Nos. 09-14657-GG, 09-14810-GG & 09-14811-GG

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

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

STATE OF ALABAMA, STATE OF FLORIDA, ALABAMA POWER COMPANY, AND CITY OF APALACHICOLA'S JOINT PETITION FOR REHEARING EN BANC

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(No. 09-14657-GG)

In re: MDL—1824 Tri State Water Rights Litigation

STATE OF GEORGIA, ET AL., *Appellants,*

v.

STATE OF ALABAMA, STATE OF FLORIDA, ET AL., *Appellees.*

(No. 09-14810-GG)

In re: MDL—1824 Tri State Water Rights Litigation

GWINNETT COUNTY, *Appellant,*

v.

STATE OF ALABAMA, STATE OF FLORIDA, ET AL., *Appellees.*

(No. 09-14811-GG)

In re: MDL—1824Tri State Water Rights Litigation

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL., *Appellant,*

v.

STATE OF ALABAMA, STATE OF FLORIDA, ET AL., *Appellees.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

Alabama Municipal Electric Authority

Alabama Power Company (a wholly owned subsidiary of Southern Company); Stock symbols: APRCP, ALP-N, ALP-P, ALBPP, ALP-O, ALAWP, APRDN, ALPVN, APRDO, APRDP, APRDM, ALBMP

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American Public Power Association

Amicalola Electric Membership Corporation

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Central Electric Power Cooperative, Inc.

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Central Virginia Electric Cooperative

Choctawhatchee Electric Cooperative, Inc.

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City of Acworth, Georgia

City of Adel, Georgia

City of Albany, Georgia

City of Alexander City, Alabama

City of Apalachicola, Florida

City of Atlanta, Georgia

City of Barnesville, Georgia

City of Blakely, Georgia

City of Brinson, Georgia

City of Buford, Georgia

City of Cairo, Georgia

City of Calhoun, Georgia

City of Camilla, Georgia

City of Cartersville, Georgia

City of Cherryville, North Carolina

City of Clinton, South Carolina

City of College Park, Georgia

City of Columbus, Georgia

City of Commerce, Georgia

City of Concord, North Carolina

City of Covington, Georgia

City of Dalton, Georgia

City of Doerun, Georgia

City of Dothan, Alabama

City of Douglas, Georgia

City of Easley, South Carolina

City of East Point, Georgia

City of Elberton, Georgia

City of Ellaville, Georgia

City of Evergreen, Alabama

City of Fairburn, Georgia

City of Fairhope, Alabama

City of Fitzgerald, Georgia

City of Foley, Alabama

City of Forsyth, Georgia

City of Fort Valley, Georgia

City of Gaffney, South Carolina

City of Gainesville, Georgia

City of Gastonia, North Carolina

City of Georgetown, South Carolina

City of Grantville, Georgia

City of Greenwood, South Carolina

City of Greer, South Carolina

City of Griffin, Georgia

City of Hampton, Georgia

City of Hartford, Alabama

City of Hogansville, Georgia

City of Jackson, Georgia

City of Kings Mountain, North Carolina

City of LaFayette, Alabama

City of LaFayette, Georgia

City of LaGrange, Georgia

City of Lanett, Alabama

City of Laurens, South Carolina

City of Lawrenceville, Georgia

City of Lincolnton, North Carolina

City of Luverne, Alabama

City of Marietta, Georgia

City of Monroe, Georgia

City of Monroe, North Carolina

City of Monticello, Georgia

City of Morgantown, North Carolina

City of Moultrie, Georgia

City of Newberry, South Carolina

City of Newnan, Georgia

City of Newton, North Carolina

City of Norcross, Georgia

City of Opelika, Alabama

City of Orangeburg, South Carolina

City of Oxford, Georgia

City of Palmetto, Georgia

City of Piedmont, Alabama

City of Quitman, Georgia

City of Rock Hill, South Carolina

City of Robertsdale, Alabama

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City of Seneca, South Carolina

City of Shelby, North Carolina

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City of West Point, Georgia

City of Westminster, South Carolina

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Clarke-Washington Electric Membership Corporation

Coast Electric Power Association

Coastal Electric Membership Corporation

Cobb County-Marietta Water Authority

Cobb Electric Membership Corporation

Colquitt Electric Membership Corporation

Coosa Valley Electric Cooperative, Inc.

Coweta-Fayette Electric Membership Corporation

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East Mississippi Electric Power Association

ElectriCities of North Carolina, Inc.

EnergyUnited

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Flint Electric Membership Corporation

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GreyStone Power Corporation, an Electric Membership Corporation

Gwinnett County, Georgia

Habersham Electric Membership Corporation

Hart Electric Membership Corporation

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Husch Blackwell Sanders LLP

Irwin Electric Membership Corporation

Jackson Electric Membership Corporation

Jefferson Energy Cooperative, an Electric Membership Corporation

Jim Woodruff Customers[1]

Susan N. Kelly

[1] Representing Central Florida Electric Cooperative; Suwannee Valley Electric Cooperative; Talquin Electric Cooperative; Tri-County Electric Cooperative; City of Chattahoochee, Florida; and City of Quincy, Florida.

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Joel M. Kuehnert

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Bill McCollum

John McHugh, Secretary of the Army

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Oconee Electric Membership Corporation

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Okefenokee Rural Electric Membership Corporation

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Pataula Electric Membership Corporation

Pea River Electric Cooperative

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Richard H. Sinkfield

Slash Pine Electric Membership Corporation

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Snapping Shoals Electric Membership Corporation

SNR Denton US LLP

South Mississippi Electric Power Association

South Carolina PSA

Southeastern Federal Power Customers, Inc.

Southeastern Power Administration

Southern Company (parent company of Alabama Power Company and Southern Nuclear Operating Company); Stock symbols: SO, SO-D[2]

Southern Nuclear Operating Company (Southern Nuclear Operating Company is a wholly owned subsidiary of Southern Company)
Southern Rivers Energy

State of Alabama

State of Florida

State of Georgia

Ruth Ann Storey

Hon. Richard W. Story

Luther J. Strange

Sumter Electric Membership Corporation

Tallapoosa River Electric Cooperative

Spencer M. Taylor

Parker D. Thomson

Three Notch EMC

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[2] Southern Company is the parent company of numerous subsidiary entities, including Alabama Power Company and Southern Nuclear Operating Company. Alabama Power Company and Southern Nuclear Operating Company are the only Southern Company affiliates with an interest in the outcome of this appeal. A list of all Southern Company affiliates is available if required.

Jeffrey M. Todd

Tombigbee Electric Cooperative, Inc.

Town of Bamberg, South Carolina

Town of Bostic, North Carolina

Town of Cornelius, North Carolina

Town of Dallas, North Carolina

Town of Drexel, North Carolina

Town of Due West, South Carolina

Town of Forest City, North Carolina

Town of Granite Falls, North Carolina

Town of Huntersville, North Carolina

Town of Landis, North Carolina

Town of Maiden, North Carolina

Town of Mansfield, Georgia

Town of McCormick, South Carolina

Town of Pineville, North Carolina

Town of Prosperity, South Carolina

Town of Winnsboro, South Carolina

Tri-County Electric Membership Corporation

Troup County, Georgia

Troutman Sanders

Union Power Cooperative

United States Army Corps of Engineers

United States Department of Justice

Upson Electric Membership Corporation

Lt. Gen. Robert L. Van Antwerp, Chief of Engineers

J. Barrington Vaught

Orlando E. Vidal

Clinton A. Vince

Virginia Cooperative Preference Power Customers[3]

Virginia Municipal Electric Association #1

Walton Electric Membership Corporation

Washington Electric Membership Corporation

Seth Waxman

West Florida Electric Co-op Association

Jean E. Williams

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[3] Specifically, B-A-R-C Electric Cooperative, Community Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, and Southside Electric Cooperative.

Willis, McKenzie, Degennaro & Alford

Wilmer Cutler Pickering Hale and Dorr LLP

Thomas R. Wilmoth

Wiregrass Electric Cooperative, Inc.

Paul R.Q. Wolfson

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GLOSSARY

1956 Act	Pub. L. No. 84-841, 70 Stat. 725 (1956)
ACF	Apalachicola-Chattahoochee-Flint
ACF Basin	Apalachicola-Chattahoochee-Flint River Basin
Alabama	State of Alabama
Alabama Power	Alabama Power Company
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Apalachicola	City of Apalachicola
cfs	Cubic Feet Per Second
Corps	United States Army Corps of Engineers
Florida	State of Florida
Georgia	State of Georgia
Georgia Parties	State of Georgia, City of Atlanta, Fulton County, DeKalb County, the Cobb County-Marietta Water Authority, the City of Gainesville, ARC, and the Lake Lanier Association
JPML	Judicial Panel on Multidistrict Litigation
Lanier	Lake Lanier
MDL	Multidistrict Litigation
RHA	River and Harbor Act of 1946, Pub. L. No. 79-525, 60 Stat. 634-35

SeFPC	Southeastern Federal Power Customers, Inc.
Settlement Agreement	2003 Settlement Agreement reached in *Southeastern Federal Power Customers, Inc. v. Caldera*, 3:08-cv-00640
Stockdale Memo	April 15, 2002 Memorandum from Earl Stockdale, United States Army Corps of Engineers Deputy General Counsel, to Acting Assistant Secretary of the Army for Civil Works, Subject: Georgia Request for Water Supply from Lake Lanier
WSA	Water Supply Act of 1958, 43 U.S.C. 390b

TABLE OF CITATIONS

Cases

Statutes

Rules

Other Authorities

Note on Record Citations

References to documents in the administrative record will be cited as "DE106:[ACFXXXXXX]" (documents from the administrative record filed April 14, 2008), and "DE231:[SUPPARXXXXXX]" (documents from the supplemental administrative record filed March 23, 2009). References to documents contained in the Appendix filed with Appellees' opening brief will be cited as "R.App.[tab no.]:[page/paragraph]".

