

# GROWING WATER DEMAND AND INEVITABLE LITIGATION: THE MISSOURI AND ACF RIVER BASINS

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## INTRODUCTION

The United States Army Corps of Engineers (“Corps”) has a long, proud and honorable tradition as the owner and operator of our nation’s greatest reservoirs. The Corps has literally moved mountains to harness the power and productivity of rivers across the nation. Since World War II however, the nation’s population has grown by 150,000,000 people. Present projections are that the nation will add another 150,000,000 people by 2050. This population growth is fueling both urban and rural demand for limited water supplies. Municipalities, industries and recreation enthusiasts, once considered minor water consumers, now demand substantial volumes of water. In addition, the flow needs for species and ecosystems has only recently become recognized as a necessary consideration in river management.

These new and increased demands have led to water disputes not only among consumers, but between states. The Corps, once seemingly immune to any criticism, is now at the focal point of multi-state litigation on multiple fronts. Two such disputes, the Missouri River Basin litigation and the Apalachicola-Chattahoochee-Flint (“ACF”) River Basin litigation, provide an interesting perspective on the future of water management across the United States. This presentation will touch lightly upon the similarities and differences between the Missouri River and ACF basins.

## THE MISSOURI RIVER BASIN

The Missouri River passes through ten states and two Canadian provinces and drains one-sixth of the North American continent. From the headwaters in the Rocky Mountains of southwestern Montana to the mouth near St. Louis, Missouri, the Missouri River stretches over 2,400 miles and is the longest river in the United States. The Missouri River main stem reservoir system, authorized by the River and Harbor Act of 1935<sup>1</sup> and the

Flood Control Act of 1944<sup>2</sup> (“FCA”), consists of six integrated dams and reservoirs. With a combined storage capacity of 74 million-acre feet, it is the largest reservoir system in North America. The authorized project purposes for the system include flood control and navigation as the dominant functions.

## THE MISSOURI RIVER LITIGATION

Recently, the management of the Corps’ Missouri River reservoirs has generated a complex series of federal cases. The upper basin states of South Dakota, North Dakota, and Montana are more-or-less united in seeking to prevent releases from dams and reservoirs within their respective borders to protect the local recreational fisheries. By contrast, downstream Missouri and barge companies, seek to obtain releases necessary to protect its interests in navigation on the Missouri and Mississippi Rivers. In the middle is Nebraska, which developed its power production infrastructure based on the flows required for navigation. In addition to the state interests, environmental groups have joined the fray in an effort to create habitat they believe will protect the endangered least tern, the endangered pallid sturgeon, and the threatened piping plover.

The stream of court actions began in 2002, arising out of the “prolonged drought conditions that the Missouri River has been experiencing over the last several years.” *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1020 (8th Cir. 2003). The Corps’ 1979 Master Manual<sup>3</sup>, consistent with the “dominant functions” of the FCA, required the Corps to release water from upstream reservoirs to meet authorized project purposes downstream, particularly navigation. See *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988) (holding the “dominant functions” of the mainstem system are flood control and navigation). To minimize disruption to upstream purposes, the Master Manual applied an annual rotational scheme, releasing waters from one reservoir each spring to meet downstream purposes while maintaining levels at other reservoirs.

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<sup>2</sup> Pub. L. No. 78-534, 58 Stat. 887 (1944).

<sup>3</sup> Missouri River Main Stem Reservoir System Reservoir Regulation Manual (1979).

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<sup>1</sup> Pub. L. No. 74-409, 49 Stat. 1028 (1935).

