed in reliance upon them.⁴ Yet Atlanta has had to fight for over twenty years to establish its right to continue its existing use of these waters, let alone to secure adequate supplies to accommodate future growth.⁵ Indeed, Atlanta's right to utilize these Corps projects was not established until 2012, when the issue was firmly and finally decided by the United States Court of Appeals for the Eleventh Circuit in *In re Tri-State Water Rights Litigation*, and the Supreme Court denied further review.⁶

The *Tri-State* decision has implications for many other federal projects. Lake Lanier, which was the focal point of the *Tri-State* case, is like many other Corps projects in that it was authorized in the 1940s to serve a mix of purposes that may no longer be relevant. As in the case of many other projects, the region served by Lake Lanier has changed dramatically since Congress authorized the project. When Lake Lanier was authorized, the population of the entire Apalachicola-Chattahoochee-Flint (ACF) River Basin was just 1.6 million,⁷ rural electrification was still a priority throughout the South,⁸ transportation networks were under-developed, and

4. *Id.* at ES-9 (explaining that “Lake Lanier and Allatoona Lake have played a key role in assuring an adequate water supply for the Metro Water District since their construction by the U.S. Army Corps of Engineers (Corps) in the 1950s” and that “[a]fter reviewing alternatives to the use of the federal reservoirs, the Water District has concluded that there are no alternatives to the Chattahoochee River and the Etowah River as major water supply sources for north Georgia.”).

5. See *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009), *rev'd and vacated sub nom. In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25 (2012); see also Shaila Dewan, *River Basin Fight Pits Atlanta Against Neighbors*, N.Y. Times (Aug. 15, 2009), <http://www.nytimes.com/2009/08/16/us/16water.html>; *Judge Rules Against Atlanta Regional Water Wars*, USA Today (July 17, 2009, 3:34 PM), http://www.usatoday.com/news/washington/2009-07-17-lake-lanier_N.htm; *Water Wars in the South-east: Chattahoochee Blues*, Economist (Sept. 16, 2010), <http://www.economist.com/node/17043462>.

6. *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160,1205 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25 (2012).

7. H.R. Doc. No. 80-300, at 17 (1947) (survey report discussing the plan of improvement for the ACF River Basin and the development of Lake Lanier, which is incorporated into the River and Harbor Act of 1946).

8. Significant legislation was enacted in furtherance of this goal, such as the Rural Electrification Act of 1936, 7 U.S.C. §§ 901–918(c) (2006), and the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831–831ee (2006). Rural electrification also played a prominent role in the authorization hearings concerning Lake Lanier. See, e.g., *Rivers and Harbors Bill: Hearings Before the Comm. on Rivers and Harbors H.R. Seventy-Ninth Cong. Second Sess. on H.R. 6407 a Bill Authorizing the*

environmental protection was hardly a consideration.⁹ Today, five million people reside in metropolitan Atlanta alone,¹⁰ water is scarce, the region is fully electrified and connected by highway and rail, and a host of environmental issues have risen to the fore. In short, priorities have changed.

Unfortunately, the prevailing wisdom—in this controversy and others—has been that an Act of Congress may be required to modify existing projects to serve modern needs.¹¹ The authors argue, however, that the need for Congressional action has been greatly overstated: The *Tri-State* decision makes clear that older authorizations, when properly understood and interpreted in their historical context, may provide significantly more authority to modify existing projects than has been previously believed.

This paper will proceed in five basic parts. Part I provides a brief discussion of the legal framework governing the authorization and modification of Corps projects.¹² Part II provides a brief overview of

Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes, 79th Cong. 249, 251 (1946) (statement of Rep. John E. Rankin, Member H. Comm. on Rivers and Harbors) (noting that there are 250,000 farms in Georgia and that electrification would “double the value of every farm it touches”).

9. The Gulf sturgeon is a case in point. No one considered the fact that construction of the large dams authorized by Congress would block its migration to historic spawning grounds in the Chattahoochee River. And at the same time, the City of Apalachicola, Florida was the center of a significant Gulf sturgeon fishery that severely depleted the species. The sturgeon is slowly coming back, since the fishery was closed in the 1990s, but it is still listed as a threatened species and managed under the Endangered Species Act. See The Gulf Sturgeon Recovery/Mgmt. Task Team, Gulf Sturgeon Recovery/Management Plan 22–24 (1995), available at http://www.nmfs.noaa.gov/pr/pdfs/recovery/sturgeon_gulf.pdf.

10. U.S. Census Bureau, Statistical Abstract of the United States: 2012, at 26–28 tbl.20 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0020.pdf>.

11. See, e.g., C. Grady Moore, *Water Wars: Interstate Water Allocation in the Southeast*, 14 NAT. RESOURCES & ENV'T. 5, 9 (1999) (discussing Alabama's position in interstate compact negotiations with Georgia that projects must be strictly operated to provide the levels of navigation support envisioned in the authorizing reports, even though major projects needed to support these flows were never constructed and notwithstanding the fact that these operations are outdated and inefficient); George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 771 n.21, 781 (2005) (opining that flood control and hydropower are the only two authorized purposes of the project and that “Lake Lanier was not authorized by Congress to be a water supply reservoir,” and broadly suggesting that congressional action is needed). This is, of course, also the position of Alabama, Florida, and the other parties challenging the Corps' water supply authority at Lake Lanier, as well as the position adopted by the district court.

12. See *infra* Part I.

the *Tri-State* litigation and the dispute surrounding the Corps' authority to operate Lake Lanier to accommodate Atlanta's growing water supply needs.¹³ Parts III and IV discuss the basic flaw in the Corps' interpretation of the authorizing legislation for Lake Lanier, with a focus on the intervening policy developments and authorization and funding procedures that caused the Corps and the district court to underestimate the Corps' authority to modify project operations to meet Atlanta's needs.¹⁴ Finally, Part V discusses what role, if any, post-authorization legislative history and appropriations legislation should play in interpreting authorizing legislation.¹⁵

I. THE LEGAL FRAMEWORK GOVERNING AUTHORIZATION AND MODIFICATION OF CORPS PROJECTS

The Corps enjoys broad discretion to operate water projects under its control. The general understanding is that Congress identifies the purposes to be served by a project while leaving it to the Corps to determine how to balance competing objectives.¹⁶ Because there is very little statutory law on point, however, and because individual project authorizations vary widely, it is not always easy to identify the authorized purposes for any given project. The Corps' own analysis of the "authorized purposes" for each of its projects is set forth in a table published in the Code of Federal Regulations at 33 C.F.R. § 222.5, Appendix E.¹⁷

13. *See infra* Part II.

14. *See infra* Part III and Part IV.

15. *See infra* Part V.