STATEMENT OF COUNSEL

We express a belief, based on a reasoned and studied professional judgment, that the full Court's reconsideration of this case is necessary to correct conflicts between the panel's decision and decisions of the Supreme Court of the United States and the precedents of this Circuit identified below and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

First, the panel's failure in this Administrative Procedure Act case to focus on whether Congress had directly spoken to the precise question at issue before the agency—whether the Rivers and Harbors Act of 1946 (RHA), Pub. L. No. 79-525, 60 Stat. 645 (1946), authorizes the Corps of Engineers to reallocate storage at Lake Lanier for local water supply—and to focus instead on whether Congress had mentioned the general topic of water supply in the RHA's statute or legislative history conflicts with the holdings of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984) (a reviewing court must determine "whether Congress has directly spoken to the precise question at issue"); *Negusie v. Holder*, 555 U.S. 511, ---, 129 S. Ct. 1159, 1164 (2009) (a reviewing court must determine whether it is "clear that Congress had an intention on the precise question at issue" and the intent must be "explicit"); and *Gonzalez v. Reno*, 212 F.3d 1338, 1348 (11th Cir. 2000) (mere mention of a

topic by Congress does not mean that Congress has spoken to all issues pertaining to it).

Second, the panel's determination that the Corps' construction of the RHA on which the Corps based the agency action being challenged is not entitled to deference because the agency had allegedly expressed prior inconsistent views on the same question conflicts with the holdings of *Mayo Foundation for Medical Education & Research v. United States*, --- U.S. ---, 131 S. Ct. 704, 712 (2011) ("[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework"), and *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1219 (11th Cir. 2009) (inconsistency is irrelevant if current agency interpretation is a "reasonable construction of an ambiguous statute").

Third, the panel's development of its own construction of the statute in question, as opposed to determining whether the Corps' construction was permissible, conflicts with the holdings in *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782 (question for reviewing court is not whether the agency's construction of a statute is the best construction, but rather whether it is a "permissible construction"), and *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir. 1993) (en banc) ("court may not substitute its own construction of a statutory provision for that of the agency").

Fourth, the panel's failure to accord deference to the contemporaneous construction of the RHA by the Corps—the agency that suggested enactment of that statute to Congress and to which Congress assigned the task of implementing the statute—conflicts with the holdings in *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801 (1965) (deference to an agency's views should be particularly pronounced when the agency's determination "involves a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new"), and *United States v. American Trucking Associations*, 310 U.S. 534, 549, 60 S. Ct. 1059, 1067 (1940) (an agency's interpretation of a statute "gains much persuasiveness from the fact that it was the [agency that] suggested the provisions' enactment to Congress").

Fifth, as to the three cases where the panel determined that the district court lacked jurisdiction to decide them, the panel's decision nonetheless to remand them with detailed instructions for the Corps to take further action in the cases violates the holding of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998), in that the only permissible course was for the panel to remand the cases to the district court with instructions to dismiss the relevant claims.

Sixth, the panel's decision to issue remand instructions that require the agency to go beyond reconsideration of the final agency action at issue and that give that agency detailed direction concerning the methods, procedures, and time limitations that the agency must follow on remand conflicts with the holdings in *Federal Power Commission v. Transcontinental Gas Line Pipe Corp.*, 423 U.S. 326, 331-32, 96 S. Ct. 579, 582-83 (1976) (court's review must be "confined to consideration of the decision of the agency" and on remand to the agency generally may not "dictate[] to the agency the methods, procedures, and time dimension" (internal quotation omitted)), and *Pollgreen v. Morris*, 770 F.2d 1536, 1544 (11th Cir. 1985) (when court finds agency committed an error of law, court's "duty . . . is to correct that error of law and remand the case to the agency to afford it an opportunity to receive and examine the evidence in light of the correct legal principle").

Finally, the panel's failure to give collateral estoppel effect to a sister circuit's determination of issues due to the losing litigants' litigation strategy decision in the prior appeal not to raise the legal arguments now made in this case conflicts with the holding in *In re Southeast Banking Corp.*, 69 F.3d 1539, 1553 (11th Cir. 1995) (a party's failure to raise an argument as a matter of litigation strategy in an earlier case does not prevent the application of collateral estoppel).

We also express a belief, based on a reasoned and studied professional judgment, that these appeals involve a question of exceptional importance:

Whether the RHA authorizes the Corps of Engineers to reallocate storage space at Lake Lanier for local water-supply use, or whether such a storage allocation must be undertaken pursuant to the Water Supply Act of 1958, 43 U.S.C. § 390b, which would require specific congressional approval of the reallocation?

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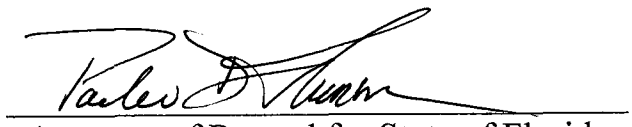
Attorney of Record for State of Alabama



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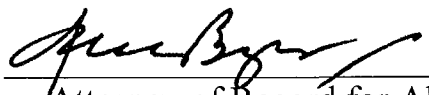

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Attorney of Record for City of Apalachicola

STATE OF ALABAMA, STATE OF FLORIDA, ALABAMA POWER COMPANY, AND CITY OF APALACHICOLA'S JOINT PETITION FOR REHEARING EN BANC

These consolidated appeals impact critical water resources in each of the States of this Circuit, and the outcome will affect the citizens as well as economic, environmental, and ecological interests in the three States for decades to come. As a result, the cases at issue are of such exceptional importance that they demand review by the full Court. The interest of Georgia's citizens in the Chattahoochee River to furnish water supply for metropolitan Atlanta is clear, but the downstream implications of water-storage allocation in Lake Lanier are hardly limited to the Atlanta metropolitan area. As this Court recognized in *Alabama v. USACE*, 424 F.3d 1117, 1130 (11th Cir. 2005), "Corps management of Lake Lanier that violates federal law may adversely impact the environment and economy downstream in the ACF Basin, thereby injuring Alabama and Florida." These impacts extend all the way downstream to the Apalachicola River and Bay, where endangered and threatened species as well as the commercial fishing industry depend upon sufficient flows from the Chattahoochee. *See Georgia v. USACE*, 302 F.3d 1242, 1250-52 (11th Cir. 2002).

The appeals also warrant en banc review because the panel in its opinion departs repeatedly from settled Supreme Court and Eleventh Circuit precedent relating to the proper means for assessing an agency's interpretation of a statute it

administers in a case brought under the Administrative Procedure Act, 5 U.S.C. § 706. The panel fails to focus on whether Congress spoke directly to the precise question at issue before the agency—whether the Rivers and Harbors Act of 1946 (RHA), Pub. L. No. 79-525, 60 Stat. 634-35 (1946), authorized the Corps to reallocate storage at Lanier, a federal reservoir, to local water-supply use. Yet even though Congress never spoke directly to that precise issue, the panel points to general references in the RHA's legislative history to the role of water supply at the reservoir in crafting its own construction of the statute. In so doing, the panel sweeps aside the settled, six-decades-old, permissible interpretation of the Corps that it lacks the authority under the RHA to reallocate storage at Lanier for local water supply. Further, by remanding the cases to the agency with broad, detailed instructions, the panel exceeds the limits of its jurisdiction in an administrative law case. The panel goes so far as to retain jurisdiction over all the cases that are included in the appeal, even the three cases that the panel holds that the district court lacked jurisdiction to decide. Finally, the panel contradicts a prior panel of this Circuit in refusing to apply collateral estoppel arising out of a prior D.C. Circuit opinion to key issues in the case that would have pretermitted the rest of the panel's substantive analysis.

ISSUES FOR EN BANC REHEARING

1. Whether the panel departs from Supreme Court and Eleventh Circuit precedent applicable to a case brought under the Administrative Procedure Act by:

    a. Under step one of its *Chevron* analysis, failing in its review of the statute and legislative history to focus on whether Congress had spoken directly to the precise question at issue—whether the RHA authorized the Corps to reallocate storage at Lake Lanier to local water supply;

    b. Under step two of the *Chevron* analysis, holding that purported prior inconsistent positions taken by the Corps means that the agency's present statutory interpretation on which the agency based the decision at issue in the litigation is entitled to no deference and thus failing to defer to the Corps' permissible understanding of its own reports underlying Congress' authorization of Lake Lanier;

    c. Failing to defer to the Corps' conclusion contained in the administrative record concerning the scope of its authority to balance water supply against hydropower at Lake Lanier even though the panel concludes that the appropriate balance is an ambiguous matter for the Corps to determine?

