NOTES

Southeastern Federal Power Customers, Inc. v. Geren: Congress's Expanding Role in Regulating Interstate Water Disputes

I. OVERVIEW OF THE CASE

Lake Sidney Lanier (Lake Lanier), situated roughly fifty miles northeast of Atlanta, Georgia, is a federally owned reservoir operated by the United States Army Corps of Engineers (Corps).[1] The lake was created by the construction of the Buford Dam on the Chattahoochee River in the mid-1950s.[2] On its journey southward, the Chattahoochee joins the Flint and Apalachicola Rivers, which eventually flow through Florida and empty into the Gulf of Mexico; together, the rivers form the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin).[3]

For decades, Alabama, Florida, and Georgia have disputed the allocation of water stored in Lake Lanier.[4] Following protracted litigation and an order for mediation issued by the United States District Court for the District of Columbia in 2001, the three states negotiated an agreement in 2003 (2003 Agreement) requiring the Corps to allocate up to 22% of Lake Lanier's total storage capacity to local uses for a once-renewable period of ten years.[5] The Corps recommended that the interim storage contracts be made permanent upon congressional approval or a court's judgment that approval was unnecessary.[6] Revenue from the

1. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1318 (D.C. Cir. 2008).
2. *Id.*
3. *Id.*
4. *See id.* at 1318-19 (recapitulating the various disputes between the three states from 1989 to 2006).
5. *Id.* at 1319-20.
6. *Id.* at 1320.

contracts would be used to reimburse hydropower customers through reduced hydropower rates.[7]

After the 2003 Agreement was signed, Alabama and Florida intervened in the D.C. District Court case and resuscitated a prior lawsuit in the United States District Court for the Northern District of Alabama, which challenged the Corps' reallocation of Lake Lanier's water storage space.[8] The Alabama district court entered a preliminary injunction against the 2003 Agreement's implementation,[9] but, upon dissolution of the injunction in 2006, the D.C. District Court entered a final judgment upholding the 2003 Agreement.[10] Alabama and Florida appealed on the grounds that the 2003 Agreement violated the Water Supply Act (WSA), the Flood Control Act (FCA), and the National Environmental Protection Act (NEPA).[11] The United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and *held* that the 2003 Agreement required congressional authorization under section 301(d) of the WSA because it constituted a "major operational change."[12] *Southeastern Federal Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008).

II. BACKGROUND

Schemes for resolving interstate water conflicts in the United States have historically taken on a different character in the west than in the east.[13] Interstate compacts in the west sought to preserve state autonomy and emphasize simple apportionment of water resources without much willingness to engage in cooperative management.[14] Eastern states, on the other hand, have promoted cooperation in settling disputes through interstate compacts.[15] However, in most cases, eastern states have not

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7. *Id.*

8. *Id.*

9. *Id.*; Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1121 (11th Cir. 2005).

10. *Geren*, 514 F.3d at 1320; Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26 (D.D.C. 2004).

11. *Geren*, 514 F.3d at 1320.

12. *Id.* at 1325. The D.C. Circuit concluded that it was unnecessary to address Alabama and Florida's arguments that the 2003 Agreement violated the FCA and NEPA. *Id.*

13. *See* Thomas L. Sansonetti & Sylvia Quast, Address, *Not Just a Western Issue Anymore: Water Disputes in the Eastern United States*, 34 CUMB. L. REV. 185, 185 (2004) (explaining that the scarcity of water in western states led to frequent water disputes whereas the eastern states, until recently, were less arid and had fewer disputes over water allocation); *see also* Joseph W. Dellapenna, *Interstate Struggles over Rivers: The Southeastern States and the Struggle over the 'Hooch*, 12 N.Y.U. ENVTL. L.J. 828 (2005) (distinguishing approaches to settling water disputes in the West from those in the East).