16. In *South Dakota v. Ubbelohde*, for example, the Eighth Circuit rejected an argument by the Corps that a challenge to the operation of its Missouri River projects should be dismissed because there was no law to apply. *See* 330 F.3d 1014, 1027 (8th Cir. 2003). The court explained that the Corps' discretion is not entirely unconstrained because the authorizing legislation "lays out purposes that the Corps is to consider in managing the River." *Id.* The Court thus held that it could review the Corps' operating decisions "to ensure that it considered each of these interests before making a decision." *Id.* The court also acknowledged, however, that its function was very limited because the applicable law "does not provide . . . a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Id.*

17. *See also* U.S. Army Corps of Eng'rs, Authorized and Operating Purposes of Corps of Engineers Reservoirs 2 (1992, rev. 1994), available at <http://corpslakes.usace.army.mil/employees/pdfs/94r-opreservoir.pdf>. This report was prepared and submitted to Congress to comply with Section 311 of the Water Resources Development Act of 1990, which directed the Secretary to identify the authorized and

Project authorities can be divided into two basic groups—specific authorities and general authorities. Specific authorities are contained in the initial authorization for a project and in any subsequent legislation that modifies the original authorizing legislation.¹⁸ Specific authorities often include purposes such as navigation, flood control, hydropower, water supply, and recreation.¹⁹

Congress has authorized other purposes through general legislation applicable to all Corps projects or to all projects constructed after a given date.²⁰ Examples of these general authorities include authority provided by the Flood Control Act of 1944 to sell “surplus water” and to construct and operate recreational facilities;²¹ authority provided by the Water Supply Act of 1958 to include storage for municipal and industrial water supply;²² authority provided by the Clean Water Act to augment low flows to benefit water quality;²³ authority provided by the Fish and Wildlife Coordination Act to modify projects to conserve fish and wildlife;²⁴ and authority provided by the Endangered Species Act to address the needs of endangered and threatened species.²⁵ The limitations applicable to these authorities vary by statute.

In addition, the Army has some inherent authority to make minor modifications to the plans approved by Congress. In some cases the authority to modify a plan is explicitly provided in the authorizing

operating purposes for each of its projects. Water Resources Development Act of 1990, Pub. L. No. 101-640, 104 Stat. 4604 (codified in scattered sections of 33 U.S.C.).

18. See U.S. Army Corps of Eng'rs, *supra* note 17, at 1, 2.

19. *Id.* at 1–3.

20. *Id.* at 2.

21. Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified in scattered sections of 16, 33 & 43 U.S.C.). For recreation, see also the Federal Water Project Recreation Act of 1965, 16 U.S.C. § 4601-12 to -21 (2006). That act declared it Congress's intent that recreation and fish and wildlife enhancement be given full consideration as project purposes provided non-Federal bodies agree to certain cost-sharing requirements. *Id.*

22. Water Supply Act of 1958, 43 U.S.C. § 390b (2006).

23. 33 U.S.C. § 1252(b)(1) (mandating that consideration be given at all projects “to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source”).

24. 16 U.S.C. § 662(c).

25. 16 U.S.C. § 1536(a) (authorizing all federal agencies to “utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species”).

legislation,²⁶ but this is the exception and not the rule.²⁷ Even when the authorizing legislation is silent, it is generally accepted that the Army has discretion to modify the specific plans authorized by Congress without further legislation so long as the modification is not “so foreign to the original purpose as to be arbitrary or capricious.”²⁸

This general understanding is reflected in an internal guidance document (called an “Engineering Regulation”) addressing the Army’s authority to modify completed projects.²⁹ The Engineering Regulation states that “significant modifications” require Congressional authorization.³⁰ It indicates that modifications should be deemed “significant” if they would “serve new purposes” or “extend services to new beneficiaries (areas).”³¹ It provides little guidance, however, to assist in determining whether a given purpose should be considered “new,” as this is a question of statutory interpretation that can only be determined by examining the specific history of each project.

26. For example, the Water Resources Development Act of 1986 authorized numerous projects “with such modifications as are recommended by the Chief of Engineers and approved by the Secretary, and with such other modifications as are recommended by the Secretary.” Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified in scattered sections of Titles 16, 26, 33 & 42).

27. It is much more common for the Chief of Engineers to request such authority in the report submitted to Congress. For example, the report recommending authorization of the Benbrook Dam in Tarrant County, Texas includes a recommendation that the project be approved “with such future modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable.” *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1292 (5th Cir. 1970) (quoting H.R. Doc. No. 77-403, at 7). When Congress then authorized the project to be constructed in accordance with the Chief of Engineers’ report, the Fifth Circuit held that Congress had, in effect, granted the Chief of Engineers’ request, thus providing substantial authority for the Army to deviate from the specific plans authorized by Congress. *Id.*

28. *See Creppel v. U.S. Army Corps of Eng’rs*, 670 F.2d 564, 572 (5th Cir. 1982); *see also Britt v. U.S. Army Corps of Eng’rs*, 769 F.2d 84, 89 (2d Cir. 1985); *United States ex rel. Chapman v. Fed. Power Comm’n*, 191 F.2d 796, 806 (4th Cir. 1951), *aff’d*, 345 U.S. 153 (1953); *Ryan v. Chi., B. & Q. R. Co.*, 59 F.2d 137, 142 (7th Cir. 1932).

29. U.S. Army Corps of Eng’rs, Engineering Regulation No. 1165-2-119 ¶ 1 (1982), available at http://publications.usace.army.mil/publications/eng-regs/ER_1165-2-119/ER_1165-2-119.pdf. Although called a “regulation,” this document is more properly considered “guidance” because it was not promulgated in accordance with the procedures required by the Administrative Procedure Act.

30. *Id.* ¶ 5.

31. *Id.*

II. A BRIEF HISTORY OF THE TRI-STATE WATER RIGHTS LITIGATION³²

Georgia, Alabama, and Florida have been litigating over the Apalachicola-Chattahoochee-Flint (ACF) River Basin and the Alabama-Coosa-Tallapoosa (ACT) River Basin for almost a quarter century.³³ The main point in controversy is the scope of the Corps' authority to use two federal reservoirs—Lake Lanier and Allatoona Lake—to provide drinking water to communities in Metropolitan Atlanta.³⁴ As framed in the litigation, two basic questions were presented: first, whether water supply is a specifically “authorized purpose” of these projects; and second, whether the Corps' water supply operations exceed its supplemental authority under the Water Supply Act of 1958.³⁵

The litigation commenced in 1990 when the Corps released a draft plan to reallocate storage in both Lake Lanier (in the ACF) and Allatoona Lake (in the ACT), and to execute contracts with water supply providers in North Georgia that would assure their access to water stored in the projects into the future.³⁶ Alabama filed suit in the

32. Here, we provide only a brief history and sufficient facts to place the dispute over Lake Lanier's so-called “authorized purposes” in context. For a more complete history of this controversy, see, for example, Robert Haskell Abrams, *Settlement of the ACF Controversy: Sisyphus at the Dawn of the 21st Century*, 31 *HAMLIN L. REV.* 679 (2008).

33. *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1165 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25 (2012).

34. *Id.*

35. *Id.* at 1165–66.

36. *See id.* at 1173 (citing Army Corps of Eng'rs, Post-Authorization Change Notification Report (1989)). The Army Corps' draft plan was thought to be the final step in a long-term partnership with the Corps to meet Atlanta's water needs. After nearly a decade of joint study by federal, state, and local agencies, including the Corps and the city of Atlanta, Congress authorized the construction of a “reregulating dam for water supply purposes” on the Chattahoochee River below Lake Lanier. *See* Water Resources Development Act of 1986, § 601(a), Pub. L. No. 99–662, 100 Stat. 4082 (codified in scattered sections of 16, 26, 33 & 42 U.S.C.). This reregulation dam was intended to capture peaking hydropower releases from Lake Lanier and attenuate the flow to make water available for withdrawal by Atlanta downstream. Indeed, the explicit purpose of the plan authorized by Congress was to increase water supply for Metropolitan Atlanta. South Atlantic Division, Army Corps of Engineers, Comments on Draft Post Authorization Change Report for Lake Lanier Reallocation at ¶ 1 (Dec. 5, 1989) (on file with author).