2. Whether the panel exceeds its jurisdiction and departs from Supreme Court and Eleventh Circuit precedent by:
    a. Remanding three cases to the Corps with detailed instructions for further action even though the panel concluded that the district court lacked jurisdiction to decide the relevant claims in those cases;
    b. Remanding the fourth case included in the appeal with detailed remand instructions that require the Corps to consider issues beyond the final agency action at issue and tightly constrain the Corps' discretion on remand?
3. Whether the panel departs from Eleventh Circuit precedent by failing to give collateral estoppel effect to a prior D.C. Circuit decision based upon the panel's view that the issue in question was not actually litigated due to a litigation strategy decision by the losing litigants in the earlier appeal not to raise a purportedly controlling legal point?

STATEMENT OF THE CASE

These consolidated appeals arise out of a multi-district litigation proceeding involving seven lawsuits challenging various aspects of the management by the Corps of federal reservoirs in the Apalachicola-Chattahoochee-Flint (ACF) River Basin. The Judicial Panel on Multidistrict Litigation transferred the cases to the Middle District of Florida and appointed Senior Judge Paul Magnuson to preside

over the MDL based upon his extensive experience in handling MDL litigation concerning the Corps' management of federal reservoirs. *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351, 1352 (JPML 2007).

Judge Magnuson divided the MDL into two phases. The first phase involved challenges in four of the cases to actions to support local water supply taken by the Corps with respect to its operation of Lake Lanier (Lanier), a federal project northeast of Atlanta. Slip op. at 32. (A copy of the slip opinion is attached as Exhibit A.) These four cases are *Alabama v. USACE*, 3:07-cv-00249 ("*Alabama*"); *Southeastern Federal Power Customers, Inc. v. Caldera*, 3:08-cv-00640 ("*SeFPC*"); *City of Apalachicola v. USACE*, 3:08-cv-00233 ("*Apalachicola*"); and *Georgia v. USACE*, 3:07-cv-00252 ("*Georgia*").

This first phase culminated in the 97-page July 17, 2009, Order that is the subject of these appeals. *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009). In the *Alabama*, *SeFPC*, and *Apalachicola* actions, the plaintiffs claimed that the Corps had effected a *de facto* reallocation of water storage at Lanier from hydropower use to local water-supply use without seeking prior congressional approval in contravention of the Water Supply Act of 1958 (WSA), 43 U.S.C. § 390b. The district court agreed that such an unlawful reallocation had occurred and ordered that the action would be set aside in July 2012 if the parties did not reach agreement on a solution by then. 639 F. Supp. 2d at 1355. In the

Georgia action, the plaintiffs challenged the Corps' denial of a request by Georgia to have 34% of Lanier's conservation storage pool reallocated from hydropower use to local water-supply use without congressional approval. Based upon its own analysis and the collateral estoppel effect of an earlier decision by the D.C. Circuit in the *SeFPC* case, *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), the district court determined that the Corps had not erred in denying that request, so the court denied the relief sought. 639 F. Supp. 2d at 1352.

On appeal, the panel holds that the Corps had not taken a final agency action in connection with the relevant claims asserted in *Alabama*, *SeFPC*, and *Apalachicola*, so the panel concludes that the district court had no jurisdiction to make its Phase-One decision in those three cases. Slip op. at 50. But, rather than ordering the district court to dismiss the relevant claims, *the panel directs the district court to remand the three cases to the Corps for reconsideration to be completed within one year.* *Id.* at 94-95. In addition, the panel itself retains jurisdiction (*which it had said the federal courts did not have*) over these three cases "to monitor the one-year time limit." *Id.* at 95.

As to the *Georgia* action, the panel holds that the Corps had taken a final agency action in denying Georgia's water supply request, so it reaches the merits of that claim. Based upon its own construction of the RHA, which differs from the Corps' construction of that statute as articulated at length in the Corps' denial of

the request, the panel determines that the district court should have set aside that denial as arbitrary, capricious, and not in accordance with law. *Id.* at 94. In sum, the panel holds that the RHA gave the Corps authority to reallocate storage space at Lanier from hydropower generation to local water-supply use, even though *the panel identifies no statement of Congress in the statute or legislative history explicitly giving the Corps this authority*. Instead, the panel relies on more general references to the role of water supply at Lanier in reaching its conclusion. *Id.* at 53-65. The panel then devotes 11 pages to laying out what it calls "complete remand instructions" (*id.* at 89 n. 40 & 90 n. 41) for the Corps, including a direction that the Corps should undertake a "comprehensive decision about the Corps' future water supply operations" (*id.* at 75) and should spell out the precise limits of its perceived authority to reallocate storage at Lanier from hydropower use to local water-supply use even if the Corps determines that the Georgia water supply request is still due to be denied. *Id.* at 82-93. As with the other three cases, the panel retains jurisdiction over the *Georgia* case despite the remand. *Id.* at 95.

STATEMENT OF FACTS

At issue in these appeals are competing demands for usage of the water stored in Lanier. Lanier, a project whose construction was paid for with no contribution from any state or local government, was authorized by Congress in the RHA. The RHA did not contain any specific discussion concerning Lanier.

Instead, Congress in the RHA authorized the Corps to proceed in the development of the ACF River Basin "in accordance with the report of the Chief of Engineers." The Chief of Engineers report, in turn, referenced other reports, including one by the Division Engineer, which the panel refers to as the Newman Report. DE106:ACF000641; Slip op. at 9.

The panel correctly notes that Lanier's authorized purposes included hydropower, flood control, and navigation. Slip op. at 10-11.

This case revolves around allocation of "storage" at Lanier. "Storage" in the reservoir refers to "the amount of space in Lake Lanier dedicated to a particular project purpose." Slip op. at 13 n.7. Releases of water contained in that storage space are then made to serve the purpose for which the space has been allocated. Thus, if local water-supply interests were allocated storage space at Lanier, they would have the ability to call for releases or withdrawals of water from that space.

The reservoir consists of three strata or "pools." At the top is the flood control pool, which remains empty most of the time so that flood waters can be captured. *Id.* at 15. Below the flood control pool is the conservation storage pool, and the storage in that pool has been allocated exclusively to hydropower generation since the project began operation. *Id.* The water released from this pool passes through the dam's turbines to generate electricity. The bottom zone is the inactive pool, and the storage space there is not allocated. *Id.*

The panel concedes that "no storage [at Lanier] was specifically allocated for water supply." *Id.* at 13. Nevertheless, the panel concludes that the RHA authorized the Corps to allocate storage at Lanier to local water-supply use. Yet neither the RHA nor any of the Corps reports pre-dating the RHA contains any statement or suggestion that storage could be allocated at the reservoir for water supply. Further, at no point since the passage of the RHA has the Corps ever stated that the RHA gave it authority to allocate storage to that use, *Geren*, 514 F.3d at 1324; DE106:ACF036352, nor has any storage in Lanier ever been allocated to use for local water supply, slip op. at 42.

There being no direct congressional authorization for allocation of Lanier's storage for water supply, the panel relies on general statements in the RHA's legislative history concerning water supply for its conclusion that the Corps can reallocate storage for that purpose under the RHA. The Corps in its reports prior to the authorization of Lake Lanier discussed impacts to water supply as a result of the dam's construction. The Newman Report noted that the development of Lake Lanier would "affect[] in several ways the regimen of the river in and below the Atlanta metropolitan area." DE106:ACF000668. In particular, the Report noted that the anticipated peaking operations[4] designed to optimize the hydropower

[4] The term "peaking operations" refers to the practice of generating hydropower at the time of greatest electricity demand when the electricity is most valuable, which is typically during certain hours of weekdays.

purpose would result in no off-peak weekday flows or weekend flows from the dam, and that other inflows to the river below the dam would result in a river flow at Atlanta of as low as 50 cfs (cubic feet per second). *Id.* This compared to a pre-dam minimum daily flow of 422 cfs at Atlanta during a previous drought. *Id.* Recognizing that the construction of the dam and the resulting peaking hydropower operations could virtually dry up the river during the weekends and other off-peak times, the Corps recommended installation of a small generating unit at the dam (in addition to the two main power turbines) to provide off-peak releases of up to 600 cfs in order to ensure a minimum flow at Atlanta (with intervening inflows) of 650 cfs. *Id.* The Report noted that the "minimum release may have to be increased somewhat as the area develops." *Id.*[5] The Report also stated that "[t]his release [through the small generating unit at Lanier] would not materially reduce the power returns from the plant" and would only involve a "slight decrease in system power value." *Id.* The Report did not allocate storage to local water supply in connection with operation of that small generating unit. Instead, the Corps' report only identified storage allocations for hydropower generation and flood control. DE106:ACF000639.

