

THE INTERSTATE COMPACTS FOR WATER ALLOCATION OF THE A.C.F. AND A.C.T. RIVER BASINS: A LEGAL PERSPECTIVE

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Abstract. Alabama, Florida, and Georgia have agreed on interstate compacts to resolve the water allocation disputes over the Alabama-Coosa-Tallapoosa (ACT) and Apalachicola-Chattahoochee-Flint (ACF) river basins. These compacts (one for each river basin) are examined by focusing on the legal implications of the agreements with special emphasis placed on:

- General characteristics of interstate compacts;
- Specific language from the ACT/ACF compacts;
- Potential preemption of state and federal environmental regulations; and
- Challenges with federal ratification.

INTRODUCTION

Alabama, Florida, and Georgia have finalized the terms of interstate compacts to allocate the water from the Alabama-Coosa-Tallapoosa (ACT) and Apalachicola-Chattahoochee-Flint (ACF) river basins. These interstate compacts promise to provide a negotiated solution to a lawsuit initially filed against the Army Corps of Engineers by Alabama and Florida demanding more water from the upstream state, Georgia. Alabama and Florida objected to what they believed was Georgia's ability to use all the water it required to serve its own citizens, without regard to downstream needs.

The interstate compacts will utilize mathematical water allocation formulas for determining proper water flows. Although the compacts are in the process of being ratified, the water allocation formulas which represent the interests of each state and the other stakeholders must still be developed.

The allocation formulas must balance the competing interests of the stakeholders in order to accomplish a long term solution to the water allocation problem and provide a permanent mechanism for managing these river basins. Interested parties include agriculture, environmental organizations, seafood industry, local governments, navigation, hydroelectric power, industry, federal government, and state agencies

As these parties reach a final compromise for regulating these rivers, the need for understanding the legal issues concerning these interstate agreements become more important. All parties must recognize how these compacts

impact existing state and federal regulations as well as the implications these agreements have on unplanned contingencies.

INTERSTATE COMPACTS

An interstate compact is an agreement between two or more states that attempts to solve a problem which transcends state lines. Once validly enacted, an interstate compact binds states to the terms of the agreement both under state and federal law. Similar to a contract between private parties, an interstate compact cannot be amended or repealed by unilateral action of the member states unless the express terms of the compact for amendment are followed.

The Constitution grants states the power to enter into interstate compacts by its language "no state shall, without the consent of Congress . . . enter into any agreement or compact with an other state or with a foreign power." An interstate compact is created when states negotiate and reach a final agreement where the parties wish to be bound to the compromise reached.

The interstate compact process has proceeded in three phases: negotiation, state ratification, and federal ratification. Currently, the negotiation phase has ended and states are ratifying the agreements in their respective legislatures.

NEGOTIATION PROCESS

With the ACF/ACT comprehensive water allocation study, governors of each state appointed representatives from the competing stakeholder interest groups to an advisory council which studied the competing state needs and reconciled these needs with the natural flows of the river basins. An independent consultant was retained by the commission to compile the results reached during the commission meetings and to recommend future directions for the negotiations.

The compacts were developed by the study team using questionnaires and surveys for identifying the concerns and issues important to the competing interests. The survey results were compiled and analyzed using a computer model which calculated the impact of different water allocations on the

identified areas of concern. The compacts resulting from this negotiation set the general parameters and give broad discretion to the administrative body overseeing the compact. The compact language which is almost identical for both compacts is examined below.

CHARACTERISTICS OF THE ACF/ACT COMPACTS

Coordination Mechanism

Currently, both interstate compacts create a "Basin Commission" as a long term coordination mechanism responsible for making decisions in accordance with the agreement. This commission contains representatives from each state appointed by that state's governor. A federal representative also serves on the commission and is nominated by the President of the United States.

The federal representative does not have a vote on commission decisions. Instead, a unanimous vote of the three state commissioners is required in all decisions.

