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Georgia loses major ruling on rights to Lanier water

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It would take an act of Congress to get more drinking water out of Lake Lanier for metro Atlanta, a federal appellate court ruled Tuesday.

Alabama and Florida immediately declared a major victory in the 18-year, tri-state water war, with Alabama Gov. Bob Riley calling it "one of the most important" legal decisions in his state's history.

"The ruling invalidates the massive water grab that Georgia tried to pull off," Riley said in a statement.

The decision by the U.S. Court of Appeals for the District of Columbia Circuit comes at a critical juncture, with the three states rushing toward a Feb. 15 deadline to reach a long-term, water-sharing agreement.

Observers say it gives Alabama and Florida leverage in the negotiations and belies metro Atlanta's assumption that it can count on Lanier to continue fueling its growth. Water from Lanier, the largest federal reservoir on the Chattahoochee River, forms Georgia and Alabama's southern border and winds up in Gulf of Mexico.

Lanier is the main water source for more than three million metro Atlantans. But it also supports multiple downstream users, from a nuclear power plant near Dothan, Ala., to oystermen in Florida's Apalachicola Bay.

"The big loser here is metro Atlanta," said George William Sherk, an expert in water law at the Colorado School of Mines who once represented the city of LaGrange and Troup County in tri-state water matters. "The logical response for metro Atlanta right now is no new building permits unless the applicant can demonstrate a long-term water supply.

"But pigs will fly before Atlanta does that."

Sherk said Congress is unlikely to intervene.

Patricia Barmeyer, a partner at King & Spalding who represents metro Atlanta governments in the tri-state litigation, said the state and region has three legal options now: ask the three judge appeals panel to reconsider its decision; request a hearing from the entire D.C. appellate court; or take it to the U.S. Supreme Court.

The three-judge panel overturned a lower court's decision. The appeals court nullified the 2003 agreement among Georgia, metro Atlanta, hydropower customers and the Corps of Engineers for rights to Lanier's water. The corps manages the lake.

The agreement would have guaranteed the metro region about 65 percent more water out of Lanier for up to 20 years, or the equivalent of nearly one-quarter of the lake's storage capacity.

Metro Atlanta now uses about 14 percent of the lake's storage capacity.

In exchange, the cities and counties that depend on Lanier and the Chattahoochee just downstream would have paid \$2.5 million a year to offset the costs of maintaining Buford Dam, relieving some of the costs now largely paid by hydropower customers.

Of the communities asked to pay more for their water, including Cobb, DeKalb and Fulton counties, Gwinnett County would have paid the lion's share because it pulls the most water directly from Lanier, averaging more than 100 million gallons a day in the summer.

Frank Stephens with the Gwinnett County Department of Public Utilities said the decision will have little short term impact on the area's water supply.

"From a city or county perspective, I don't think this makes much of a difference but it does deny the U.S. government some revenues," he said.

Georgia and metro Atlanta argued the corps was acting within its legal rights to reallocate Lanier's water from hydropower generation to water supply.

Alabama and Florida disagreed, saying the change would constitute a major operational change, which requires Congressional approval under the Water Supply Act. The two states also argued that keeping water in Lanier for metro Atlanta's use "and the region's withdrawals" would reduce the water flowing down the Chattahoochee River.

In siding with Alabama and Florida, the court said "The Agreement does potentially reduce the amount of water flowing downstream. . . and the [Apalachicola-Chattahoochee-Flint river] basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years."

The corps, during oral arguments in November, conceded that changing the amount Lanier's stored water earmarked for drinking supplies from 47.6 billion gallons to 78.5 billion gallons would have been its largest reallocation of water without Congressional approval.

Gov. Sonny Perdue's spokesman, Bert Brantley, said the ruling does not change the state's long-term goal to reach a water-sharing agreement with Alabama and Florida, possibly by Feb. 15.

"We've always said our preference was to reach an agreement at the negotiating table as opposed to arguing it in the court room," Brantley said.

He said the question of whether the corps can allocate more water for metro Atlanta will be resolved as part of the "bigger picture of how the basin is operated and managed."

Barmeyer, the attorney representing metro governments, said the decision finally makes clear that a fundamental question will have to be litigated: whether providing drinking water to metro Atlanta was one of Lanier's original purposes. The three states are currently locked in court action in the U.S. District Court in Middle District of Florida over longer-term allocations of water.

Georgia has spent nearly \$5 million since 1998 on legal costs on the water war and metro Atlanta governments have spent about \$2.4 million since 2001.

If the states are unable to come to terms by Feb. 15 "despite prodding from the White House" continued litigation is the most likely course.

That's because Congress is unlikely to act on its own without a ready-made deal from the three states, said Sherk, the water law expert.

"Congress is not going to get into the internecine fight between Florida, Alabama and Georgia," Sherk said. And if it does, Georgia could be in trouble.

"You only need eight states to win the presidency. Florida's one of them. Georgia isn't. Florida's political clout dwarfs Georgia's," he said.

Alabama views Tuesday's decision as a win as well for its most important river basin, the one it shares with Georgia's Allatoona and Carters lakes, called the Alabama-Coosa-Tallapoosa basin. Allatoona provides drinking water to about 800,000 metro Atlantans.

In his statement, Gov. Riley said "The ruling will have far reaching consequences. It establishes that the decades-old practice of Atlanta taking more and more water from the federal reservoirs in the Coosa and Chattahoochee Rivers without any legal authority to do so will not stand."

The ruling may also help downstream users in Georgia.

Joe Maltese, assistant to the LaGrange city manager and chairman of the Middle Chattahoochee Water Coalition that includes groups in Alabama and Georgia, said the ruling should bolster his group's contention that the federally authorized purposes of all area lakes should be treated equitably, including recreation at West Point Lake near LaGrange.

"We don't want to see Atlanta hurt," Maltese said. "By the same token we don't want to see the corps take away the resources that were promised to us to utilize the water for other purposes that Congress did not approve."

THE STORY SO FAR:

The pressing issue: In 2003, Georgia and Metro Atlanta struck a deal with the U.S. Corps of Engineers, which operates Lake Lanier, that would have given metro Atlanta 23 percent of the water in the federal reservoir. Alabama and Florida challenged the agreement in court. The U.S. District Court for the District of Columbia upheld the agreement.

The history: The three states have squabbled since Alabama and Florida sued the corps in 1990 to stop metro Atlanta from taking more water out of Lake Lanier and the Chattahoochee River.

The stakes: Water got a lot more precious in the last year, as a record-breaking drought choked water supplies in north Georgia and much of the Southeast. Lake Lanier provides water to more than three million metro Atlantans and is essential to the area's growth. Alabama needs water via the Chattahoochee for paper mills, a nuclear power plant and small communities, while Florida wants to protect its marine and wetlands ecosystems and oyster industry. Releases from Lanier also provides water needed by the federally endangered Gulf sturgeon fish and two species of federally protected mussels in the Apalachicola River, formed by the confluence of the Chattahoochee and the Flint rivers.

The new development: Tuesday, the U.S. Court of Appeals in Washington overturned the lower court's decision, nullifying the 2003 agreement, which never became effective. The ruling says metro Atlanta and Georgia need Congressional authorization to take more water from the lake.

WHAT HAPPENS NEXT: The three states are negotiating a new division of water from Lake Lanier. Georgia, Alabama and Florida officials say they expect to meet a Feb. 15 deadline for an agreement. Georgia could decide to appeal the decision to the U.S. Supreme Court. Or Congress could step in.