Following an environmental study required by the National Environmental Policy Act, the Corps concluded that it would be preferable to reallocate storage in Lake Lanier to water supply permanently rather than to build the reregulation dam authorized by Congress. To that end, the Corps prepared the Draft Post Authorization Change Report, which proposed to reallocate 207,000 acre-feet of storage in Lake Lanier to water supply. *Id.*

Northern District of Alabama to enjoin the Corps from finalizing or implementing the draft plan.³⁷ This litigation was stayed several months later to give the states and the Corps time to negotiate. The stay remained in effect and led to the formation of two interstate compacts—one for each basin—in 1997.³⁸

The two compacts established a governing structure but did not include a formula for allocating water among the states.³⁹ In essence, they were “agreement[s] to agree” on an allocation formula, which the signatories anticipated would be negotiated within one year.⁴⁰ This did not occur, however, and (after several extensions) the ACF and ACT Compacts terminated in 2003 and 2004, respectively.⁴¹

While the compact allocation negotiations were still pending, the State of Georgia submitted a “water supply request” to the Corps.⁴² In this request, Georgia asked the Corps to reallocate storage in Lake Lanier in an amount sufficient to accommodate withdrawals (either directly from Lake Lanier or from the Chattahoochee River below the project) in the amount of 705 million gallons per day.⁴³

37. *See* Alabama v. U.S. Army Corps of Eng’rs, 424 F.3d 1117, 1122–23 (11th Cir. 2005). Several aspects of Alabama’s original suit are notable. First, it was commenced before the draft Post Authorization Change Report was finalized and before the proposed contracts were executed. *See id.* The suit was thus clearly unripe at the time it was filed. Second, the suit alleged only violations of the National Environmental Policy Act. *Id.* at 1123. The notion that the draft plan exceeded the Corps’ authority did not creep into the litigation until much later.

38. *See* Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) (ACF Compact); Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997) (ACT Compact).

39. *See* ACF Compact art. VII(a) (stating that it was “the intent of the parties to this Compact to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states,” that “[w]hen an allocation formula [was] unanimously approved by the State Commissioners, there shall be an agreement among the states regarding an allocation formula,” and that “[t]he allocation formula thus agreed upon shall become effective and binding upon the parties to this Compact” upon concurrence by the Federal Commissioner); ACT Compact art. VII(a) (same).

40. *See, e.g.,* Benjamin L. Snowden, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 N.Y.U. ENVTL. L.J. 134, 146 (2005) (explaining that “the drafters of the ACF and ACT compacts . . . ‘punted’ on the most important issue: the actual allocation of the waters”); Andrew Thornley, *A Tale of Two River Basins: The Southeast Finds Itself in a Rare Interstate Water Struggle*, 9 U. DENV. WATER L. REV. 97, 102 (2005) (pointing out that the “compacts contained no allocation formula, which is noteworthy ‘since most water compacts allocate water’”).

41. Joseph F. Zimmerman, *Interstate Disputes: The Supreme Court’s Original Jurisdiction* 170–71 (2006).

42. *See* Letter from Roy E. Barnes, Governor of Ga., to Honorable Joseph W. Westphal, Asst. Sec’y of the Army for Civil Works (May 16, 2000) (on file with author).

43. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1176 (11th Cir. 2011) (per

The Corps denied Georgia's water supply request on grounds that it could not "be accommodated without additional Congressional authorization."⁴⁴ The legal memorandum accompanying the denial explained that water supply was not an "authorized purpose" of Lake Lanier under the River and Harbor Act of 1946, which was the original legislation authorizing construction of the project.⁴⁵ The Corps recognized that the River and Harbor Act of 1946 did not itself say anything about the authorized purposes of Lake Lanier; instead, the Act merely directed that the project be constructed "in accordance with" certain engineering reports and project documents prepared by the Corps, which were incorporated into statute.⁴⁶ The Corps found, however, that those engineering reports and project documents identified only three congressionally authorized purposes: hydropower, flood control, and navigation.⁴⁷ Water supply, according to the Corps, was intended as merely an "incidental benefit" of releases for the other authorized purposes.⁴⁸

Having concluded that water supply was not an authorized purpose, the Corps then analyzed whether it could grant Georgia's request under the supplemental authority provided by the Water

curiam), *cert. denied*, 133 S. Ct. 25 (2012) (explaining that "the State of Georgia submitted a formal request to the Corps to modify its operation of the Buford Project in order to meet the Georgia Parties' water supply needs through 2030. The request was to withdraw 408 mgd from the river and 297 mgd directly from the lake"); Letter from Roy E. Barnes, *supra* note 42 at 1.

44. See Letter from R. L. Brownlee, Acting Assistant Sec'y of the Army for Civil Works, to Roy E. Barnes, Governor of Ga. (Apr. 15, 2002) (on file with author).

45. See Memorandum from Earl Stockdale, Deputy General Counsel, U.S. Army Corps of Eng'rs (Civil Works & Env't), to Acting Assistant Sec'y of the Army 2, 3-8 (Apr. 15, 2002) [hereinafter Stockdale Memorandum] (on file with the Georgia State University Law Review).

46. *Id.* at 4. As it relates to Lake Lanier, the sole reference to the ACF River Basin in the Act is found in the list of sixty "works of improvement," as follows:

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

River and Harbor Act of 1946, Pub. L. No. 79-525 § 1, 60 Stat. 634.

47. Stockdale Memorandum, *supra* note 45, at 4.

48. *Id.* at 4 (reasoning that the project documents indicate "that navigation, hydropower and flood control were the specifically authorized purposes—those purposes which render the project economically feasible and which govern the operation of the reservoir. On the other hand, water supply was clearly one of the project's incidental benefits—those benefits that accrue to the project as a byproduct of its operation for its specifically authorized purposes").

Supply Act of 1958.⁴⁹ The Corps concluded that it could not because the request would result in a “major operational change” and “seriously affect” the other authorized purposes of the project.⁵⁰

Georgia and the Georgia Water Supply Providers filed suit in the Northern District of Georgia to challenge the Corps’ denial of Georgia’s water supply request.⁵¹ They were hardly the only parties to file suit to challenge the Corps’ actions in the ACF River Basin, however, and litigation proliferated following the collapse of the Compacts. At one time there were no fewer than eight different district court cases pending in federal courts in Georgia, Florida, Alabama, and the District of Columbia.⁵² The various cases were ultimately consolidated in a multidistrict litigation proceeding in 2007, transferring claims involving the ACF River Basin to the U.S. District Court for the Middle District of Florida while claims involving the ACT River Basin remaining in the U.S. District Court

49. *Id.* at 7–12.

50. *Id.*; see also 43 U.S.C. § 390b(d) (2006). As relevant here, the Water Supply Act of 1958 imposes two limits the Corps’ discretion to modify projects to include water supply without seeking additional congressional authorization:

Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

Id.

51. *Georgia v. U.S. Army Corps of Eng’rs*, 223 F.R.D. 691, 693 (N.D. Ga. 2004), *aff’d*, 144 F. App’x 850 (11th Cir. 2005).