14. Dellapenna, *supra* note 13, at 831.

15. *Id.*

gone so far as to create joint decision-making authorities with the ability to provide ongoing supervision.[16] Consequently, western states have found that litigation is the only effective mechanism for deciding water rights, and even eastern states have generally failed to negotiate water disputes.[17]

In the 1980s and 1990s, Alabama, Florida, and Georgia suffered through the two worst droughts ever recorded in the Southeast.[18] Lake Lanier's water level fell to all-time lows.[19] Exacerbating this problem was the fact that the city of Atlanta, which relied on Lake Lanier as its primary reservoir, had undergone remarkable growth and was demanding ever-increasing amounts of water.[20] In 1989, the Corps entered into contracts with Atlanta to increase diversions to the city up to 50%.[21] The same year, the Corps submitted a report to Congress, recommending that a large portion of Lake Lanier be reallocated from hydropower to local consumption. [22] The Corps indicated that the change might require Congress's consent.[23]

The proposed reallocation spurred Alabama to sue the Corps, seeking an injunction against the reallocation of Lake Lanier's storage space.[24] The Alabama district court considered Alabama's request for a preliminary injunction pending the Corps' successful completion of a NEPA analysis.[25] In 1990, Alabama and the Corps jointly moved to stay the proceedings in order to negotiate an agreement.[26] The Alabama district court granted the stay, and in 1992, Alabama, Florida, Georgia, and the Corps entered into an agreement allowing existing withdrawals to continue or increase in response to reasonable demand.[27] In 1997, the parties entered into, and Congress passed, the Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact), which was aimed at developing a solution to water disputes in the ACF Basin.[28] The ACF Compact adopted the 1992 Agreement's provision allowing existing withdrawals to continue and to increase in response to reasonable

16. *Id.*
17. *See id.* at 836-38.
18. *Id.* at 828.
19. *Id.* at 829.
20. *Id.*
21. *Id.*
22. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1318-19 (D.C. Cir. 2008).
23. *Id.* at 1319.
24. *Id.*
25. Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1123 (11th Cir. 2005).
26. *Id.*
27. *Id.*; *Geren*, 514 F.3d at 1319.
28. *Alabama*, 424 F.3d at 1123.

demand.[29] The ACF Compact's stated purposes were "promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface waters of the ACF, engaging in water planning, and developing and sharing common data bases."[30]

The ACF Compact ultimately failed to meet these objectives and was terminated in 2003.[31] Although article VII of the ACF Compact, entitled "Equitable Apportionment," sought to develop an allocation formula to resolve the states' disagreements regarding water rights,[32] no formula was ever established.[33] Furthermore, the ACF Compact required the agreement of all three states, which inevitably led to stalemates when negotiations broke down.[34] For example, in *Georgia v. United States Army Corps of Engineers*, the United States Court of Appeals for the Eleventh Circuit considered Florida's and Southeastern Federal Power Customers' (SFPC) motions to intervene, and found that the ACF Compact was ineffective both because its deadline was continuously extended pending negotiations and because Georgia was meanwhile allowed to increase withdrawals from Lake Lanier.[35] Because the ACF Compact required agreement of all three states, but could not compel agreement, the Eleventh Circuit concluded, it provided no meaningful way for Florida to protect its interests when negotiations broke down.[36]

Although the ACF Compact lapsed in 2003, it is important insofar as it represents a power struggle between the state and federal governments regarding the regulation of interstate water disputes.[37] Following release of the ACF Compact's initial draft in 1996, Attorney General Janet Reno noted: "[T]he compact as drafted fails to take into account the substantial interests of the United States in the management of the basin."[38] In 1997, the ACF Compact was amended to provide the

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29. *Id.*

30. Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact), Pub. L. No. 105-104, § 1, art. I, 111 Stat. 2219, 2219 (1997).

31. *Alabama*, 424 F.3d at 1123.

32. *See* ACF Compact, Pub. L. No. 105-104, § 1, art. VII(a), 111 Stat. 2219, 2223 (1997). Article VII states that "the basis and terms and conditions of the allocation formula are to be discussed or negotiated," and requires unanimous approval among the states and Federal Commissioner for the ACF Basin before the allocation formula becomes effective. *Id.*

33. Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1247 (11th Cir. 2002).

34. *Id.* at 1253.

35. *Id.*

36. *Id.*

37. *See* George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time To Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 773-75 (2005) (citing legislative history disfavoring passage of the ACF Compact's initial draft because it vested too much power in the states and emphasizing "the need to preserve Federal agency discretion").