When the Corps announced it would draw down Lake Oahe in South Dakota in the Spring of 2002, South Dakota became concerned about the impacts to its recreational fishery. Specifically, South Dakota feared the draw down would significantly harm its walleye fishery and decrease recreational revenues by preventing a successful smelt spawn, the preferred prey of walleye. South Dakota obtained a temporary restraining order and preliminary injunction preventing releases from Lake Oahe required under the Master Manual. *Ubbelohde*, 330 F.3d at 1021. “The South Dakota Court’s injunction had a cascading effect.” *Id.* The injunction led to actions by the upper basin states of Montana and North Dakota, where additional injunctions issued preventing releases from the dams and reservoirs in Montana and North Dakota. Left with no alternative, Nebraska obtained an injunction requiring the Corps to operate the reservoir system in accordance with the FCA and the Master Manual. As the Eighth Circuit explained:

This order left the Corps in a thorny predicament. The Nebraska order required it to maintain navigation, but with Lakes Oahe, Francis Case, and Sakakawea and Fort Peck Reservoir[s] off limits, the Corps was forced to rely on the two smallest reservoirs for the releases. Ultimately, downstream flows were reduced, and navigation and other downstream interests suffered.

*Ubbelohde*, 330 F.3d at 1022.

Environmental groups, led by American Rivers, entered the scene in the Spring of 2003, seeking to implement a Biological Opinion issued by the United States Fish and Wildlife Service three years earlier. American Rivers received an injunction from the District of Columbia preventing the Corps from releasing water sufficient to support downstream navigation and power interests. *American Rivers v. U.S. Army Corps of Eng’rs*, 271 F.Supp.2d 230 (D.D.C. 2003). Lower basin navigation interests filed suit shortly thereafter, challenging the designation of critical habitat for one of the threatened species. In addition, the navigation interests sought to prevent the Corps from giving recreation a higher priority than flood control and navigation in the operation of the reservoir system. *In re Operation of the Missouri River System*, 2004 WL 1402563, \*12-16 (D.Minn.).

While several of the injunction actions were pending before the Eighth Circuit, Nebraska filed a motion before the Judicial Panel on Multidistrict Litigation seeking to transfer the seven underlying actions in four district courts to a single district court for consolidated proceedings. Just hours after oral argument, the Panel

granted Nebraska’s motion and the cases were consolidated before Judge Paul A. Magnuson in the District of Minnesota. *In re Operation of the Missouri River System*, 277 F.Supp.2d 1378 (J.P.M.L. 2003). Judge Magnuson entered a dispositive order in the Summer of 2004, granting the Federal Defendants’ motions for summary judgment in all respects. The cases are once again pending before the Eighth Circuit. Briefing will be completed in February, with oral argument to be heard in mid April.

## THE A.C.F. BASIN

The ACF Basin includes portions of only three states, Alabama, Georgia and Florida. By contrast to the 2400 miles in length of the Missouri River, the ACF system stretches a mere 400. While there are numerous reservoirs in the ACF Basin – perhaps more than in the Missouri - the Corps owns and operates the four major mainstem dams on the system. The dams and their reservoirs are operated in an coordinated fashion to provide multiple benefits including flood control, hydropower and navigation. Buford Dam is situated north of Atlanta on the Chattahoochee River, represents the largest reservoir in the ACF system. Hartsfield Airport in Atlanta is at the headwaters of the Flint River. The Flint River is, at present, heavily utilized by Georgia for agricultural purposes. The Flint and Chattahoochee Rivers join at the Georgia/Florida state line to form the Apalachicola River. The Apalachicola flows across Florida’s panhandle and into the Gulf of Mexico, creating an ecological treasure unique even to Florida.

## THE A.C.F. LITIGATION

In the 1980s, the Corps considered plans to alter the operation and use of Buford Dam and Lake Lanier to provide water for municipal and industrial purposes to the metro-Atlanta region. The volume of water to be withdrawn from Buford Dam and points downstream were so significant that a multitude of concerns were raised by people in Alabama, southern Georgia, and Florida. Alabama responded to the threat by filing suit in federal court, alleging, among other things, violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, and other environmental laws. Florida filed a motion to intervene in the suit alleging that the Corps exceeded its authority in operating Lake Lanier for municipal and industrial purposes. Georgia filed a motion to intervene as a party defendant, aligned with the Corps. On September 19, 1990, the Alabama court entered an order that abating the action pending the completion of a comprehensive study of the water issues and prohibited the Corps from entering into the water supply contracts. As a result of this order, and the comprehensive study, Congress enacted the ACF Compact which required the states to

work cooperatively to develop a water allocation formula.