52. These included the original suit by Alabama that precipitated the tri-state legal battle (which was bifurcated by the Judicial Panel on Multidistrict Litigation into separate proceedings in federal courts in Florida and Alabama), the suit by Georgia and the Georgia Water Supply Providers challenging the Corps’ denial of Georgia’s water supply request, a suit by hydropower customers who purchase power from the Corps alleging that water supply withdrawals impacted hydropower production, suits by the State of Florida and the City of Apalachicola, Florida challenging the Corps’ compliance with the Endangered Species Act and other statutes, a suit by the City of Columbus, Georgia seeking to ensure flows in the Chattahoochee River sufficient for wastewater dilution, and a second suit by Georgia and the Water Supply Providers challenging an interim operating rule adopted by the Corps to address Florida’s Endangered Species Act claims. See *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1165 n.2 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25, (2012) (“The four underlying cases are *Alabama v. United States Army Corps of Engineers*; *Southeastern Federal Power Customers, Inc. v. Caldera*; *Georgia v. United States Army Corps of Engineers*; and *City of Apalachicola v. United States Army Corps of Engineers*.”); *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1121 (11th Cir. 2005) (noting there were “are two ancillary proceedings which are relevant to these appeals,” *Southeastern Federal Power Customers, Inc. v. United States Army Corps of Engineers*, 00–CV–2975 (D.D.C.) and *Georgia v. U.S. Army Corps of Engineers*, 2:01–CV–00026–RWS (N.D. Ga.)).

for the Northern District of Alabama.⁵³ The ACF litigation was further bifurcated to separate claims involving the Corps' authority to operate Lake Lanier to meet Atlanta's water supply needs from other claims involving the Endangered Species Act, the National Environmental Policy Act, and other statutes.⁵⁴

Against this backdrop, the scope of the Corps' authority to operate Lake Lanier to meet Atlanta's water supply needs was presented to the district court in two separate but related ways. On the one hand, Alabama, Florida, and others presented the district court with claims that Atlanta's *existing* water use exceeded the Corps' legal authority.⁵⁵ On the other hand, the district court reviewed claims by Georgia and the Georgia Water Supply Providers that the Corps erred in concluding it lacked the authority to grant Georgia's water supply request, which was intended to facilitate expanded withdrawals necessary to meet future water supply needs.⁵⁶

In 2009, the district court issued a summary judgment order and injunction in favor of Alabama, Florida and the other plaintiffs challenging the Corps' authority to meet Atlanta's water supply needs.⁵⁷ The district court decision included three basic parts. First, the district court affirmed the Corps' denial of Georgia's water supply request, including the determination that water supply is not an authorized purpose of Lake Lanier.⁵⁸ It did so based on many of the same factors identified by the Corps in the Stockdale Memorandum, as well as evidence and "legislative history" that post-dated the authorization of the project in 1946.⁵⁹ Second, the district court found that Georgia's water supply request would exceed the

53. See *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d at 1176–77; *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351, 1353 (J.P.M.L. 2007).

54. See Third Amended Joint Scheduling Order, No. 3:07-md-00001 (Nov. 7, 2008) (discussing bifurcation of proceeding).

55. *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1347 (M.D. Fla. 2009), *rev'd and vacated sub nom. In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011) (*per curiam*), *cert. denied*, 133 S. Ct. 25 (2012).

56. *Id.* at 1352–54 (addressing Georgia's claim).

57. *Id.* at 1356.

58. See *id.* at 1347 (coming to what it termed "the inescapable conclusion that water supply, at least in the form of withdrawals from Lake Lanier, is not an authorized purpose of the Buford project").

59. *Id.*

Corps' authority under the Water Supply Act of 1958 because it would result in a "major operational change" and would "seriously affect" the authorized purposes of the project.⁶⁰ Third, the district court held that, for the same reasons, even Atlanta's *existing* water supply uses exceeded the Corps' authority.⁶¹ Based on these three conclusions, the district court entered an injunction, which the court itself called "draconian," giving Metropolitan Atlanta just three years to find an alternative water supply, after which time the taps and toilets of some 3.5 million to 4 million people would run dry.⁶²

The United States Court of Appeals for the Eleventh Circuit reversed and vacated the district court's ruling in June 2011.⁶³ The Eleventh Circuit found that the district court lacked jurisdiction to consider the various claims by Alabama, Florida and others challenging Atlanta's existing water supply withdrawals, finding that the suits failed to identify any final agency action subject to review under the Administrative Procedure Act (APA).⁶⁴ Insofar as Alabama, Florida and others challenged the Corps' operations to meet Atlanta's current water supply needs, the court explained that the Corps had not reached any final decision concerning its water supply operations at Lake Lanier.⁶⁵ The court also concluded that—despite the fact that the dispute over Lake Lanier's operation had been ongoing for more than two decades—the Corps' failure to take final agency action was reasonable under the circumstances, explaining that the Corps had been prevented from taking final action through a combination of court injunctions, voluntary stays to facilitate negotiations among the states, and the ACF Compact.⁶⁶ The court accordingly vacated the district court's self-described "draconian" injunction, allowing metropolitan Atlanta's water supply

60. *See id.* at 1347–54.

61. *See In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d at 1352–54.

62. *See id.* at 1355.

63. *See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1205 (11th Cir. 2011) (*per curiam*), *cert. denied*, 133 S. Ct. 25 (2012).

64. *See id.* at 1181–85.

65. *See id.*

66. *See id.* at 1182–84.

withdrawals to continue until the Corps reaches a final decision on its water supply operations.

The court did, however, have jurisdiction to review the Corps' denial of Georgia's water supply request, which was undoubtedly final agency action under the APA. And on this point, the Eleventh Circuit also reversed.⁶⁷ Contrary to the opinion of both the Corps and the district court, the Eleventh Circuit held that water supply is, and always has been, a fully authorized purpose of Lake Lanier.⁶⁸ The Court explained that the project documents incorporated into the River and Harbor Act of 1946 "clearly indicate[] that Congress intended for water supply to be an authorized, rather than incidental, use of the water stored in Lake Lanier,"⁶⁹ and that the "language of the [River and Harbor Act of 1946] clearly indicates that water supply was an authorized purpose of the Buford Project" and Lake Lanier.⁷⁰ The Court explained that Congress intended for project operations to change to meet Atlanta's growing water supply needs when it authorized the project in 1946, and that Congress understood that any marginal impact to hydropower production would be more than outweighed by providing Atlanta an assured water supply source.⁷¹ The Eleventh Circuit accordingly remanded the case to the Corps to reconsider Georgia's water supply request in light of this clarified legal authority.⁷²

Following the Eleventh Circuit's remand, the Corps issued a legal opinion in June 2012 concluding that it has sufficient authority to grant Georgia's water supply request but that it must prepare an environmental impact statement (EIS) before deciding whether or not to do so.⁷³ The Corps is now in the process of preparing the EIS.⁷⁴

67. *See id.* at 1192–97.

68. *See id.* at 1187–92.

69. *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d at 1188–89.

70. *Id.* at 1192.

71. *Id.* at 1188.

72. *Id.* at 1200–01.

73. Memorandum from Earl H. Stockdale, Chief Counsel, U.S. Army Corps of Eng'rs, to the Chief of Engineers (June 25, 2012), available at www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.