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[5] In the Newman Report, Paragraph 79 notes that "[l]ocal interests state" that the flow needs at Atlanta in 1965 would be 800 cfs. DE106:ACF000668. The Corps did not commit to provide a flow of that amount from Lanier. Nevertheless, the panel inexplicably construes that paragraph as such a commitment. Slip op. at 56.

The Newman Report's discussion of the Lanier site focused on the benefits to hydropower and navigation that would result from location of the dam there, not on water supply. The Newman Report determined that a "large storage-power reservoir" on the upper part of the Chattahoochee River was needed to provide flow regulation so that downstream reservoirs would be economically viable. DE106:ACF000661. The Report noted that the City of Atlanta and other local interests had urged the Federal Government to develop a reservoir above Atlanta first among the ACF projects "in order to meet a threatened shortage of water, during low-flow periods [i.e., droughts], for municipal and industrial purposes." *Id.* The Report stated that a reservoir above Atlanta "would greatly increase the minimum flow in the river at Atlanta, thereby producing considerable *incidental benefits* by reinforcing and safeguarding the water supply of the metropolitan area." *Id.* (emphasis added).

Underscoring that the water supply benefit to Atlanta was merely the *result* of increased flows in the river during dry times from releases from the dam for hydropower generation—rather than an intended purpose for the project's storage—the Newman Report assigned monetary values only to the benefits accruing from power generation, navigation, and flood control. DE106:ACF000672. No value was assigned to water supply. Then-Mayor Hartsfield of Atlanta confirmed his understanding that the storage in the dam had

not been constructed to serve Atlanta's water-supply needs in a 1948 letter. He said, "In our case the benefit so far as water supply is *only incidental and in case of a prolonged drought.*" DE231:SUPPAR001063 (emphasis added).

Further underscoring that the RHA contained no authorization for the Corps to allocate storage to water supply is the Corps' denial of a 1961 request by a downstream municipality that the Corps increase releases from the dam at Lanier to support its water-supply needs. The Corps' Division Engineer determined that the Corps had already exhausted all authority it had arising out of the Newman Report's language stating that the "minimum releases may have to be increased somewhat as the area develops." DE106:ACF002233. The Division Engineer determined that any future increases in releases to meet the needs of downstream water supply would have to be made through a reallocation of storage under the terms of the WSA for which the locality would have to make payment. *Id.* The Chief of Engineers, the commanding general of the Corps, concurred in the determination that the Corps had no authority to make any further releases for downstream water supply under the RHA. DE:106:ACF002230. At the time of that decision, no storage had been allocated to local water-supply use. No one challenged the Corps' final agency action denying that request.

As the Atlanta area's population exploded in the 1970s, local governments made requests both for special non-peak releases from the dam to meet

downstream water-supply needs and for direct withdrawals from the reservoir to meet the water-supply needs of the communities surrounding the lake. The Corps determined that such water supply could only be made available out of storage that had been allocated to hydropower production. DE106:ACF020069. The Corps also recognized that before it could reallocate storage to water supply, a study comprehensively assessing present and future water-supply demands would be needed. DE106:ACF003900.

Congress in 1972 authorized a study of Atlanta-area water supply, which was known as the Metropolitan Atlanta Area Water Resources Management Study. The Corps and the Georgia Parties[6] acted as the Study's executive committee. The committee issued its report in 1981. DE231:SUPPAR001951-4053. *The report did not state, nor even suggest, that the RHA authorized the Corps to allocate storage to water supply.* To the contrary, the Study suggested three alternatives for meeting future water-supply needs in the area, two of which involved reallocation of storage at Lanier for local water supply, and *the Study acknowledged that each of the alternatives would require congressional approval. See* DE264:38-40.

Although the Corps has never allocated any storage at Lanier for water supply, the Corps began in the 1970s to enter into interim contracts with local

[6] "Georgia Parties" refers to Appellants State of Georgia, City of Atlanta, Fulton County, DeKalb County, the Cobb County-Marietta Water Authority, the City of Gainesville, the Atlanta Regional Commission, and the Lake Lanier Association.

governments for water supply usage pending completion of the study. The last of those contracts expired in 1990. Nonetheless, for the last 21 years, the Corps has allowed water-supply providers to utilize Lanier's hydropower storage for water supply, in the form of both direct withdrawals and special non-peak releases from the dam to meet downstream water-supply needs. The panel holds that, notwithstanding this occurring for more than two decades, the Corps has not yet taken a final agency action to allow this usage of Lanier's storage. Slip op. at 50. It is undisputed that the Corps is causing this water-supply usage to be made available out of storage that has been allocated to hydropower use.

In 2000, the Governor of Georgia requested that the Corps commit to substantial increases in both direct withdrawals from Lanier for water supply and special non-peak releases from the dam specifically to meet downstream water-supply needs. In 2002, the Acting Assistant Secretary of the Army denied that request in a letter to Georgia's Governor, and he provided the Governor with an analysis prepared by the Corps' legal counsel Earl Stockdale (which will be referred to as the "Stockdale Memo") that explained in detail the basis for the denial. (A copy of the letter and the attachment is attached hereto as Exhibit B.)

In the Stockdale Memo, the Corps recognized that the Georgia water supply request was for reallocation of hydropower storage at Lanier to meet Atlanta-area water-supply needs. DE106:ACF036355. The Corps calculated the size of that

requested reallocation as 370,930 acre-feet, or 34% of Lanier's total conservation storage. DE106:ACF036362-63. The Stockdale Memo undertook a legal analysis of the Corps' ability to make the requested allocation. The D.C. Circuit in a prior appeal in the *SeFPC* case described that analysis as "comprehensive." *Geren*, 514 F.3d at 1323. The analysis included a review of the Corps reports underlying the RHA, including the Newman Report, as well as a discussion of the statutory backdrop against which Congress enacted the RHA. DE106:ACF036357-61 & n.1. The Corps concluded that allocation of storage for water supply was not authorized by the RHA and that water supply was only one of the project's incidental benefits, which "are those benefits that accrue to the project as a byproduct of its operation for its specifically authorized purposes." DE106:ACF036360. The Corps stated that the authorized purposes for Lanier were hydropower, flood control, and navigation. *Id.*[7]

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[7] In a prior appeal in the *Alabama* action, a panel of this Circuit stated that "Lake Lanier was created for the explicitly authorized purposes of flood control, navigation, and electric power generation." *Alabama v. USACE*, 424 F.3d 1117, 1122 (11th Cir. 2005). The Court also recognized that "although not explicitly authorized by Congress, the Corps has historically maintained that water supply use is an 'incidental benefit' flowing from the creation of the reservoir." *Id.* The Georgia Parties filed a joint application for panel rehearing asking the Court to "correct" these statements, but this Court denied rehearing. R.App.11. The current panel opinion rejects those pronouncements by a prior panel, thereby violating this Circuit's important prior panel rule. *See United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam) (explaining prior panel rule).

Because the Corps determined that the RHA provided no authority to grant Georgia's request, the reallocation could only be permitted if it met the requirements of the WSA. Under the WSA, the Corps cannot reallocate storage for water supply without congressional approval if the reallocation would involve a major operational change or would seriously affect the authorized project purposes. 43 U.S.C. § 390b(d). The Corps found that a 34% reallocation would involve major operational change and would seriously affect the authorized project purposes of Lake Lanier, so *the Stockdale Memo concluded that the Corps lacked authority to undertake the reallocation without congressional approval.* The Corps noted that a reallocation of that size would be more than four times larger than the largest reallocation for water supply ever approved at any Corps project under the WSA without congressional approval. DE106:ACF036369.

ARGUMENT

I. The Panel Disregards Supreme Court and Eleventh Circuit Precedent Concerning Review of An Agency's Interpretation of a Statute It Administers.

The panel's legal analysis in connection with the *Georgia* case repeatedly departs from fundamental principles of administrative law as set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the numerous Supreme Court and Eleventh Circuit cases applying the analytical framework established in *Chevron*. First, under step one of *Chevron*, the panel

does not focus its review of the RHA statute and legislative history on the precise question at issue and ignores congressional silence on that precise question. Second, under step two, the panel fails to defer to the Corps' interpretation, and the panel does that because it perceives that the Corps has been inconsistent in its views, even though the Supreme Court has said that such inconsistency is not a reason to disregard an agency's views. And, in further rejecting the Corps' interpretation, *the panel undertakes its own construction of the statute* rather than analyzing whether the Corps' interpretation is permissible. Third, on an issue that the panel concedes is an ambiguous matter for determination by the Corps, the panel ignores the Corps' determination on that issue shown in the administrative record and, instead, remands the question for the Corps to decide it all over again.

A. In Performing Step One of the *Chevron* Analysis, the Panel Ignores A Prior Panel's Holding in Concluding that Congress Had Spoken to the Precise Issue.