38. *Id.* at 774.

federal government with a more definite role.[39] Following amendment, article VII(b) stated that once an allocation formula was adopted, agents of the federal government had a duty "to exercise their powers, authority, and discretion in a manner consistent with the allocation formula *so long as the exercise of such powers, authority, and discretion* [*was*] *not in conflict with federal law*."[40] In essence, this provision mandated that federal law should prevail over state law in case of a conflict.[41] Former Speaker of the House Newt Gingrich declared that the ACF Compact did not authorize the states "to rewrite federal law."[42]

In the 2005 case, *Alabama v. United States Army Corps of Engineers*, the Eleventh Circuit considered the threshold issue of standing as it applied to states seeking intervention in interstate water disputes.[43] The Eleventh Circuit began by citing the United States Supreme Court's requirements for standing.[44] A plaintiff must show "(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision."[45] The Eleventh Circuit concluded that Alabama and Florida had standing to intervene because the Corps' actions could adversely affect the environment of the entire ACF Basin by allowing Georgia to increase its withdrawals from Lake Lanier, and that a favorable outcome in the case could redress such an injury.[46] In *Georgia v. United States Army Corps of Engineers*, the same court considered Florida's motion to intervene as a defendant in Georgia's suit seeking increased water supply.[47] The Eleventh Circuit found that Florida had a legally protectable interest because it would suffer a practical effect as a result of the reallocation.[48]

Continuing its standing analysis, the court in *Georgia v. United States Army Corps of Engineers* discussed the doctrine of equitable apportionment.[49] The court adhered to the theory that whenever "the

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39. *See id.* at 775-76. Section VII(b) of the new ACF Compact provided "a proper relationship between federal and state statutory and regulatory requirements." *Id.*

40. ACF Compact, Pub. L. No. 105-104, § 1, art. VII(b), 111 Stat. 2219, 2223 (1997) (emphasis added).

41. Sherk, *supra* note 37, at 777.

42. *Id.* at 809.

43. Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1130 (11th Cir. 2005).

44. *Id.*

45. *Id.*

46. *Id.*

47. Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1246 (11th Cir. 2002).

48. *Id.* at 1252.

49. *Id.*

action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them."[50] The court decided that the ACF Compact did not adequately protect Florida's interests and rejected Georgia's alternative argument that Florida could protect itself through an original action in the Supreme Court seeking equitable apportionment.[51] The court noted that the Supreme Court had never considered an equitable apportionment case in conjunction with an interstate compact and that no "clear-cut and compulsory right to be heard" exists in equitable apportionment cases.[52] Thus, Florida met the requirements of standing, and, upon ruling that its interests were not represented by any party already involved in the suit, the court reversed the denial of Florida's motion to intervene.[53]

In 2001, the D.C. District Court ordered a mediation, which resulted in the 2003 Agreement requiring the Corps to allocate large portions of Lake Lanier's storage space to local uses for a once-renewable period of ten years.[54] The same court ruled on the validity of the 2003 Agreement in *Southeastern Federal Power Customers, Inc. v. Caldera* and, in so doing, was the first to analyze claims that the 2003 Agreement violated various federal statutes including the WSA and NEPA.[55] The court stated that it would address the 2003 Agreement's validity "to minimize the prospects of duplicative litigation and inconsistent adjudicative results."[56] The court indicated that although courts generally favor resolution through settlement, litigation is appropriate where a nonconsenting intervenor raises valid claims.[57] The court then considered whether the 2003 Agreement violated NEPA or the WSA.[58]

Section 301(a) of the WSA provides that it is Congress's policy "to recognize the primary responsibility of the States and local interests in developing water supplies."[59] Section 301(b) authorizes the Corps to allocate storage space to meet present or future local demand if the local

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50. *Id.* (quoting Kansas v. Colorado, 206 U.S. 46, 97-98 (1907)).
51. *Id.* at 1253-54.
52. *Id.* at 1254-55.
53. *Id.* at 1255-56.
54. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1319 (D.C. Cir. 2008).
55. Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 31 (D.D.C. 2004). The Alabama district court declined to address federal statutes pending the decision in *Caldera*, which it asserted "[went] more to the merits of the settlement." Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1125 n.12 (11th Cir. 2005).
56. *Caldera*, 301 F. Supp. 2d at 31.
57. *Id.*
58. *Id.*
59. Water Supply Act (WSA) § 301(a), 43 U.S.C. § 390(b)(a) (2000).

beneficiaries agree to pay for such a modification.[60] In section 301(d), however, the WSA stipulates that congressional approval is required for any change that would "seriously affect the purposes for which the project was authorized" or "involve major structural or operational changes."[61] Thus, the WSA limits the Corps' ability to alter existing projects without Congress's approval.[62]