74. *See* Notice of Intent To Revise Scope of Draft Environmental Impact Statement for Updating the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin, 77 Fed. Reg. 62224-01–

A. An Anachronistic Analysis: Viewing Project Authorizations Through The Lens Of Modern Policy

Given that the Eleventh Circuit, the district court, and the Corps all reached such starkly different conclusions, it is fair to ask how and why their analyses diverged. The answer, we suggest, is two-fold. First, the district court focused largely on documents and congressional testimony developed long after the legislation authorizing Lake Lanier was enacted, giving only scant attention to the actual authorizing legislation that the Eleventh Circuit found controlling.⁷⁵ Second, and perhaps more fundamentally, the Corps (and to a certain degree the district court) viewed the authorizing legislation and incorporated reports through a distorted lens, reading the authorizing documents as if they had been written today, in accordance with modern principles and guidelines that did not exist at the time. As explained more fully below, the modern guidelines make it easy to identify a discrete set of “authorized purposes” for each project. These modern guidelines were not developed until later, however, and the result of viewing project documents from the 1940s through this anachronistic lens is to distort them. The Eleventh Circuit, in contrast, was able to read the historical documents on their own terms. When this is done, the documents reveal quite clearly—in terms appropriate to the era—that water supply was among the primary purposes of Lake Lanier.

When the Corps denied Georgia’s Water Supply Request in 2000, it did so based on its interpretation of the Chief of Engineers’ report referenced in the River and Harbor Act of 1946, which it erroneously viewed as establishing that water supply was not an “authorized purpose” of Lake Lanier.⁷⁶ As the outcome of this litigation demonstrates, the legal determination as to whether a purpose is or is not an “authorized purpose” is extremely important, as it marks the difference between a request the Corps cannot grant without

02 (Oct. 12, 2012).

75. For a discussion on this analytical error, see *infra* Part V.

76. See *supra* note 45–46 and accompanying text (discussing the Corps’ rationale, as set forth in the Stockdale Memorandum).

additional Congressional authorization and one the Corps has almost unlimited discretion to accommodate. The litigation also shows, however, that the legal framework for this analysis is not at all clear.

The first difficulty lies in the fact that the legislation authorizing a project rarely enumerates “authorized purposes” as such. Instead, the legislation typically authorizes a project to be constructed in accordance with a report submitted by the Chief of Engineers without further discussion.⁷⁷ For example, Buford Dam and Lake Lanier were authorized by the River and Harbor Act of 1946,⁷⁸ but as noted above, that legislation merely “adopted and authorized” a long list of sixty projects, including Buford Dam, to be “prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated”⁷⁹

Ordinary tools of statutory interpretation are not much help with statutes like these. The traditional canons can be applied to the reports referenced in the statute, which are generally treated as if they were incorporated into the text of the legislation itself,⁸⁰ but this can be problematic for several reasons. First, because the Chief of Engineers’ reports are written with a view to the initial proposed construction, they rarely have much, if anything, to say about potential future modifications. Second, the reports are not written by lawyers and are not generally intended to serve as legal documents. Instead, they tend to provide a broad, narrative description of the many potential benefits that a proposed project might bring and often include conflicting views about the benefits of one plan or another. It can be difficult, therefore, to parse them in the way one would parse

77. U.S. Army Corps of Eng’rs, *supra* note 17, at 2 (explaining that the authorized purposes of Corps projects “are not identified directly in the authorizing law but instead are contained in reports of the Secretary of the Army, Chief of Engineers, Board of Engineers for Rivers and Harbors, or others referred to in the law”).

78. Pub. L. No. 79-525, 60 Stat. 634 (1946).

79. *Id.*

80. *See, e.g.,* Anderson v. Seeman, 252 F.2d 321, 325 (5th Cir. 1958) (determining the congressionally authorized purposes of a project under the 1945 River and Harbor Act according to the Corps reports incorporated by reference into that statute); *see also* U.S. Army Corps of Eng’rs, *supra* note 17 at 2.

a statute or a contract to determine what was actually recommended for authorization. Third, because the reports also tend to be long and detailed, it can be difficult to identify those features of the project that Congress would have deemed material to, and thus a condition of, the authorization. Fourth, the project documents authored by the Corps are a product of their time; they are written in accordance with the Corps' policies and procedures that have evolved over time, and yet the Corps seems to have lost sight of these changes—and thus persists in reading survey reports from the previous era as if they had been written today.

While each of these problems played a role in the litigation over Lake Lanier, the fourth lies at the very heart of the *Tri-State* case. In the case of Lake Lanier, the Corps made a critical mistake by assuming that the Chief of Engineers' report was written in accordance with modern policies and guidelines that make it easy to identify authorized purposes. According to the Corps, the authorized purposes of a project should be ascertained by looking only to “those purposes which render the project economically feasible and which govern the operation of the reservoir.”⁸¹ In this regard, the Corps placed special emphasis on three aspects of the Chief of Engineers' report: (1) the fact that water supply was not explicitly identified as an “authorized purpose” in the Chief of Engineers' report; (2) the fact that the benefit–cost analysis did not attribute any benefits to water supply; and (3) the fact that no storage was explicitly allocated to water supply.⁸² Modern guidelines require this type of breakdown whenever water supply (or any other purpose) is proposed to be included as a project purpose.⁸³ Its omission in the Chief of Engineers' Report for Lake Lanier led the Corps to conclude that water supply was not an authorized purpose of that project.⁸⁴

The Corps' error lay in the fact that it viewed Lake Lanier's authorization through the lens of its modern policies and guidelines that were not adopted until after 1946, when Lake Lanier was

81. Stockdale Memorandum, *supra* note 45, at 4.

82. *See id.* at 7.

83. *See, e.g., id.*, at 2.

84. *Id.* at 12.

authorized.⁸⁵ The phrase “authorized purpose” was not a term of art in the 1940s, and it had no particular legal significance.⁸⁶ Moreover, a specific breakdown of the costs and benefits attributable to each authorized purpose was simply not required at the time of Lake Lanier’s authorization.⁸⁷ And finally, there was no requirement that the Corps specifically allocate storage to each of the authorized purposes.⁸⁸ In short, all of the reasons the Corps offered to conclude water supply was not an authorized purpose of Lake Lanier were based on policies that did not exist at the time the project was authorized.

III. THE HISTORY THE CORPS FORGOT: POLICY DEVELOPMENTS GOVERNING THE AUTHORIZATION OF WATER PROJECTS

The fundamental flaw in the Corps’ approach to Lake Lanier was to assume that uniform policies of the type that exist today also existed when that project was authorized. If such uniform policies existed at the time when Lake Lanier was authorized, they might provide evidence of background understandings shared by Congress, but they did not. To the contrary, the struggle to develop a coherent national water policy had barely begun.⁸⁹ Indeed, the Corps was not authorized to undertake multipurpose water projects until 1936,⁹⁰ and it took decades even to agree on the federal objectives for developing such projects.⁹¹

85. *See id.*

86. *See id.*

87. *See* Stockdale Memorandum, *supra* note 45, at 12.

88. *See id.* at 7, 12.

89. *See generally* Arthur Maass, *Muddy Waters: The Army Engineers and the Nation’s Rivers* (1951) (reviewing current policies and practices, describing attempts to establish a uniform national water policy, and making specific recommendations).

90. Flood Control Act of 1936, Pub. L. No. 74-738, § 5, 49 Stat. 1570, 1572 (codified at 33 U.S.C. § 701a–f). It went on to authorize a host of water resources projects, and directed that any projects constructed include facilities for future development of hydroelectric power. *See id.*; Joseph L. Arnold, *The Evolution of the 1936 Flood Control Act* 73, 97 (1988).

91. Arnold, *supra* note 90, at 92–93. The statute has been described as “a good example of congressional legislation that is fairly clear in its general goals, but confusing and even irrational in its specific policies and administrative machinery.” *Id.* at iii.