The panel's analysis under step one of *Chevron* contradicts the holding of a prior panel of this Circuit in *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), as well as the holding of *Chevron* and the Supreme Court cases in the *Chevron* line. As the Supreme Court made clear in *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S. Ct. at 2781. For a court to answer that question in the affirmative, it must be "clear that Congress had an intention on the precise question at issue," and

Congress' statement on the precise question must be "explicit." *Negusie v. Holder*, 555 U.S. 511, ---, 129 S. Ct. 1159, 1164 (2009). This Circuit's prior panel in *Gonzalez* held that the mere mention of a topic by Congress does not mean that Congress has spoken to all issues pertaining to it. 212 F.3d at 1348-49. Indeed, the prior panel explained that congressional statements of intent as to one aspect of a topic but silence on another means that "Congress has left a gap in the statutory scheme," and "[f]rom that gap springs executive discretion." *Id.* at 1348.

The precise question at issue in connection with the Corps' denial of the Georgia water supply request is whether the RHA authorized the Corps to reallocate hydropower storage at Lanier for local water supply. The Corps concluded that the RHA gave it no such authority, and as a result, the Corps found that its only source of authority to reallocate storage for water supply was the later-enacted WSA (hence the name "Water Supply Act"). DE106:ACF036360-61.

In finding under step one of *Chevron* that the Corps had erred in interpreting the RHA, the panel does not focus on *the precise question at issue*. Rather than concentrate on whether Congress had directly spoken to whether the Corps could *allocate storage for water supply*, the panel instead broadly expands its analysis, looking to any statements in the legislative history (which consists primarily of reports prepared by the Corps) concerning whether there was any role for water supply to play in connection with Lanier's operation. Slip op. at 53-54. The

district court recognized that "Congress . . . anticipated some benefits to water supply from the project," 639 F. Supp. 2d at 1345, so it is not surprising that the panel concludes that "the design of the project and the operational scheme were influenced by water supply concerns," slip op. at 55.

But under the holding of the prior panel in *Gonzalez*, the fact that water supply had some role to play is irrelevant to the *Chevron*-step-one analysis. The question is whether Congress explicitly told the Corps in the RHA that it was authorized to allocate storage to water supply. Just because there would be releases from the small generating unit to maintain a minimum flow for downstream water supply at non-peak times does not equate to a congressional directive that storage allocated for peak hydropower production could be reallocated for water supply. *See* DE231:SUPPAR026656 (Corps officer explaining in 1952 congressional appropriations testimony that anticipated benefits for downstream water supply from Lanier did not correspond to an allocation of storage for water supply). The panel fails to identify a single statement in the statute or the underlying Corps reports expressing an explicit intent that storage be allocated for water supply, slip op. at 51-65, and no such statement exists.

Just as the prior panel concluded in *Gonzalez* that a statutory reference to any alien being able to apply for asylum did not mean that Congress had directly spoken to the specific procedures to be followed in submitting such an application,

212 F.3d at 1348, references in the RHA's legislative history to certain water-supply benefits or operations resulting from Lanier's construction does not mean that Congress spoke directly to the question of authority to reallocate storage for water supply. A situation like this where there is no direct congressional statement on the precise issue presents the classic case for *Chevron* step-two deference to the agency's interpretation, not a conclusion under *Chevron* step one that Congress has spoken directly and explicitly to the precise issue. The statutory gap left by Congress' silence on this issue leaves a policy choice to be made by the political branches, not by the judiciary. *See Gonzalez*, 212 F.3d at 1349 n.13 (citing *Chevron*, 467 U.S. at 866, 104 S. Ct. at 2793).

In reaching its conclusion, the panel employs analytical tools that are not appropriate for a *Chevron* step-one evaluation. For example, the Newman Report and one of the other Corps reports that had discussed development of a large federal reservoir near Atlanta did not assign any monetary value to water supply arising from the project, but did assign such value to hydropower, navigation, and flood control. Slip op. at 8-10. Apparently recognizing that this omission undercuts any conclusion that Congress intended for storage to be allocated to water supply in the reservoir, the panel makes a *presumption* about why no value was assigned to water supply. Specifically, the panel surmises that no value was assigned to water supply in one report "*presumably* because the benefit of this

purpose, unlike all of the others, could only accrue in the future, rendering any value at that time speculative." Slip op. at 9 (emphasis added). Similarly, as to the Newman Report, the panel said "[i]t is *probable* that Newman . . . deemed there to be no immediate benefit from water supply, rendering any benefit purely prospective and any valuation of this benefit entirely speculative." *Id.* at 10 (emphasis added). To determine whether Congress has spoken explicitly on the precise question at issue, resort to presumptions is wholly misplaced and inconsistent with *Chevron* and the prior panel's holding in *Gonzalez*.

Moreover, it is far more likely that Congress assigned no value to water supply at Lanier because, as the Corps explained in the Stockdale Memo, the Corps had no general authority to allocate storage at federal reservoirs to local water supply in 1946 when the RHA was enacted. DE106:ACF036361 n.1. Beginning in the early 1800s, Congress gradually expanded the purposes for which the Corps utilizes storage at federal water projects—starting with navigation, then adding flood control, and then adding hydropower generation. *Id.* It was not until passage of the WSA in 1958 that Congress extended general authority to reallocate storage in federal reservoirs to local water supply,[8] *id.*, and even that authority had limits

[8] The WSA shows that Congress knows how to directly and explicitly authorize the Corps to reallocate storage to water supply when it wants to do so. *See* 43 U.S.C. § 390b(b) ("it is provided that storage may be included in any reservoir project . . . constructed . . . by the Corps of Engineers . . . to impound water for present or anticipated future demand or need for municipal or industrial water").

beyond which the Corps would need to seek congressional approval, 43 U.S.C. § 390b(d). The Supreme Court has made clear that "other legislative action concerning water resources and . . . the history of federal activity in that regard" is relevant to determining the meaning of a statute such as the RHA involving a federal water project. *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 163, 73 S. Ct. 609, 615 (1953). But rather than look to that legislative backdrop, which suggests that an authorization for the Corps to allocate storage for water supply at Lanier would have marked a sea change in federal water policy in 1946, the panel erroneously relies on presumptions that have no basis in fact.

In sum, there is not a single instance in the RHA or the accompanying Corps reports where Congress specifically authorized the Corps to allocate storage at Lanier to water supply.[9] The panel infers from what can, at best, be called

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[9] Not only does Congress not speak directly and explicitly to authority under the RHA for the Corps to allocate storage to water supply, but subsequent congressional activity confirms that there is no such authority under the RHA. When Gwinnett County asked for an allocation of storage for water supply withdrawals directly from Lanier in the 1950s, the Corps stated that it had no authority under the RHA to make such a reallocation and that Gwinnett County would need to go to Congress. DE231:SUPPAR005459. Gwinnett County did so, and in 1956, Congress passed a law giving the Corps authority to allocate up to 11,200 acre-feet (less than 1% of Lanier's conservation storage) to water supply. Pub. L. No. 84-841, 70 Stat. 725 (1956). If Congress had already empowered the Corps to reallocate storage to water supply, then there would have been no need for that 1956 Act. This Court "will assume that the legislature did not intend to pass vain or meaningless legislation." *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987).

congressional silence the existence of a clear statutory directive. The inconsistency of the panel's analytical approach with *Chevron*, *Negusie*, and *Gonzalez* must be corrected by en banc review.

B. In Performing Step Two of the *Chevron* Analysis, the Panel Incorrectly Disregards the Agency's Determination Because of Purported Inconsistent Statements of the Agency, and the Panel Improperly Undertakes to Substitute Its Judgment About the Meaning of the Statute for the Corps'.

1. Agency Inconsistency Does Not Require a Court to Disregard the Agency's Present Reasonable Construction of a Statute.

Even though the panel (erroneously) finds a specific congressional intent under step one of *Chevron*, the panel nonetheless decides that no deference would be owed to the Corps' interpretation of the RHA under step two of *Chevron* in any event. The panel bases this decision on its incorrect view that the Corps had taken inconsistent positions on the question at issue in the past. Slip op. at 68. However, the panel's conclusions regarding this purported inconsistency are simply erroneous.[10] More importantly, even assuming the panel is correct that the Corps

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[10] The Corps has *never* stated that it has the authority under the RHA to allocate storage at Lanier to water supply. In holding that the Corps had been inconsistent, the panel focused on excerpts from three documents. Although the Corps described water supply as a "primary purpose" in the 1949 Definite Project Report, DE106:ACF001459, the context of the discussion in that report makes clear that the Corps was not suggesting that it had authority to allocate storage for local water-supply use, but rather was merely referencing the releases from the small generating unit, DE106:ACF001459-60 (referring to Lanier's conservation storage pool as the "full-power-pool" and stating that the dam will contain two large turbines plus "one small unit to utilize minimum releases from the reservoir

made past inconsistent statements on the precise question at issue (which it did not), the Supreme Court and this Circuit have made clear that prior inconsistent agency interpretations do not permit a court to disregard an agency's current reasonable construction of a statute. Just this year, the Court stated, "We have repeatedly held that '[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'" *Mayo Found. for Med. Educ. & Research v. United States*, --- U.S. ---, 131 S. Ct. 704, 712 (2011) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 2699 (2005)). Similarly, this Court has held that, inconsistency or not, "[a]ll that matters [under step two] is whether the [current interpretation] is a reasonable construction of an ambiguous statute." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009).