The court in *Caldera* found that the test for WSA compliance should be "whether the Settlement Agreement will seriously affect the purposes for which Lake Lanier was originally authorized."[63] Although Alabama and Florida asserted that water supply was an authorized purpose, the court decided that the inquiry was irrelevant to its analysis because the 2003 Agreement only dealt with water storage.[64] Among the remaining purposes—hydropower, flood control, and navigation—the court found that only hydropower was potentially impacted.[65] Despite this possible impact, the court upheld the 2003 Agreement because the power suppliers endorsed it and intended to become signatories.[66] In a footnote, the court indicated its opinion that agencies generally have "unfettered discretion."[67]

The court in *Caldera* then considered the 2003 Agreement's validity under NEPA, which demands that all federal agencies "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement" describing any environmental effects of and alternatives to the proposed action.[68] The court acknowledged that the 2003 Agreement necessitated successful completion of the NEPA analysis; however, it disagreed with Alabama and Florida's contention that the analysis had to be completed before the Corps could make a recommendation supporting the 2003 Agreement.[69] According to the court, the 2003 Agreement left the timing of the NEPA analysis to the Corps' discretion.[70] The court then rejected the argument that the 2003 Agreement did not consider alternatives in accordance with NEPA

60. *Id.* § 301(b), 43 U.S.C. § 390(b)(b).
61. *Id.* § 301(d), 43 U.S.C. § 390(b)(d).
62. *Caldera*, 301 F. Supp. 2d at 31.
63. *Id.* at 32.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 32 n.5 (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970)).
68. *Id.* at 32-33; 42 U.S.C. § 4332(2)(C)(i)-(v) (2000).
69. *Caldera*, 301 F. Supp. 2d at 33.
70. *Id.*

requirements, reasoning that alternatives could be considered whenever the NEPA process was undertaken.[71] The court declined to address the 2003 Agreement's validity under other statutes, explaining that the NEPA process would carry the Corps' burden of establishing the 2003 Agreement's validity under each statute.[72] The court concluded that the 2003 Agreement should be upheld, but conditioned implementation of the 2003 Agreement upon dissolution of the Alabama district court's preliminary injunction.[73]

Following *Caldera*, the Alabama district court refused to dissolve the injunction, instead concluding that Alabama and Florida had succeeded on the merits.[74] The court noted that the injunction was necessary to prevent irreparable injury and that it was not adverse to public interests.[75] Therefore, the court decided, the 2003 Agreement was unenforceable.[76] In 2005, however, the Eleventh Circuit vacated the Alabama district court's denial of the motion to dissolve the preliminary injunction.[77] The court in *Caldera* thereafter entered a final judgment upholding the 2003 Agreement, which Alabama and Florida appealed.[78]

III. THE COURT'S DECISION

In the noted case, the D.C. Circuit began by prescribing the standard of review for the Corps' statutory authority to enter into an agreement, which would reallocate up to 22% of Lake Lanier's total water storage space to Georgia.[79] The D.C. Circuit observed that little precedent existed as to the appropriate standard of review when a settlement agreement must meet statutory requirements.[80] Although the fairness of settlement agreements is generally reviewed for abuse of discretion, the court determined that the appropriate standard for reviewing the district court's statutory interpretation was *de novo*.[81] The court followed the Supreme Court's mandate that, where a statute addresses an issue, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[82] Because section 301 of the WSA specifically

71. *Id.* at 34.
72. *Id.*
73. *Id.* at 35.
74. Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1126 (11th Cir. 2005).
75. *Id.*
76. *Id.*
77. *Id.* at 1136.
78. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1320 (D.C. Cir. 2008).
79. *Id.* at 1319-21.
80. *Id.*
81. *Id.*
82. *Id.* (quoting Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

addressed the development of "water supplies for domestic, municipal, industrial, and other purposes" and laid out the extent to which the Corps could authorize storage in reservoir projects, the court proceeded to analyze the 2003 Agreement's validity under the WSA.[83]

The D.C. Circuit then discussed the threshold issue of standing.[84] It held that Alabama and Florida had standing to challenge the 2003 Agreement because it constituted a major operational change to the reservoir.[85] The court noted the Alabama district court's prior finding that the 2003 Agreement could potentially reduce the flow of water to downstream states, a fact that the 2003 Agreement itself conceded.[86] The court explained that changes in the quantity of water in the Chattahoochee River would impact the ACF Basin for up to twenty years, directly affecting both Alabama and Florida.[87] As a result, the D.C. Circuit concluded, the states had shown imminence of injury in fact and causation.[88] The court rejected the argument that the Corps' duty to comply with NEPA would cause delay and reduce the imminence of injury, instead reasoning that the 2003 Agreement's provision requiring the Corps to use its "best efforts to complete any applicable requirements of the NEPA as expeditiously as practicable" sufficiently protected against delay.[89] Alabama and Florida had also established prudential standing because they came within the zone of interests that Congress could reasonably have intended to protect.[90]