The Commission is vested with the following powers:

- to adopt bylaws and procedures governing conduct;
- to staff positions necessary to accomplish the goals of the compacts;
- to receive and spend funds from lawful sources;
- to enter into agreements and contracts to further the goals of the compacts;
- to plan, coordinate, monitor, and study problems related to floods, droughts, water quality, water supply, and conservation; and
- to establish and modify an allocation formula apportioning water quantity.

Although these duties are general and give the commission flexibility to handle upcoming problems, its lack of specificity makes it difficult to predict how the coordination mechanism will handle future problems.

Flexibility

The tri-state compacts try to reach a balance between the level of certainty necessary to ensure enforcement and compliance of the agreements and the flexibility needed to handle future contingencies. Because the compacts will be both federal and state law after ratification by Congress and the state legislatures, the states will not be able to unilaterally change the terms of the agreements. This makes the broad language of the compact in the areas of water quality and regulatory impacts more influential.

Even though the current contract negotiations are concentrating on water quantity, these compacts will not adequately handle the tri-state problems without considering water quality because the issues of water quantity and quality are so intertwined. It is also not clear how this new commission will interact with existing water management agencies such as the Army Corps of Engineers, state

environmental protection divisions, the Environmental Protection Agency, the United States Fish and Wildlife Service, and the Federal Energy Regulatory Commission.

The role of those currently utilizing the water in these river basins is also not certain. Reservoirs, hydroelectric power, navigation, and natural processes all have future needs which are difficult to predict. The technological methods and computer models used to simulate their water allocation impacts must be agreed upon so that an objective method of evaluating the agreement is present. Integrating each of the stakeholders into this process makes the agreement more likely to adequately handle future contingencies.

Water Allocation Mechanism

Even though the commission has agreed upon general water quantity goals, the commission must still formulate an equation for updating the water flows for future years which will accommodate the changing needs of the parties utilizing water from these river basins. This formula must be agreed upon unanimously by the members of River Basin Commissions. The compact language states that the water allocation formula should protect "water quality, ecology, and biodiversity," but this language does not bind the Commissioners to a particular allocation strategy.

Termination Provisions

The ACF/ACT compacts expressly indicate methods for withdrawing from the compact. These methods include:

- Legislatures of all three states repeal the compact through general laws enacted within three consecutive years.
- United States Congress expressly repeals the compact.
- The states fail to agree on a water allocation standard by December 31, 1998 (unless the Basin Commission unanimously agrees on a time extension).
- The Federal Commissioner submits an official letter of nonconcurrency about the allocation formula, and the State Commissioners are unable to renegotiate a suitable compromise with the Federal Commissioner

REGULATORY PREEMPTION

Preemption of Federal Environmental Regulation

An area of potential concern with interstate compacts and their status as binding federal law involves preemption of previously enacted federal legislation. The following federal statutes are of special concern:

- The Clean Water Act;
- The Endangered Species Act;
- The National Environmental Policy Act; and
- The Rivers and Harbors Act.

If these statutes are in conflict with the terms of the interstate compacts, the courts may assume that Congress understood the potential conflicts with existing legislation

when the compact was adopted and meant for the new agreement to prevail.

Although the compacts expressly state their intention to comply with this federal legislation, no specific mention is made of how to handle conflicts between the compacts and federal laws. In fact, in broad language, the compacts state that "other state and federal laws affecting the basin shall, to the maximum extent practicable, enforce, implement or administer those laws in furtherance of the purposes of the compact." This language does not address what happens when compliance with federal law is not "practicable" given a rigid allocation formula.

Most current interstate compacts were signed in the 1940s, before the comprehensive environmental protection acts were promulgated, so courts have had few opportunities for examining the impact of interstate compacts enacted after these statutes. Water quantity allocation schemes could result in violation of federal environmental protection statutes in order to achieve the quantities required under the compacts. Since water quantity and economic interests represent the dominant interests of the compact drafters' interests, it remains unclear how the compacts may impact environmental quality issues.

Issues of conflict and preemption may be difficult to resolve because conflict is measured by the scope and area of operation of the relevant statutes. Because potential conflicts are fact-based and often involve contingencies which were not considered when the compacts were drafted, conflict and the scope of the provisions are often difficult to determine. Whenever possible, the courts will seek to find an interpretation where both state and compact can coexist, but if conflict is inevitable, the terms of the interstate contract will control.