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required for water supply"); DE106:ACF001487 ("during off-peak periods when the large units are not operating, the small unit will be operated as necessary to provide flow to meet municipal and industrial requirements at Atlanta"). The panel also references a 1986 Corps regulation and a 1994 Corps report that contain tables for dozens of Corps reservoirs listing authorized purposes and the corresponding legal authorities for those purposes. While water supply and the RHA were listed in the portion of the charts pertaining to Lake Lanier, there was no discussion whatsoever to suggest that the Corps believed the RHA gave it authority to allocate storage for water supply as opposed to merely making releases from the small unit. 33 C.F.R. § 222.5; DE106:ACF041892. These three isolated snippets that the panel seizes on do not address the precise question at issue, and cannot override the detailed analysis in the Stockdale Memo, which fully explains the Corps' longstanding interpretation that the RHA did not authorize it to allocate storage at Lanier to water supply. DE106:ACF036355-67.

The panel's ruling cannot be squared with *Mayo* or *Friends of the Everglades*. The panel cuts short its *Chevron* step-two analysis because, in the panel's view, the Corps failed to explain the purported inconsistency between its analysis in the Stockdale Memo and three past statements. Slip op. at 69, n.29. The panel, however, still should have analyzed the legal reasoning of the Stockdale Memo to determine whether it was reasonable, as the prior panel's holding in *Friends of the Everglades* required. In fact, the legal analysis in the Stockdale Memo was "comprehensive," as the D.C. Circuit previously recognized, *Geren*, 543 F.3d at 1323, and the analysis fully supports the Corps' reasonable conclusion that the RHA did not authorize the Corps to reallocate storage at Lanier to local water supply. DE106:ACF036355-67.

2. The Panel Should Have Deferred to the Corps' Interpretation.

Because Congress never explicitly stated its intent for the Corps to have authority to allocate storage at Lanier to water supply, the panel under step two of *Chevron* should have deferred to the Corps' interpretation of its authority under the RHA as established by the administrative record. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782.

The question under *Chevron*'s step two is not whether the agency has reached the same interpretation of a statute that a court would reach, but rather

"'whether the agency's answer is based on a *permissible* construction of the statute.'" *Jaramillo v. INS*, 1 F.3d 1149, 1154 (11th Cir. 1993) (en banc) (quoting *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782) (emphasis in original); *accord Friends of the Everglades*, 570 F.3d at 1219. "'[A] court may not substitute its own construction of a statutory provision for that of the agency.'" *Jaramillo*, 1 F.3d at 1153 (citing *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782). But that is exactly what the panel did here (purportedly and erroneously as a *Chevron* step-one analysis). It substituted its view for the Corps' view, which the Corps articulated at length in the Stockdale Memo. Slip op. at 52-65. Through a selective, incomplete review of the legislative history underlying the RHA, the panel reaches a different conclusion about the RHA than the Corps did. That approach contradicts both *Chevron* and *Jaramillo*.

The Supreme Court has made clear that deference to an agency's view of its authority under a statute should be particularly pronounced when agency statements "involve[] a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801 (1965) (internal quotation omitted). Furthermore, an agency's interpretation of a statute "gains much persuasiveness from the fact that it was the [agency] which suggested the provisions' enactment to

Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549, 60 S. Ct. 1059, 1067 (1940). The Corps, of course, wrote the Newman Report and the other reports that make up the legislative history of the RHA. In contravention of *Udall* and *American Trucking*, the panel fails to give the proper deference to the Corps' long-held view that it lacked authority under the RHA to allocate storage at Lanier.

Not only has the Corps never stated that the RHA gave it authority to allocate storage at Lanier to water supply, but the Corps has made numerous statements to the contrary. Although the district court set out in detail the many statements by the Corps dating back to the 1930s indicating that the authorized purposes of the project that would become known as Lanier did not include allocation of storage for water supply, *see* 639 F. Supp. 2d at 1310-33, the panel does not mention most of those statements and does not appreciate the significance of some of the ones it did mention. For example, the testimony of a Corps officer at an appropriations hearing in 1952 pertaining to the funding for Lanier's construction makes clear that the Corps saw no authority in the RHA to allocate storage at Lake Lanier to water supply.

> Mr. [Gerald] Ford: Is it not conceivable in the future, though, when this particular project is completed that *the City of Atlanta will make demands on the Corps of Engineers for certain water at certain times because of the needs of the community, when at the same time it will be for the best interests of the over-all picture—power, navigation, and flood control—to retain water in the reservoir?* Now, what is the attitude or what will be the attitude of the Corps of Engineers under those circumstances?

. . .

> Col. Potter: The first thing we do is to decide, after a study, whether or not water supply is more valuable to use for the production of electricity. If it is, *then we would have to come back, I believe, to Congress to alter the authorization of that project*, were it a major diversion of the water.

DE231:SUPPAR026658 (emphasis added). That Corps officer further made plain that the RHA did not authorize allocation of storage for water supply:

> Mr. Davis: Is Atlanta cooperating in this project in any way?
>
> Col. Potter: No sir; *because this is not a problem of furnishing water directly or furnishing storage for that purpose*; it is the regulation of the river that gives them a constant supply over the up-and-down supply now existing during the year. The river gets very low in the summertime, and then they have rather to scramble for water. With this dam letting out a constant supply of water every day their water-supply problem is reduced immensely, to the point whether the project is of importance to them for water supply more than for any other reason.

DE231:SUPPAR026656 (emphasis added). Similarly, in a 1955 appropriation hearing pertaining to the reservoir's construction, a different Corps officer described water supply at Lanier as "purely an incidental benefit on account of the power releases *which does not require any storage to be devoted to that purpose*." DE231:SUPPAR026699 (emphasis added).

All of these statements make the same essential point: the water-supply benefit to downstream communities in Atlanta resulted from the releases from the dam for hydropower providing a more reliable, consistent flow than Atlanta had

previously enjoyed, but there was no contemplation that storage at the reservoir would be allocated to local water supply under the RHA.

These were contemporaneous statements made by the agency that wrote the reports that led Congress to authorize the construction of Lanier in the RHA, and that agency was charged by Congress with operating the reservoir. The legal analysis in the Stockdale Memo, although written about 50 years later, is entirely consistent with that construction of the statute. DE106:ACF035357-61. And the Stockdale Memo analyzes the Newman Report, on which the panel places great emphasis. DE106:ACF036349-60.[11]

The Corps' construction of the statute and the underlying reports is permissible, which is all that is required for deference to the agency's interpretation under this Circuit's precedent in *Jaramillo* and *Friends of the Everglades*. But the panel seems intent on developing its own independent statutory analysis. For example, while the panel focuses on the reference in the Newman Report to Lanier providing an "assured" water supply for downstream Atlanta, slip op. at 60, the panel never explains why the interpretation of the role of Lanier in protecting and enhancing water supply presented by the Corp's officers

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[11] The panel in its opinion erroneously states that the "Corps concedes that the 2002 Stockdale Memo might not be entitled to *Chevron* deference. . . ." Slip op. at 68 n.27. The Corps made no such concession. Instead, the Corps conceded the *Chevron* point as to a totally separate 2009 memo not in the administrative record written by the same author. Corps Opening Br. at 79.

to Congress in the 1950s (and maintained by the Corps' in the Stockdale Memo) is not reasonable or permissible. Similarly, the panel construes the use of the term "incidental benefits" in the Newman Reports in a manner different from the Corps, slip op. at 58, but again the Corps' understanding of the term (which mirrors the view of the Mayor of Atlanta, *see supra* at 11-12) is a reasonable construction. DE106:ACF036360-61. The fact that the same language might be read two different ways is not justification for overturning the agency's interpretation.[12]

The interpretation of the RHA reflected in the Corps' statements over the years, culminating in the denial of the Georgia water supply request, was entitled to deference. The panel's development of an alternate construction of the statute in order to overturn the agency's decision is not permissible under *Chevron* and *Jaramillo*. This error also warrants en banc review.

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[12] Although the panel concludes correctly that the denial of the Georgia water supply request was a final agency action, the panel makes the erroneous statement that remand for further consideration is warranted because the Corps' "analysis on the effects of the Georgia request was incomplete." Slip op. at 73. There was nothing tentative about the Corps' conclusions in the Stockdale Memo. As the Corps' counsel explained at oral argument, the reason the Corps stopped at its "preliminary" analysis of the effects of the request was that the size of the proposed reallocation was so enormous that it plainly exceeded the Corps' discretionary authority under the WSA. Oral Arg. Tr. at 55-56. (A copy of the oral argument transcript is attached as Exhibit C.)

C. The Panel Fails to Defer to the Agency's Determination on a Point That the Panel Concedes Is Ambiguous.

The panel further violates administrative law by ordering the Corps to consider an issue on remand that the administrative record showed the Corps had already decided decades ago, a decision which has never been challenged. This Circuit has recognized that, in a case brought under the APA, a court must have as its focal point the administrative record. *See Preserve Endangered Areas of Cobb's History, Inc. v. USACE*, 87 F.3d 1242, 1246 (11th Cir. 1996) (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973)). In addition, as discussed above, under *Chevron* step two, an agency's action can only be overturned if it does not reflect a "reasonable construction of an ambiguous statute." *Friends of the Everglades*, 570 F.3d at 1219.