In February of 2000, while the states were engaged in negotiations to develop the water allocation formula, Georgia filed a suit against the Corps seeking to compel the Corps to operate Buford Dam for the water supply demands of metro-Atlanta. Florida filed a motion to intervene and abate or dismiss the action but its motion was denied. Florida appealed the denial of that motion to the 11<sup>th</sup> Circuit. In the meantime, in December of 2000, the Southeastern Federal Power Customers, Inc., (SeFPC) filed suit against the Corps in the U.S. District Court for the District of Columbia contending that the Corps' contracts with metro-Atlanta water suppliers exceeded its authority under the Water Supply Act of 1958 and the Flood Control Act of 1944. More specifically, SeFPC argued that the Corps' operation of Buford Dam for metro-Atlanta resulted in reduced power production from the federal reservoirs which in turn drove up replacement power costs for SeFPC members. The D.C. case went into confidential negotiations that, unknown to other parties, included Georgia.

While the confidential negotiations were underway, the 11<sup>th</sup> Circuit reversed the Georgia court's denial of Florida's motion to intervene stating, "[a]lthough the remedy sought in Georgia's lawsuit may occur within Georgia's borders, it will have a practical effect upon the water flowing in the Chattahoochee River . . . to which Florida has a right." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1251 (11<sup>th</sup> Cir. 2002). Just prior to this ruling, the Corps itself concluded that it did not hold the authority to grant Georgia's water supply request. Yet despite the 11<sup>th</sup> Circuit's opinion and the Corps' conclusion, the United States entered into a settlement agreement of the D.C. litigation that effectively granted the water supply request of metro-Atlanta. Florida and Alabama intervened and have appealed this matter to the D.C. Circuit Court of Appeals.

Also in response to the D.C. settlement, Alabama revived its 1990 action and moved for a preliminary

injunction declaring the D.C. settlement agreement violative of the stay ordered in 1990. The Alabama court allowed Florida and Georgia to intervene in that case. On October 15, 2003, the Alabama court entered an order enjoining the Corps from implementing any part of the settlement agreement and from entering into any new storage or withdrawal contracts affecting the ACF Basin without approval of the other parties. Georgia has appealed to the 11<sup>th</sup> Circuit.

Not surprisingly, these events ultimately led to the demise of the ACF and ACT compacts. With the revitalization of the Alabama case, the Georgia court issued an order on July 20, 2004 abating Georgia's case. Georgia has appealed that decision to the 11<sup>th</sup> Circuit. On January 7, 2005, Alabama and Florida filed motions for leave to amend their complaints in the Alabama case to include a host of new complaints that include, among other things, violations of the Endangered Species Act by the Corps.

#### IS LITIGATION INEVITABLE?

The Missouri River Basin states have a long history of cooperative agreement regarding the operation of the Corps' reservoirs. Yet despite this history, litigation was virtually unavoidable when drought conditions impacted major industries. While many issues will be resolved by the 8<sup>th</sup> Circuit, conditions in the Missouri remain dry which may likely trigger additional court action. Ultimately the environmental, power, navigation and recreation interests will not have final resolution anytime soon.

While the drought no longer exists in the ACF Basin, litigation is unlikely to end anytime soon. The resolution of key issues before the D.C. and 11<sup>th</sup> Circuit Courts of Appeal should serve to guide the course of future litigation. But metro-Atlanta's demand for water will not subside, nor will Florida's dependence on those flows. Ultimately, so long as demand for water continues to grow across the United States, this sort of litigation appears to be simply unavoidable.