With standing established, the D.C. Circuit analyzed the Corps' authority under the WSA.[91] The court emphasized section 301(d)'s requirement that the Corps obtain congressional approval for all major operational changes.[92] The court adduced evidence tending to prove that the Corps knew that the 22% increase contemplated by the 2003 Agreement qualified as a major operational change.[93] Two instances in particular bolstered this conclusion: first, a 1989 report in which the Corps admitted that congressional approval might be required for reallocation of 20% of Lake Lanier's storage space, and second, a 2002

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83. *See id.* at 1321 (quoting WSA § 301(a), 43 U.S.C. § 390(a) (2000)).
84. *Id.* at 1322.
85. *Id.*
86. *Id.* (citing Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1122 (11th Cir. 2005)).
87. *Id.*
88. *Id.* at 1323.
89. *Id.* at 1322-23.
90. *Id.* at 1323.
91. *Id.*
92. *Id.*
93. *Id.*

Army Legal Memorandum (Army Memorandum), which considered Georgia's request for a 35% reallocation a major operational change.[94] In light of this evidence, the D.C. Circuit held that the 22% reallocation was, on its face, a major operational change.[95]

The D.C. Circuit rejected each of the appellees' responsive arguments, beginning with their claim that the reallocation did not represent a major operational change because it merely preserved the status quo of gradual water storage reallocation.[96] The court explained that such logic would allow the Corps to bypass section 301(d)'s requirement of congressional consent.[97] Instead of ascertaining the impact of water storage reallocations based on the most recent levels before the increase, the court declared that the appropriate baseline for water storage space was zero, based on conditions when the lake began operation.[98] The court pointed out that even if the most recent storage level was the appropriate baseline, the 2003 Agreement still represented the largest reallocation ever undertaken without Congress's approval.[99]

Next, the D.C. Circuit rejected the appellees' claims that the 2003 Agreement did not qualify as a major operational change because the amount of storage space was too limited and because the 2003 Agreement compensated hydropower users for losses.[100] The court referenced Georgia's proposal for a 35% increase that was rejected following the Army Memorandum and claimed that the appellees had provided no basis to distinguish that increase from the 22% increase at issue.[101] The argument that compensating hydropower users precluded the reallocation from being considered a major operational change was also unconvincing, in the court's opinion, because it ignored the basic fact that the reallocation reduced water flow.[102]

The D.C. Circuit then disposed of the appellees' final argument that temporary reallocations do not call for prior congressional approval.[103] The court reasoned that Congress could not have intended to create a loophole whereby the Corps could approve major changes without congressional consent simply because the changes were limited to

94. *Id.*
95. *Id.* at 1324.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1324-25.

specific time frames that could potentially be extended indefinitely.[104] Furthermore, the court found no explanation for the appellees' attempt to distinguish a ninety-nine-year term, which they admitted "might cause a serious impact," from the 2003 Agreement's twenty-year term.[105] The court found all of appellees' arguments unpersuasive and believed that the 22% increase was large enough to "unambiguously constitute" a major operational change under section 301(d).[106] The D.C. Circuit concluded that the 2003 Agreement was invalid absent congressional consent, and reversed the district court's ruling upholding it.[107] The court declined to address Alabama and Florida's remaining statutory claims.[108]

Judge Silberman issued an opinion concurring in the judgment.[109] Unlike the majority, Judge Silberman found it necessary to address, and dispose of, the appellees' unaddressed FCA argument and remaining WSA claim that the 2003 Agreement undermined the original purposes behind the reservoir project.[110] Furthermore, Judge Silberman fundamentally disagreed with the majority's approach to analyzing major operational changes under the WSA.[111] He was specifically troubled by the use of zero as the baseline for measuring the impact of water storage reallocations.[112]