The situation as of 1944—just two years before Lake Lanier was authorized—is illustrated by the controversy over the development of the Missouri River Basin in the 1940s. The Bureau of Reclamation and the Army Corps of Engineers developed competing plans for the Missouri River Basin—the “Sloan Plan” promoted by the Bureau, and the “Pick Plan” promoted by the Corps.⁹² Ultimately these competing plans were reconciled in a document known as the Pick-Sloan Plan, which was authorized by Congress in the Flood Control Act of 1944, at about the same time as Buford Dam.⁹³

The Bureau and the Corps each criticized the other’s plans. The Bureau was especially critical of the Corps’ economic analysis for its multipurpose projects—in particular, of its failure to allocate storage and to conduct a benefit–cost analysis for each purpose.⁹⁴ This disagreement is demonstrated by correspondence in which the Commissioner of the Bureau of Reclamation urged the Chief of Engineers to establish a more precise allocation of storage and costs for the Pick Plan.⁹⁵ The Chief of Engineers declined, explaining that the Army preferred instead to request authorization for multiple purpose developments in very general terms,⁹⁶ thus allowing the Corps to retain maximum flexibility to alter its projects over time.⁹⁷ The Pick-Sloan correspondence demonstrates that Army policy as it existed in 1944—just two years before Lake Lanier was authorized—not only did not require, but actively discouraged the type of detailed economic analysis that is required today.

The modern project authorization procedures were not adopted as national policy until 1983, when President Reagan approved the *Economic and Environmental Principles and Guidelines for Water*

92. See generally John R. Ferrell, *Big Dam Era* 39–68 (1993).

93. Pub. L. No. 78-534 § 9, 58 Stat. 887, 891–92 (1944) (codified in scattered sections of 16, 33 & 43 U.S.C.); Ferrell, *supra* note 92, at 65.

94. See H.R. Doc. No. 78-475, at 5–9 (1944) (printing a letter from H.W. Bashore, Commissioner, Bureau of Reclamation, to Major Gen. E. Reybold, Chief of Engineers, War Department); *id.* at 3 (printing a letter from Major Gen. E. Reybold, Chief of Engineers, War Department, to Chairman, Committee on Flood Control, U.S. House of Representatives).

95. See *id.* at 5–9.

96. See *id.* at 3.

97. See *id.* at 4.

*and Related Land Resources Implementation Studies (P&G).*⁹⁸ The P&G establish detailed guidelines for the survey reports submitted to Congress in support of authorization requests. For example, they require that the federal objective for any proposed project “be stated in terms of an expressed desire to alleviate problems and realize opportunities,” and that “[e]ach statement of a problem or opportunity should be expressed in terms of a desired output,” such as “[r]educ[ing] flood losses in the Red River floodplain”⁹⁹ Given the emphasis on economic efficiency, the P&G further require that a detailed benefit–cost analysis be prepared for each project purpose to ensure that it is included at the optimal level to maximize national economic development.¹⁰⁰ When a survey report is prepared in accordance with these guidelines, there is rarely any doubt about the purposes for which authorization is requested.

It is precisely this type of analysis the Corps was looking for, but did not find, when it reviewed the Chief of Engineers’ report for Lake Lanier. The Corps’ logical error was to conclude that the absence of a P&G-style analysis for the water supply purpose meant that water supply was never intended to be an authorized purpose of Lake Lanier—when in fact, as confirmed by the Pick-Sloan correspondence, there was simply no expectation at the time that such an analysis would be done for each authorized purpose.

The type of analysis the Corps expected to find in the documents for Lake Lanier was not required until December 31, 1952, when the Bureau of the Budget issued a directive to all executive agencies known as Budget Circular A-47.¹⁰¹ Among other requirements, the

98. U.S. Water Res. Council, *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* (1983), available at http://planning.usace.army.mil/toolbox/library/Guidance/Principles_Guidelines.pdf.

99. *Id.* at 1.

100. *Id.* at 7.

101. Budget Circular A-47 from Frederick J. Lawton, Dir., Bureau of the Budget to the Heads of Exec. Dep’ts & Establishments (Dec. 31, 1952) (on file with the Georgia State University Law Review) [hereinafter Budget Circular A-47]; see also Maynard M. Hufschmidt, *Benefit-Cost Analysis: 1933-1985*, OPEN SIUC 43, available at <http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1196&context=jcwre> (last visited Apr. 15, 2013). The Bureau of the Budget was reorganized into the Office of Management and Budget (OMB) in 1970. Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (July 1, 1970).

circular required the following to be included in all survey reports requesting authorization:

A concise but complete estimate of all the benefits and all of the economic costs of undertaking the program or project. In addition to comparing the total benefits of the program or project with its total economic costs, the estimate should also show separately the particular benefits and economic costs attributable to each purpose of the program or project. Wherever appropriate, benefits and economic costs shall be expressed in monetary terms. Where monetary estimates cannot reasonably be made, the relative significance of such benefits and costs shall be stated in as precise and quantitative terms as possible.¹⁰²

The Circular further stated: “Inclusion in a multiple-purpose program or project plan of any purpose of resource development will, except in unusual cases . . . , be considered only if the benefits attributable to that particular purpose are greater than the economic costs of including that purpose in the program or project.”¹⁰³ This was new because the previous policy established by the Flood Control Act of 1936 was merely to ensure that benefits exceeded costs overall.¹⁰⁴

Budget Circular A-47 was never fully implemented, and the basic planning framework underwent several revisions before the current P&G were finally adopted in 1983.¹⁰⁵ It is important, though, because

102. Budget Circular A-47, *supra* note 101, at 5–6.

103. *Id.* at 6.

104. Pub. L. No. 74-738, § 1, 49 Stat. 1570 (codified at 33 U.S.C. § 701a–f).

105. See generally U.S. Water Res. Council, *supra* note 98, at 1, 7. For an outline of major changes to the planning framework from 1953 to 1983, see Kyna Powers, Cong. Res. Serv., RL31976, Benefit-Cost Analysis and the Discount Rate for the Corps of Engineers’ Water Resource Projects: Theory and Practice (2003). The latest evolution is the result of Section 2031 of the Water Resources Development Act of 2007, 42 U.S.C. § 1962-3, which instructed the Secretary of the Army to revise the 1983 P&G. The Secretary released the new “Principles and Requirements” in March 2013, together with proposed implementing regulations referred to as the “Interagency Guidelines.” See Council on Env’tl. Quality, Principles and Requirements for Federal Investments in Water Resources (March 2013), available at http://www.whitehouse.gov/sites/default/files/final_principles_and_requirements_march_2013.pdf. These new Principles and Requirements will not take effect until 180 days after the Interagency Guidelines are published in final form. It is unclear when this will occur because the Secretary is

it marks the earliest point in time that a Chief of Engineers' report can be expected to have a detailed benefit–cost analysis for each proposed project purpose. The lesson from Lake Lanier is that extreme caution must be used when interpreting survey reports written before 1953—or, more generally, before the existing guidelines were adopted.