The panel *acknowledges* that the RHA is ambiguous on the balance to be struck between hydropower and water supply. Although concluding, per *Chevron* step one, that Congress granted the Corps authority under the RHA to allocate storage for water supply at Lanier, the panel then asserts that "the extent of the Corps' authority" to do just that is ambiguous. Slip op. at 83. Because the panel believes that Congress intended the Corps to balance use of storage for hydropower against use of it for water supply, the panel directs that "the Corps, the agency authorized by Congress to implement and enforce this legislation, should, in the first instance, evaluate precisely what this balance should be." *Id.* at 83-84.

The administrative record establishes, however, that the Corps had already struck that balance fifty years ago in 1961. When a local municipality asked for increased releases from Lanier to support water supply, the Corps determined that it had no authority to do so under the RHA. Looking to the Newman Report's statement that the "minimum release [from the small generating unit] may have to be increased somewhat as the area develops," the Corps stated that all authority to increase releases under that provision had been exhausted and that any future increases in releases for downstream water supply would require an allocation of storage under the WSA. DE106:ACF002230-33. No party ever filed any challenge to that determination by the Corps. The panel simply ignores that determination, even though it was highlighted by Appellees in their brief and at oral argument. Appellees' Br. at 8, 56 n. 16; Oral Arg. Tr. at 66-68.

The panel has no authority to require the Corps on remand to reexamine an issue on which it has already spoken. The panel makes no determination that the Corps' striking of the balance (on what the panel concedes is an ambiguous issue) was unreasonable or impermissible. (Indeed, that final agency action was not properly before the panel because it was never challenged.) As a result, it would be inconsistent with the prior panels' holdings in *Jaramillo* and *Friends of the Everglades* for the remand on this point to go forward.

II. The Panel Violates Supreme Court and Eleventh Circuit Precedent By Exceeding Its Jurisdiction in Its Remand Instructions.

A. The Panel Takes Substantive Action in Three Cases Even After Determining That It Lacks Jurisdiction to Address the Merits of Those Cases.

The panel violates one of the most fundamental rules for the limits of a federal court's authority by taking substantive action in a case over which the court lacks jurisdiction. The Supreme Court has made clear that a federal court lacking jurisdiction must dismiss the case and can take no other action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998) (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). While the district court concluded that the Corps' actions upon which that court based its ruling in the *Alabama*, *SeFPC*, and *Apalachicola* cases were final agency actions within the meaning of the APA, the panel disagreed, holding that the actions were not final and that the district court, therefore, lacked jurisdiction to decide those claims. Slip op. at 50. Yet the panel does not dismiss those claims, nor does it direct the district court to dismiss them. Instead, the panel orders the district court to remand those claims to the Corps with instructions "to make final determinations pertaining to its current policy for water supply storage allocation." *Id.* The panel directs that the Corps should complete its work within one year, and the panel retains jurisdiction over those cases to monitor compliance with that time limit. *Id.*

at 94-95. The panel offers no explanation as to how it can retain nonexistent jurisdiction. Plainly, the panel's order with regard to those three cases directly contradicts the binding authority of the Supreme Court.

B. The Panel Issues Improper Remand Instructions.

The panel also exceeds the appropriate bounds of its authority under the APA in the *Georgia* case by issuing sweeping remand instructions that direct the Corps to go far beyond reexamination of the final agency action at issue in the case. It is a fundamental principle under the APA that "review of administrative decisions is to be confined to consideration of the decision of the agency . . .and of the evidence on which it was based." *Fed. Power Comm'n v. Transcon. Gas Line Pipe Corp.*, 423 U.S. 326, 332, 96 S. Ct. 579, 582 (1976) (internal quotation omitted). Once a court finds that an error of law has been made by the agency, the court's "duty . . . is to correct that error of law and remand the case to the agency to afford it an opportunity to receive and examine the evidence in light of the correct legal principle." *Pollgreen v. Morris*, 770 F.2d 1536, 1544 (11th Cir. 1985). Courts are ordinarily not permitted to "dictat[e] to the agency the *methods, procedures, and time dimension*" of the agency's actions on remand because to do so would "run[] the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency." *Fed. Power Comm'n*, 423 U.S. at 333, 96 S. Ct. at 583 (emphasis added, internal quotation omitted). *But that*

is exactly what the panel does. The panel's remand instructions cannot be reconciled with these binding authorities.

As an initial matter, under the holdings of *Federal Power Commission* and *Pollgreen*, the only action the panel could have taken once it determined that the Corps had committed a legal error was to remand the *Georgia* case to the Corps for reconsideration of its decision denying the Georgia water supply request. That, of course, was the only final agency action at issue in the *Georgia* case. But the panel's instructions go well beyond that. The panel directs that, even if the Corps determines that the Georgia water supply request should still be denied, the Corps "nevertheless should indicate the scope of the authority it thinks it does have, under the RHA, the WSA, and the 1956 Act." Slip op. at 86. The panel orders that the Corps on remand must issue a "final, definitive statement of [its] water supply analysis" so that the parties will have "some further instruction . . . of what the Corps believes to be the limitations on its power." *Id.* But the panel has no authority to require the Corps to issue advisory statements on matters not necessary to resolution of the final agency action before the Court. If the Corps can decide the Georgia water supply request without issuing a final, definitive statement, then it has no obligation to do so just because the panel thinks it would be "sensible and efficient" for such a statement to be prepared as part of a "comprehensive decision about the Corps' future water supply operations." Slip op. at 75.

There are other serious flaws with the panel's remand instructions. The panel requires that the Corps make a determination on a number of highly detailed specific issues even if the Georgia water supply request can be resolved without deciding them. The findings that must be made include:

- A "firm calculation of how many gallons per day can be provided for the Atlanta area's water supply as a mere incident to, or byproduct of, power generation," slip op. at 85;

- A "definitive, final determination of whether, and to what extent, storage reallocation would be necessary for RHA-authorized releases from the dam primarily for water supply purposes (and how to factor in the fact that these releases will still generate some power, though not of peak value)," *id.*;

- A "final determination of the appropriate measure for determining under the RHA what the impact of increased water supply use on power is," *id.*;

- A "final determination of . . . the appropriate measure for determining under the WSA what constitutes a 'major operational change,'" *id.*;

- The articulation of "a policy on whether to account for return flows, and if so, how to differentiate between flows returned directly to the lake and flows returned downstream from the dam," *id.*;

- An analysis of "whether compensation is a factor in determining the extent of the Corps' authority under the RHA," *id.* at 75 n.31; and

- An analysis of "whether under the WSA a reallocation of storage is an operational change, and whether such a change is major," *id.*

These detailed directives substantially intrude on the executive branch's realm of discretionary authority.

Finally, the panel, although remanding to the district court to remand to the Corps, retains jurisdiction over the *Georgia* case (along with the other three cases) in order to monitor the compliance with the panel's direction that the Corps' actions on remand be completed within one year. Slip op. at 95. But the panel offers no explanation why, if the extraordinary action of retaining jurisdiction is even necessary or lawful, the district court is not better suited to perform the required oversight. Nor does the panel explain how it intends to monitor the Corps—there are no provisions in the instructions for reports from the Corps.

In sum, the panel's unprecedented remand instructions are in violation of the precedents of the Supreme Court and this Circuit and must be reviewed en banc.

III. The Panel Violates the Prior Panel Rule in Failing to Give Collateral Estoppel Effect to a Prior Ruling of the D.C. Circuit.

The panel should never have undertaken its erroneous *Chevron* analysis because the Corps' denial of the Georgia water supply request should have been upheld based upon application of collateral estoppel arising out of the D.C. Circuit's *Geren* decision. The failure of the panel to apply collateral estoppel contradicts this Circuit's settled collateral estoppel principles, especially as stated in the decision of a prior panel of this Circuit in *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552-53 (11th Cir. 1995).

The panel correctly identifies the requirements for collateral estoppel to apply: "(1) the issue at stake is identical to the one involved in the prior

proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue was critical and necessary to the earlier judgment; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." Slip op. at 86-87 (citing *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)).

Collateral estoppel is, of course, often referred to as issue preclusion. *See Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010). A conclusion that an *issue* was actually litigated does not turn on whether the party against whom collateral estoppel is asserted actually made every *argument* available to it in litigating the issue. The *Southeast Banking* panel held that a party's failure to raise an argument as a matter of litigation strategy in an earlier case does not prevent the application of collateral estoppel. 69 F.3d at 1553. "'If [an issue] has been determined in the former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result.'" *Id.* (quoting 1B *Moore's Fed. Prac.*, ¶ 0.441[2], at 523 (Matthew Bender 2d ed.)); *accord Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) ("once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support in the first case" (emphasis in original)). While a litigant may regret his decision in the earlier case to "select[] a litigation strategy . . . [that]

plac[ed] all his eggs in one basket . . . his choice of that strategy will not prevent the application of collateral estoppel." *Southeast Banking*, 69 F.3d at 1553.