First, Judge Silberman analyzed whether the 2003 Agreement violated the FCA, citing the relevant FCA provision discussing "[s]ale of surplus waters for domestic and industrial uses."[113] Because the 2003 Agreement did not purport to dispose of "surplus" water, but rather reallocated reservoir capacity, Judge Silberman determined that the WSA was the controlling statute.[114] Judge Silberman, for this reason, would have rejected Alabama and Florida's FCA claims.[115]

Second, Judge Silberman analyzed whether the 2003 Agreement was inconsistent with the authorized purposes behind the construction of Lake Lanier.[116] Judge Silberman cited an Eleventh Circuit ruling, which found that the project was intended to improve navigation, generate

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104. *Id.* at 1325.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* (Silberman, J., concurring).
110. *Id.* at 1325-26.
111. *Id.* at 1326.
112. *Id.* at 1327.
113. *Id.* at 1325-26 (quoting Flood Control Act, 33 U.S.C. § 708 (2000)).
114. *Id.*
115. *Id.*
116. *Id.*

hydroelectric power, and control flooding.[117] In rejecting Alabama and Florida's argument that the reallocation would diminish generation of hydroelectric power, Judge Silberman reasoned that the 2003 Agreement's compensation mechanisms sufficiently protected against such adverse effects.[118] Judge Silberman stated that it was unnecessary, in any case, to reach the merits of this argument: Alabama and Florida lacked standing because they made no claim that their hydroelectric customers would pay increased rates.[119] Judge Silberman found additional support in the fact that hydroelectric companies in Alabama and Florida endorsed the 2003 Agreement due to its compensation mechanism, which sufficiently offset increased costs.[120]

Finally, Judge Silberman departed from the majority's decision that zero was the appropriate baseline for judging the impacts of water storage reallocations.[121] He stated that a baseline of zero "seem[ed] to imply that the project was never intended to provide water to the city of Atlanta, which [was] in tension with the [Eleventh] Circuit's observation" in *Alabama v. United States Army Corps of Engineers*.[122] Judge Silberman also noted that Alabama and Florida had acquiesced to incremental increases in water allotted to the city of Atlanta for years and that they had even entered into two agreements that allowed "reasonable increases" to meet demand.[123] Accordingly, Judge Silberman found that the majority's use of a baseline of zero was inappropriate because it led to the "draconian conclusion" that the water stored for and apportioned to the city of Atlanta over the years was illegal.[124]

Nonetheless, Judge Silberman agreed with the majority's holding that the 2003 Agreement was unlawful.[125] He reasoned that agencies are generally afforded substantial latitude to interpret ambiguous terms, but that deference was inappropriate where, as here, the agency was an interested party.[126] Consequently, Judge Silberman did not believe that the court was obligated to adhere to the agency's interpretation of major

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

118. *Geren*, 514 F.3d at 1326 (Silberman, J., concurring).

119. *Id.*

120. *Id.* Judge Silberman stressed that his argument in no way undermined the idea that Florida and Alabama had standing to challenge the alleged "major operational change" because the reduction in water supply would impact the states' environments. *Id.*

121. *Id.* at 1327.

122. *Id.* (referencing *Alabama*, 424 F.3d at 1122).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

operational changes as excluding incremental increases.[127] Judge Silberman thereby avoided using a baseline of zero, and premised his finding that the reallocation contemplated by the 2003 Agreement did, in fact, represent a major operational change on the 9% increase from 2002 levels.[128] In support of the 9% figure's status as a major operational change, Judge Silberman cited the Corps' concession at oral argument that a 10% reallocation would constitute a major operational change.[129]

Finally, Judge Silberman agreed with the majority that the Corps' attempt to characterize the reallocation as an interim rather than a permanent measure was irrelevant because the WSA drew no such distinction.[130] Thus, Judge Silberman ultimately agreed that the 2003 Agreement was invalid under section 301(d) in the absence of congressional approval.[131]

IV. ANALYSIS

The D.C. Circuit's decision in the noted case places considerable limitations on the Corps' discretion to approve proposed water reallocations under the WSA. Perhaps more importantly, the decision implicitly subordinates the states' traditional role in regulating interstate water conflicts to that of the federal government.