IV. A FRESH LOOK AT OLD REPORTS: READING PROJECT DOCUMENTS THROUGH AN APPROPRIATE HISTORICAL LENS

A completely different picture of the Chief of Engineers' report for Lake Lanier emerges when it is read on its own terms, through the lens of the policies in effect at the time it was written. At that time, all that was required of the benefit–cost analysis was a demonstration that overall benefits exceeded overall costs.¹⁰⁶ Because the benefit–cost ratio for Buford Dam was already greater than one, even without water supply,¹⁰⁷ there was no need to quantify the water supply benefit before requesting authorization. In reviewing the 1946 report, therefore, the appropriate question to ask is whether it is clear—*notwithstanding the fact that water supply benefits were not quantified*—that one purpose of the project was to supply water to Metropolitan Atlanta. When viewed in this light, it is hard to escape the conclusion that providing water to Atlanta was not just a purpose, but indeed one of the main reasons that Buford Dam was built.

The Chief of Engineers' Report of May 13, 1946¹⁰⁸ recommended the approval of a plan prepared by the Commander of the South Atlantic Division.¹⁰⁹ In summarizing this recommendation, the Chief of Engineers specifically noted that “the city of Atlanta and local

currently prohibited from spending any funds to develop or implement the Interagency Guidance. *See* H.R. Rep. No. 112-331, at 802 (2011) (Conf. Rep.). This budget rider was extended under Section 1101(a)(1) of the Consolidated and Further Continuing Appropriations Act enacted on March 26, 2013. *See* Pub. L. No. 113-6 (Mar. 26, 2013).

106. *See* Flood Control Act of 1936, Pub. L. No. 74-738, § 1, 49 Stat. 1570 (codified at 33 U.S.C. § 701a–f).

107. *See* H.R. Doc. No. 80-300, at v–vi (printing letter from L.C. Martin, Assistant Director of Estimates, Executive Office of the President, Bureau of the Budget, to the Secretary of War).

108. *See id.* at 1.

109. *See id.* ¶ 16, at 7.

interests” urged construction of Buford Dam to meet a “threatened shortage of water.”¹¹⁰ He also noted that flow regulation provided by the Buford Project would “*assure an adequate supply of water for municipal and industrial purposes in the Atlanta metropolitan area.*”¹¹¹

General Newman went even further in his own report, which the Chief of Engineers approved and submitted to Congress along with his own. The Newman Report estimated that Atlanta’s “present needs” could be met by providing a minimum continuous flow of about 600 cfs, but that “[t]his minimum release may have to be increased somewhat as the area develops.”¹¹² General Newman expressly recognized that providing additional water to Atlanta for water supply would decrease the amount of hydropower the Corps’ dams could produce. He concluded, however, that any impacts to hydropower resulting from such an increase would be acceptable because the change in operations would not “materially reduce” power benefits downstream, and also because the benefits of providing water supply to Atlanta would “outweigh any slight decrease in system power value.”¹¹³ When presented this with language, the Eleventh Circuit had no difficulty concluding that water supply is and always has been an “authorized purpose” of Buford Dam.¹¹⁴

V. THE PROPER ROLE (OR NOT) OF POST-AUTHORIZATION LEGISLATIVE HISTORY AND APPROPRIATIONS LEGISLATION IN CONSTRUING AUTHORIZING LEGISLATION

The Eleventh Circuit’s conclusion that Congress intended for Lake Lanier to meet Atlanta’s water supply needs is consistent with the Corps’ contemporaneous statements concerning its authorization, as

110. *Id.* ¶ 9, at 4.

111. *Id.* ¶ 11(d), at 5 (emphasis added).

112. *Id.* ¶ 80, at 34 (emphasis added).

113. H.R. Doc. No. 80-300 ¶ 80, at 34.

114. *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1187 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25 (2012).

well as certain more significant later pronouncements of the Corps. For example, the Corps issued a “Definite Project Report” shortly after authorization of the project, which clearly stated that one of “the primary purposes of the Buford project” was “an increased water supply for Atlanta.”¹¹⁵ Even the bronze memorial tablet on the face of Buford Dam identifies water supply as one of the “primary purposes” of the project.¹¹⁶ More recently, the Corps produced a report to Congress stating that water supply is an authorized purpose under the River and Harbor Act of 1946,¹¹⁷ and this finding is codified in the Corps’ regulations.¹¹⁸

However, none of these subsequent pronouncements factored into the Eleventh Circuit’s decision. Rather, the Eleventh Circuit based its conclusion that water supply is an authorized purpose of Lake Lanier on the authorizing legislation and the incorporated project documents alone.¹¹⁹ This is as it should be. The scope of Congress’s authorization was fixed by the authorizing legislation itself. Later statements by the Corps or even subsequent Congresses, absent express repeal or alteration, cannot change what was authorized in the River and Harbor Act of 1946, and they offer little if any guidance into the authorizing Congress’s intent.¹²⁰

115. *Id.* at 1169 (citing U.S. Army Corps of Eng’rs: Mobile District, Definite Project Report on Buford Dam Chattahoochee River, Georgia ¶ 48 (1949)).

116. Photograph of Memorial Tablet, Buford Dam (“FOR PURPOSES OF FLOOD CONTROL—NAVIGATION—POWER—RECREATION AND WATER SUPPLY.”) (on file with the Georgia State University Law Review).

117. U.S. Army Corps of Eng’rs, *supra* note 17, at E-94. This report was submitted to Congress in response to a congressional mandate in the Water Resources Development Act of 1990, which required the Corps to identify the authorized purposes for each of its projects. *See id.* at 1.

118. *See* 33 C.F.R. § 222.5 app. E (2013) (identifying “Municipal and/or Industrial Water/Supply” as an authorized purpose of Buford Dam and Lake Lanier).

119. *See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d at 1186–92.

120. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001) (“[S]ubsequent history is less illuminating than the contemporaneous evidence . . .” (quoting *Hagen v. Utah*, 510 U.S. 399, 420 (1994))); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) (“But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act’s passage. Such statements ‘represent only the personal views of these legislators, since the statements were (made) after passage of the act.’” (citations omitted)); *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 639 n.34 (1967) (“[T]hese statements could represent only the personal views of these legislators, since the statements were inserted in the Congressional Record after passage of the Act.”); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947) (“We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932.”).

Yet water projects like Lake Lanier and other Corps multipurpose reservoirs—particularly those authorized during this time period—are notable in at least two respects. First, they are often massive developments that are studied, authorized, funded, and constructed over a long period of time.¹²¹ Congressional involvement therefore extends far beyond the original authorization of a project, and the Corps is required to return to Congress annually in an effort to secure funds for the construction of previously authorized projects.¹²² Second, perhaps as a result of the pervasive congressional involvement and their potential to confer significant benefits on particular uses or users, water projects are frequently driven by the special, and often parochial, interests of particular members of Congress.¹²³

Together, these two characteristics often lead to efforts by later Congresses (or more frequently, by specific congresspersons) to somehow alter the function of an authorized project in a way that suits their particular interests. Indeed, the Corps is given extraordinarily broad latitude to develop water projects, which affords the Corps substantial discretion in the specific design and operation of its multipurpose reservoirs.¹²⁴ The members of Congress

121. Lake Lanier, for example, was the culmination of decades of work. The survey report incorporated into the River and Harbor Act of 1946 was authorized twenty-one years earlier by the River and Harbor Act of 1925. *See* H.R. Doc. No. 80-300, at 10. Following its authorization in 1946, it took ten years of appropriations by Congress and construction work by the Corps before the project was ultimately completed in 1956.

122. *See* Maass, *supra* note 89, at 34 (explaining that funds for navigation and flood control projects are appropriated annually, and that the “appropriation process is involved in all stages of project planning[,] [m]oney is appropriated for conducting the preliminary examination, survey, definite project report, and detailed plans and specifications”).