Parties involved with drafting the ACT/ACF allocation formulas must keep these potential impacts in mind so that the tri-state agreements do not unduly jeopardize environmental protection of the river basins in order to accommodate diverse water quantity needs.

Limits on State Sovereignty

Once the agreement is ratified, the compacting states will be restrained from acting in manner that might interfere with the compact terms. This means that state legislatures and agencies are bound by the water allocation scheme as stated in the ACT/ACF compact and future state legislative or agency actions cannot jeopardize state compliance with the interstate compacts without violating federal law.

Also, prior state statutes which conflict with the terms of the agreement will be preempted by the compact's requirements. This could create problems with previous legislative schemes for environmental protection and citizen water rights as discussed above with federal legislative preemption.

Even though the language of the ACT/ACF agreements states that the "compact shall not interfere with the right or power of any state to regulate the uses and control of water

within the boundaries of the state," this right is limited by the allocation formula. This restraint could be devastating depending on the types of unplanned events occurring and the need for unanimous approval before the compact can be modified.

FORMAL RATIFICATION

State Ratification

The states' respective legislative bodies must ratify the compact. The document enacted by each state should be identical to that ratified by the federal government and the other state legislatures to prevent any confusion about the terms of the agreement. State legislative enactment of the compact allows states to enforce the compact against individual state citizens even if those citizens did not participate in the agreement's negotiation.

Federal Ratification

Once the state legislatures approve the compacts, the federal government should approve the final compacts. Most interstate compacts experience few problems with congressional ratification because the federal government encourages compromise and negotiation to solve the complex problems and differing interests inherent in water resource allocation., however the federal government may object to the limited role of the Federal Commissioner in the Basin Commission. This limited role only gives the federal officer power to veto water allocation formulas and voice concerns about all other issues - no vote on other Commission decisions.

Another potential hurdle for the ACT/ACF compacts comes from the fact that few interstate compacts have been signed since the enactment of comprehensive federal environmental legislation. The uncertainty and potential problems of the interstate compact preempting federal legislation may cause Congress to more closely scrutinize the tri-state compact than previous compacts which were easily enacted.

Once the compact is ratified by Congress, the agreement becomes a federal law binding the states to its terms. Because the compact has become federal law, states and individual citizens can bring actions in federal court to enforce the agreement. The Supremacy Clause of the Constitution requires states to obey federally enacted law. This binds states to the compacts' agreed upon terms unless the terms allow states to withdraw under certain circumstances or if Congress gives approval for a compact's dissolution.

Congressional scrutiny before the agreement's enactment allows the federal government to ensure that non-compacting states are not prejudiced by the agreement. Federal ratification is also needed so that the federal government will not interfere with the interstate agreement outside the formal mechanisms for federal intrusion the agreements create.

Federal ratification also protects interstate compacts from Commerce Clause challenges. The Commerce Clause

recognizes that the Constitution has reserved the power for regulating interstate commerce with the federal government. The negative implication from this power may invalidate state efforts which seek to regulate interstate commerce. If the federal government exercises its grant of power to regulate interstate commerce by enacting the interstate compacts, no state intrusion into federal power will occur, and the interstate compact will sustain any Commerce Clause challenge.

CONCLUSION

The ACF/ACT river basin compacts have been ratified by the Georgia Assembly, but the real issues concerning water allocation have yet to be decided. Because of the broad language used in adopting the parameters of the compact itself, the state Basin Commissioners and public participants must actively scrutinize the proposed water allocation formulas. If not designed properly, these formulas have the potential of binding states to water allocation levels that would threaten federal and state environmental regulation.

Moreover, the compacting states should have the agreement ratified by Congress to insure that the agreements survive constitutional scrutiny and secure federal governmental cooperation. This federal ratification may prove difficult because of the limited federal role in the coordination mechanism as well as the uncertain interaction between the compact and environmental regulation.

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