The fundamental *issue* before the D.C. Circuit in *Geren* was whether a reallocation of 22% of the conservation storage pool at Lanier for local water-supply use violated the WSA if not approved by Congress. 514 F.3d at 1323-25. *Geren* was an appeal in the *SeFPC* action, one of the four cases now before this Court. Prior to the *SeFPC* case being transferred to the MDL, the Corps, the Georgia Parties, and SeFPC entered into a settlement of the case whereby the Corps agreed to enter into "interim" contracts reallocating 22% of the conservation storage pool at Lanier to water supply. *Id.* at 1319-20. The settling parties recited in the Settlement Agreement that authority for the settlement included both the RHA and the WSA. DE231:SUPPAR035453.

When the existence of the settlement came to light, Alabama and Florida intervened to oppose its approval, asserting, *inter alia*, that it violated the requirement of the WSA that reallocations for water supply involving major operational change or which seriously affected the authorized purposes receive prior congressional approval. *Id.* at 1320.

After the district court approved the settlement, Alabama and Florida appealed, and the D.C. Circuit found that the settlement should not have been approved because a reallocation of 22% of the conservation storage pool at Lanier

involved a major operational change, thereby requiring congressional approval under the WSA. *Geren*, 514 F.3d at 1323-25. To make that determination, the D.C. Circuit considered the competing positions of the Georgia Parties and the Corps on one hand and Alabama and Florida on the other concerning what the appropriate baseline is for a court to use when deciding whether an operational change is major for purposes of the WSA analysis. *Id.* at 1324. The D.C. Circuit held that "the appropriate baseline for measuring the impact of the [Settlement] Agreement's reallocation of water storage is *zero*, which was the *amount allocated to storage space for water supply when the lake began operation*." *Id.* (emphasis added).

In upholding the Corps' denial of the Georgia water supply request, the district court applied collateral estoppel. Because the D.C. Circuit had concluded that a 22% reallocation at Lanier for water supply violated the WSA without congressional approval, collateral estoppel compelled the conclusion that the Corps had not erred in deciding that a 34% reallocation for water supply at Lanier would also violate the WSA without congressional approval. 639 F. Supp. 2d at 1352.

The district court correctly applied collateral estoppel because the *issue*—whether a 22% reallocation for water supply at Lanier without congressional approval violates the WSA—is identical to the issue in this case; the issue was obviously actually litigated in *Geren*; the determination of it was critical and

necessary to the D.C. Circuit's judgment; and the Georgia Parties had a full and fair opportunity to litigate the issue in *Geren*. All of the factors for application of collateral estoppel identified in *Christo* are satisfied. 223 F.3d at 1339.

The panel bases its refusal to accord collateral estoppel effect to the issue on its cursory statement that "the *Geren* court considered only the Corps' authority under the WSA, not its authority under the RHA." Slip op. at 87. The panel also notes that the Georgia Parties "did not make an issue of the Corps' authority under the RHA because they were not in full agreement [with the other settling parties] on whether water supply was an authorized purpose of [Lanier,]"[13] so the panel erroneously concludes that the Georgia Parties "had no incentive to assert issues about which they disagreed." *Id.* at 87 n.37.

As the prior panel of this Circuit held in *Southeast Banking*, a party cannot escape application of collateral estoppel because it chose to withhold an argument in the earlier litigation. 69 F.3d at 1552-53. Assuming *arguendo* that the Georgia Parties are right that the RHA provides the Corps authority to reallocate storage space at Lanier to water supply without congressional approval, that would have

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[13] Because the Georgia Parties and the other settling parties consciously elected not to raise the RHA in their brief in *Geren*, it is hardly surprising that, in response to a point made by the concurring judge, the majority said it was not deciding questions under the RHA pertaining to any prior storage allocations at Lake Lanier. 514 F.3d at 1324 n.4. But the D.C. Circuit made clear it was deciding the *issue* of whether a 22% reallocation for the future without congressional approval violated the WSA. *Id.*

been a defense to the argument in *Geren* that the Corps' reallocation for water supply without congressional approval violated the WSA. It defies logic to state, as the panel did, that the Georgia Parties had no incentive to assert what they now claim to be a winning argument. Instead of making an argument based upon the alleged authority provided by the RHA, the Georgia Parties placed all their eggs in a different basket in defense of the WSA claim. Those other arguments were unsuccessful. *Geren* conclusively established that a reallocation of 22% at Lanier without congressional approval violates the WSA. The prior panel's holding in *Southeast Banking* does not allow the Georgia Parties to relitigate the *issue* by asserting the *argument* that they withheld in the earlier case.

The error of the panel's refusal to apply collateral estoppel in this case—and its inconsistency with the settled holdings of this Circuit—is made clear by one fact. Under the panel's logic, the settling parties in *Geren* could sign an agreement identical to the settlement agreement that was ruled invalid under the WSA by the D.C. Circuit and not be precluded from relitigating its validity under the WSA. Under the panel's view, those parties could relitigate the issue all over, this time arguing that there is no WSA violation because of the alleged authority found in the RHA. That would turn established principles of issue preclusion on their head.

Just as the district court held, the Corps' decision to deny the Georgia water supply request for a 34% reallocation without congressional approval must be

affirmed based on collateral estoppel—if a 22% reallocation violates the WSA without congressional approval, then a 34% reallocation must as well. Had the panel correctly applied collateral estoppel, it would have pretermitted the need to address the question of whether the RHA authorized the Corps to allocate storage at Lanier for water supply, which occupied most of the panel's decision pertaining to the Georgia water supply request.

Not only does the panel fail to correctly apply collateral estoppel to the determination that a 22% reallocation at Lanier to water supply violated the WSA without congressional approval, but it also fails to give proper collateral estoppel effect to the D.C. Circuit's ruling on the issue of the appropriate baseline for performing the WSA analysis. As mentioned above, the D.C. Circuit determined that the appropriate baseline is the amount of storage originally allocated to water supply at the federal reservoir in question. 514 F.3d at 1324. At Lanier, that original allocation was *zero*, so the D.C. Circuit compared the 22% reallocation to zero in determining that it involved a major operational change under the WSA.

In its decision, the panel holds that a different baseline applies for the WSA analysis. Specifically, the panel directs in its remand instructions that "[t]he authority under the WSA will be in addition to the Corps' authority under the RHA." Slip op. at 84. The panel makes clear that any "RHA-authorized water supply would not count" in determination by the Corps of whether a reallocation

constitutes major operational change under the WSA. *Id.* at 88; *accord id.* at 84 n.35. In other words, the WSA baseline under the panel's holding is not the amount originally allocated to storage at Lanier, but rather the baseline includes all authority under the RHA for water supply.

The D.C. Circuit's decision on the issue of the appropriate WSA baseline must be given collateral estoppel effect. It is the same issue as the panel decides, and it unquestionably was litigated and was a crucial and necessary part of the D.C. Circuit's decision. Indeed, the D.C. Circuit could not determine whether a WSA violation had occurred until it decided the analytical baseline. And, again, the Georgia Parties had a full and fair opportunity to litigate the question—they had every incentive to convince the D.C. Circuit to use a different baseline because it could have led the D.C. Circuit to reach a result in their favor.

The panel's rationale for not applying collateral estoppel to this issue is essentially the same as for the issue concerning the 22% reallocation violating the WSA. The panel states that the D.C. Circuit "addressed the issue of the appropriate baseline for the WSA analysis only," but that a "wholly different issue is presented in this appeal, in which we are required to assess the Corps' authority under the RHA." Slip op. at 92. The panel fails to recognize, however, that the Georgia Parties' decision not to mention the RHA in *Geren* was a litigation strategy decision, which does not leave open the door to relitigation. Had the

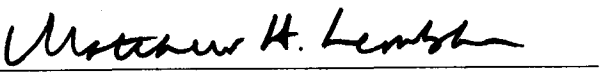
Georgia Parties wanted to argue that the WSA baseline included some amount of storage authorized by the RHA, the time to have made that argument was in *Geren*. The D.C. Circuit decided what the WSA baseline is, and the Georgia Parties are bound to that determination.

The panel's departure from fundamental principles of collateral estoppel, as explained by the prior panel in *Southeast Banking*, warrants en banc review.

CONCLUSION

For these reasons, Alabama, Florida, Alabama Power, and the City of Apalachicola ask the en banc Court to rehear these appeals.

Respectfully submitted,



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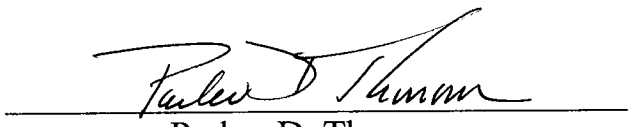

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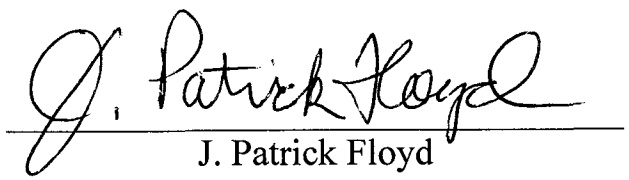

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2011, I caused a copy of the foregoing Joint Petition for Rehearing En Banc to be served via Federal Express for next-day delivery upon:

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