123. Arthur Maass explains that, as of 1934, the Corps:
was more nearly responsible to individual Members of Congress directly than to Congress as a whole or to certain congressional committees. Senators and Representatives, knowing that the projects they sponsored could not as a rule be undertaken without favorable Engineer survey reports and support from the [Corps] for congressional authorizations and appropriations, attempted to pressure the executive agency into approving those projects.

Id. at 63. He goes on to explain that the “history of the development of procedures for planning water resource projects between 1934 and 1949 is largely the history of attempts to break down this pattern of direct [Corps] responsibility to the legislature.” *Id.* at 68.

124. *See, e.g.,* *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003) (explaining that the Flood Control Act of 1944, which authorized the Corps’ projects on the Missouri River, grants the Corps broad discretion to balance among the projects’ various authorized purposes and “does not

who oversee the authorization and appropriate funds for these projects are aware of this discretion and the Corps' need to return for additional funding to see its projects through to completion. As a result, they and others in Congress often seek to use the appropriations process to shape the design and function of projects, exacting agreements and concessions from the Corps before an appropriation is made. While these agreements are rarely included as actual conditions of appropriations legislation, both the Corps and the appropriators (who have long memories) take them seriously.

Both of these issues are clearly evident in the post-authorization history of Lake Lanier. As discussed above, budget priorities and cost-benefit requirements changed over time. These shifting priorities and policies led the Corps and members of Congress seeking to secure funding for Lake Lanier to change the way they described the project in testimony before the appropriations committees. The focus shifted away from water supply to those purposes that, at that time, would support an appropriation based on then-existing budget policy and cost-benefit requirements.¹²⁵ What is more, the project, like many others, became part of a larger struggle regarding the proper role of the federal government in shaping water policy, federal budget priorities, and the relative role of states and local governments in constructing and funding water projects for their benefit. Thus it was that Congressman Gerald Ford, a fiscally conservative proponent of a more limited federal role and increased cost-sharing by the beneficiaries of federal projects, focused on the absence of any monetary contribution by Atlanta toward the project, and sought concessions from the Corps in an apparent effort to limit the federal benefit conferred on Atlanta.¹²⁶

provide is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not").

125. See, e.g., *Civil Functions, Department of the Army Appropriations, 1954: Hearings on H.R. 5376 Before the Subcomm. of the S. Comm. on Appropriations*, 83d Cong. 480 (1953) (statement of Colonel E.C. Paules) (describing the project as "a combination flood control—power project which will assist navigation downstream by the regulation of the river flows"); *Civil Functions, Department of the Army Appropriations, 1953: Hearings on H.R. 7268 Before the Subcomm. of the S. Comm. on Appropriations*, 82d Cong. 1196–97 (1952) (statement of Rep. James C. Davis, Georgia) (seeking appropriations and describing the project as providing flood control, power, and navigation benefits).

126. See *Civil Functions, Department of the Army Appropriations for 1952: Hearings Before the*

The district court in the *Tri-State* case relied heavily on this “post-authorization legislative history,” focusing almost exclusively on statements and reports generated long after the project was authorized in 1946 to conclude that water supply was not an authorized purpose.¹²⁷ For example, the district court found that the “legislative history of the Buford project . . . consistently described the primary purposes of the project as flood control, navigation, and hydropower.”¹²⁸ But to reach this conclusion, the district court relied *exclusively* on statements made in appropriations hearings in 1951, 1953, and 1954, respectively, well after the project was authorized.¹²⁹

Reliance on post-authorization statements from appropriations hearings to ascertain the scope of a project’s authorization is seriously misplaced. First, as discussed above, “subsequent legislative history is” at best “a hazardous basis for inferring the intent of an earlier Congress.”¹³⁰ This becomes particularly true the farther removed the statements are from the authorization itself.¹³¹ Second, because the appropriations process is separate from the authorization process, appropriations usually do not affect substantive project authorizations. Indeed, the rules of both the House and the Senate specifically prohibit the inclusion in an appropriations bill of any amendment to existing law. These rules “call[] for previous choice of policy through authorization by law before any item of appropriations might be included in a general appropriations bill.”¹³² As the Supreme Court explained in *TVA v.*

Subcomm. of the H. Comm. on Appropriations, 82d Cong. 118, 121–22 (1951) (statement of Colonel Potter).

127. See *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1345 (M.D. Fla. 2009), *rev’d and vacated sub nom. In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 25 (2012).

128. *Id.*

129. See *id.*

130. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

131. See *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) (explaining, in a case involving a committee report issued five years after the relevant legislation, that later statements are of little if any interpretive value when they are “so distant in time from the enacting Congress that we cannot accept their remarks as an accurate expression of the earlier Congress’s intent”).

132. See *United States ex rel. Chapman v. Fed. Power Comm’n*, 345 U.S. 153, 164 n.5 (1953) (citing S. Doc. No. 239, at 20 (Rule XVI of Senate Manual, 77th Cong.); H.R. Doc. No. 812, at 384 (Rule XXI of Rules of the House of Representatives, 77th Cong.)).

Hill, the purpose of this rule is to avoid the situation where “every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.”¹³³ This is not to say that Congress absolutely cannot use appropriations legislation as a vehicle to change the substantive law, as it has been established that it can,¹³⁴ but the rule does create a strong presumption against finding that this has occurred. More generally, it is quite clear that a substantive authorization cannot, under any circumstances, be modified as a result of congressional testimony or language included in a committee report that is not enacted into law.

In the end, as in all cases of statutory interpretation, the question is Congress’s intent. That intent must be gleaned from the authorizing legislation and any incorporated reports, read in their historical context. The focus must be on what Congress understood it was authorizing, and special care must be taken to avoid being drawn in by shifting project descriptions and convenient appropriations testimony occurring long after authorization.

CONCLUSION

The operations of many existing federal water projects need to be updated to address present and future needs. This need will only increase as communities grapple with balancing population and economic growth and environmental health with dwindling water supplies. To date, however, this has proved difficult and all too often led to seemingly endless litigation among basin stakeholders.

133. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

134. *See, e.g., United States v. Will*, 449 U.S. 200, 222 (1980) (“Nevertheless, when Congress desires to suspend or repeal a statute in force, “[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.” (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940))); *id.* (“The whole question depends on the intention of Congress as expressed in the statutes.” (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883))); *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng’rs*, 619 F.3d 1289, 1303 (11th Cir. 2010) (holding that provision in omnibus appropriations act repealed National Environmental Policy Act, Endangered Species Act, and other statutes as they related to Everglades restoration project, and thus deprived federal courts of jurisdiction to hear tribe’s claims).

The Tri-State Water Rights Litigation makes clear that the Corps may be able to modify project operations to meet the needs of the twenty-first century without additional Congressional authorization. It teaches us that to fully understand the scope of the Corps' authority at a particular project, we must read and understand the authorizing legislation and survey reports through a historical lens that accounts for the policies and procedures in place at the time the project was authorized. And it cautions against the dangers of relying on post-authorization statements to ascertain a project's authorized purposes.

In the end, the Tri-State Litigation shows that the Corps has much more authority than it has previously understood or has been willing to accept. This expansive authority perhaps puts the Army in an unenviable position, as it will be forced to make incredibly controversial and consequential decisions. But this is just the natural consequence of Congress's broad delegation of authority to the Corps—to strike the appropriate balance among projects' various authorized purposes.