Prior to the decision in the noted case, courts focused on the language of WSA sections 301(a) and 301(b) in construing the scope of the Corps' authority.[132] In *Caldera*, the D.C. district court cited section 301(b) for the proposition that "[t]he Corps has authority to allocate storage capacity in Corps-managed reservoirs."[133] The court further demonstrated its belief that the WSA afforded the Corps wide latitude when it asserted that the Corps generally has "unfettered discretion."[134] The court in *Caldera*'s decision to uphold the 2003 Agreement despite limiting language in section 301(d) similarly indicates deference to determinations made by the Corps. The court also displayed a high degree of deference to the Corps' decision-making authority when it adopted the Georgia district court's reasoning that "the Court cannot substitute its judgment for that of the Corps [and] will defer to the

127. *Id.*
128. *Id.* at 1327-28.
129. *Id.* at 1328.
130. *Id.*
131. *Id.*
132. *See, e.g.*, Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 31 (D.D.C. 2004) (focusing on WSA § 301(b)'s grant of discretion to the Corps).
133. *Id.* at 28 n.1.
134. *Id.* at 32 n.5.

expertise of the Corps for a final agency decision."[135] The court's further statement that it would consider the effect of federal and state law on the Corps, however, somewhat limited the degree of authority vested in the Corps.[136]

The D.C. Circuit's decision in the noted case provides a stark contrast to the decision in *Caldera*, in particular by limiting agency discretion and requiring congressional consent for significant increases in water reallocations. Early on, the D.C. Circuit cited the Supreme Court's mandate that "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[137] Although the court admitted that settlement agreements are reviewed for abuse of discretion, it went on to state that "the district court could hardly approve a settlement agreement that violates a statute."[138] The court, therefore, viewed section 301(d) as confining the Corps' authority and adopted the language of that provision throughout its analysis.[139] The primary distinction, in the court's opinion, was between "minor modifications" and "major changes in a project," which the Corps had no authority to approve absent congressional consent.[140]

A somewhat more subtle point is the effect of the D.C. Circuit's emphasis on the "major operational change" language, because it represents a departure from the *Caldera* decision. In *Caldera*, the court announced that the test for WSA compliance turned on whether the change would "seriously affect" purposes for which the project was originally authorized.[141] In contrast, the court in *Geren* refocused its analysis on section 301(d)'s major operational change language, and therefore reasoned that the 22% increase in storage space represented a major operational change under the WSA.[142] Proving that the 2003 Agreement violated the original, authorized purposes behind Lake Lanier's construction could be problematic given that history only substantiates three clear purposes: "Congress initially authorized Lake Lanier and Buford Dam expressly for flood control, navigation, and hydropower generation purposes."[143] On the other hand, arguing that a

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135. Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1253 n.8 (11th Cir. 2002).

136. *Id.*

137. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1321 (D.C. Cir. 2004) (quoting Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

138. *Id.*

139. *Id.*

140. *Id.* at 1323.

141. Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 32 (D.D.C. 2004).

142. *Geren*, 514 F.3d at 1323.

143. *Caldera*, 301 F. Supp. 2d at 28.

given percentage of reallocated space represents a major operational change allows substantial interpretive leeway, as is apparent from the fact that the majority held that 22% represented a major operational change while Judge Silberman's concurrence held that 9% was also a major operational change.[144] The fact that the majority implemented a baseline standard of zero, as opposed to Judge Silberman, advocates for exceptional caution against allowing successive changes that "would effectively bypass section 301(d)."[145]

The court's opinion in *Geren* similarly demonstrates a reduction in state authority. Although the D.C. Circuit noted that the language of section 301(a) vests authority in the states, its decision implicitly diminishes the states' power against that of the federal government by making an affirmative statement requiring congressional approval.[146] The decision also represents a break from *Caldera*, which announced that "[t]he right to withdraw water for consumption from intrastate sources . . . is conferred by state, not federal law."[147] The court's limitation on state authority in the noted case finds support in the ACF Compact's legislative history. Particularly noteworthy are Janet Reno and Newt Gingrich's criticisms of the ACF Compact draft as lacking a definite role for the federal government.[148] Furthermore, if the intent behind the ACF Compact is any indicator of congressional intent in general, it seems that the 2003 Agreement, like the ACF Compact, should not be presumed to allow the states "'to rewrite federal law.'"[149]

The D.C. Circuit's disposition of the case solely on the basis of the WSA's "major operational change" language simplifies what had become an inordinately complicated mess of ongoing litigation and negotiation concerning the allocation of water resources in the ACF Basin. Although the court included a brief review of NEPA as a component of its standing analysis, the court essentially bypassed the statute by reasoning that the Corps was merely required to use its "best efforts to complete any applicable requirements of NEPA as expeditiously as practicable."[150] While Judge Silberman's choice to

144. *Geren*, 514 F.3d at 1324; *id.* at 1328 (Silberman, J., concurring).

145. *Id.* at 1324 (majority opinion).

146. *Id.* at 1321.

147. *Caldera*, 301 F. Supp. 2d at 28 n.1.

148. Sherk, *supra* note 37, at 774-75.

149. See id. at 809 ("[C]ongressional ratification of the ACF Compact did not authorize the states 'to rewrite federal law.'" (quoting Oversight Hearing on the Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee-Flint River Basin Compact: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 107th Cong. 81 (2001) (statement of Newt Gingrich, CEO, The Gingrich Group))).

150. *Geren*, 514 F.3d at 1322-23.

analyze the other Acts was not incorrect, it was unnecessary because violation of the WSA alone invalidated the 2003 Agreement. Judge Silberman's analysis of the portion of the WSA discussing authorized purposes behind the creation of Lake Lanier was similarly inessential given section 301(d)'s use of the word "or," which either requires the change to seriously affect authorized project purposes or requires a major structural or operational change.[151]

Finally, it is significant that the D.C. Circuit's approach did not necessarily demand equitable apportionment by the court. In this respect, the decision departs from precedent instructing that when disputes arise "the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them."[152] Instead, the decision focused on obtaining congressional approval before the need to litigate ever arises.[153] This comports with the Supreme Court's preference against adjudication while simultaneously avoiding the naïve assumption that states can resolve interstate water conflicts among themselves in the face of federal laws.[154] One commentator posited, "the inescapable conclusion is that congressional action is the only means by which interstate water conflicts can be managed in the twenty-first century."[155] The D.C. Circuit's decision represents an important step forward in water management policy by expanding Congress's role in the scheme of interstate water conflicts.

V. CONCLUSION

In 2008, the U.S. District Court for the District of Colorado endorsed the D.C. Circuit's test for WSA compliance by focusing on section 301(d) of the WSA's language concerning major operational changes.[156] However, the parties to the noted case have yet to reach a final resolution as to water rights in the ACF Basin.[157] Alabama

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151. WSA § 301(d), 43 U.S.C. § 309b(d) (2000).

152. Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1252 (11th Cir. 2002) (citing Kansas v. Colorado, 206 U.S. 47, 96-97 (1907)).

153. *Geren*, 514 F.3d at 1324-25.

154. *See* Sherk, *supra* note 37, at 767-68 ("An interstate water conflict is 'more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of . . . the States . . . than by proceedings in any court.'").

155. *Id.* at 827.

156. Lower Ark. Valley Water Conservancy Dist. v. United States, No. 07-cv-02244-EWN-MEH, 2008 U.S. Dist. LEXIS 73379, at *55-56 (D. Colo. Sept. 25, 2008).

157. EPA, *Congress To Take Up Southeastern Water Resources Dispute*, WATER POL'Y REP., Feb. 18, 2008, *available at* http://www.lexisnexis.com (follow "Search" hyperlink; then follow "by Source" hyperlink; then follow "News & Business" hyperlink; then select "All

Governor Bob Riley expressed his satisfaction, calling the D.C. Circuit's decision "the most consequential legal ruling in the 18-year history of the water war."[158] Georgia Governor Sonny Perdue, on the other hand, announced that Georgia would prefer to settle issues "over a negotiating table rather than in a courtroom."[159] Ongoing talks between Alabama, Florida, Georgia, the Corps, and the Secretary of the Interior continue despite the recent declaration of the 2003 Agreement's invalidity.[160]

It seems clear that the D.C. Circuit's decision will not be the last word over water rights in the ACF Basin. However, the shift away from state power over water allocation in the noted case represents much-needed evolution toward a modern system of federal regulation. Although early compacts, particularly those in the western United States, sought to preserve state autonomy in allocating water rights,[161] the states' inability to settle interstate water disputes effectively calls for congressional intervention.[162] The D.C. Circuit's approach provides a clear-cut step towards accomplishing these goals by requiring congressional approval when water reallocations effect major operational changes under section 301(d) of the WSA.

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English"; then follow "Individual Publications" hyperlink; then follow the "W" hyperlink; then follow "Water Policy Report" hyperlink; search for "Congress Southeastern Water Resources").

158. *Id.*

159. *Id.*

160. *Id.*

161. Dellapenna, *supra* note 13, at 837.

162. Sherk, *supra* note 37, at 819.

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