ON WINGS OF WAX:
GEORGIA'S FLIGHT OVER THE CHATTAHOOCHEE

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Abstract. The draft allocation formula agreements that have been prepared to implement the ACF and ACT River Basin Compacts are both substantively and procedurally flawed. They are substantively flawed in that they attempt to do indirectly what the states have been precluded from doing directly. They are procedurally flawed in that that their development did not include full participation by all relevant stakeholders. These inadequacies and related issues are examined in the context of applicable federal legal requirements.

INTRODUCTION

The Apalachicola–Chattahoochee–Flint (ACF) River Basin Compact (Public Law No. 105–104, 111 Statutes at Large 2219) and the Alabama–Coosa–Tallapoosa (ACT) River Basin Compact (Public Law No. 105-105, 111 Statutes at Large 2233) authorized the states to negotiate allocation formula agreements for the ACF and ACT River Basins, respectively. The draft ACF and ACT allocation agreements that have been prepared to date emerged from a procedural history in which the states attempted to circumvent the requirements of federal law applicable to the management and allocation of water resources. (Hawk, 1997; Sherk, 2001) These efforts were unsuccessful. The ACF and ACT Compacts as ratified reflect congressional intent to preserve the "congressionally authorized purposes" of federal facilities. As former Speaker of the House Newt Gingrich has stressed, ratification of the ACF and ACT Compacts by Congress did not authorize the states "to rewrite federal law." (Gingrich, 2001)

Nonetheless, despite this legislative history, the draft allocation agreements attempted to do indirectly what the states were precluded from doing directly. Specifically, the draft agreements sought to change the congressionally authorized purposes for which federal facilities were constructed. The draft agreements also attempted to limit the applicability of federal law. These attempts raise a number of issues.

FEDERALISM ISSUES

The states do not appear to recognize or understand the distinction between physical and legal availability of water. States may exercise primacy over the management and allocation of water resources only to the extent that such resources are not needed to fulfill the requirements of federal statutes and regulations. As Justice Douglas noted in *Oklahoma ex rel Phillips v. Guy F. Atkinson Co*., 313 U.S. 508, 534-535 (1941): "'Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.' *Florida v. Mellon*, 273 U.S. 12, 17, 47 S.Ct. 265, 266, 71 L.Ed. 511. ... [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress."

Neither the ACF Compact nor the ACT Compact authorized the states to change the requirements of federal law. Nonetheless, review of the draft allocation formula agreements leads to the inescapable conclusion that the same individuals who failed in their attempts to circumvent the requirements of federal law through the compact negotiation and ratification process attempted to achieve the same goal through the allocation agreements. Simply stated, those provisions of the allocation agreements that change the use of federal facilities are *prima facie* illegal. Only Congress has the authority to authorize federal projects and only Congress can change the purposes for which the projects are authorized. (Thuss, 1990; Vest, 1993; Carriker, 2000)

Furthermore, any attempt by Congress to authorize the states to change the requirements of federal law (*i.e.*, to change the purposes for which federal facilities have been authorized) would be a violation of the nondelegation doctrine. (Sherk, 2001) As noted above, the Constitution vests all legislative power in the United States Congress. Given this requirement, "Congress is not permitted to grant policy making power to agencies when doing so would be an

abdication of its constitutional duty to enact legislation." (Quandt, 2000) In essence, while it is within the authority of Congress to reauthorize the use of the federal facilities located within the ACF and ACT River Basins, it is not within the authority of Congress to delegate the power of reauthorization to an administrative agency such as the ACF or ACT Commissions or to the states. In addition, Muys has noted that the authority delegated to the Federal Commissioner by both the ACF and ACT Compacts vis-à-vis approval of the allocation agreements may also violate the nondelegation doctrine. (Muys, 2001)

Finally, it must be noted that the rivers of the ACF and ACT River Basins are subject to the requirements of a number of federal statutes and regulations. As a result, the regulation, control and allocation of these rivers requires the full participation of several federal agencies and related organizations. With regard to participation by the federal agencies in development of the draft allocation formula agreements, former Speaker of the House Gingrich has made the intent of Congress crystal clear: Federal agencies were to participate fully "during the development of the allocation formula" and were to "have equal participation in all technical working groups and meetings in which the terms and conditions of the allocation formula are negotiated." (Gingrich, 1997) The former Speaker has reaffirmed this conclusion repeatedly. (Gingrich, 2001). Nonetheless, despite the clarity of this directive, the states chose to exclude the federal agencies and related organizations from the process by which the draft allocation agreements were negotiated. Many of the negotiating sessions were held in secret (some under the guise of "mediation" or the "exchange of technical information") from which the federal agencies and the public (as well as several state agencies) were excluded. The potential effect of such exclusions was summarized by Copas who, after noting that "[a]ll users must be accounted for and dealt with for a compact to be successful[,]" concluded that "[a] compact that does not account for federal drains on water resources is doomed to fail." (Copas, 1997)

PROCEDURAL ISSUES

Both the ACF and ACT Compacts establish a concurrence/nonconcurrence procedure applicable to review of the draft allocation formula agreements by the Federal Commissioner. Unfortunately, a critical question that was not addressed when the ACF and ACT Compacts were enacted is whether the burden of proof rest with the states (to prove consistency with federal laws and regulations) or with the Federal Commissioner (to prove inconsistency). The former chief negotiator for the state of Georgia took the position that the Federal Commissioner was obligated to concur unless the Commissioner could point to a specific statutory or regulatory violation. (Moore, 1999)

It is a well-established provision of American jurisprudence that a party seeking governmental approval (in whatever form that approval might take) has the burden of demonstrating why approval should be forthcoming. This is particularly true when the issue is use of public resources such as water. With regard to the use of water resources in Georgia, for example, requiring the applicant to bear the burden of proof is statutory. O.C.G.A. §12-5-31(c) provides that, "[t]o obtain a permit pursuant to this Code section, the applicant must establish that the proposed withdrawal, diversion, or impoundment of surface waters is consistent with this article." The applicant, therefore, bears the burden of proof.

In a similar manner, the states bear the burden of proving that the draft allocation agreements are consistent with the requirements of applicable federal law such as the Federal Power Act, the Fish and Wildlife Coordination Act, the Clean Water Act, the Safe Drinking Water Act, various Rivers & Harbors Acts, various species protection statutes (including the Endangered Species Act) and the Coastal Zone Management Act. In addition, to the extent that these federal programs are implemented through programs established pursuant to state law, compliance with the requirements of applicable state laws would have to be demonstrated.

Compliance with procedural statutes, such as the National Environmental Policy Act (NEPA) and the Administrative Procedure Act, would also have to be demonstrated. It has been argued, for example, that the Federal Commissioner is precluded from concurring if the requirements of NEPA have not been fulfilled.

An additional procedural issue relates to congressional approval of the draft allocation formula agreements. Not all interstate agreements are subject to congressional ratification. The Supreme Court has ruled that only those interstate agreements "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States" are subject to approval by the Congress. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Irrespective, virtually all interstate agreements involving the management and allocation of water resources, because of their impacts on such federal issues as

navigation and commerce, require congressional approval. (Sherk, 1994; Grant, 1991)

As noted above, the ACF and ACT Compacts authorized the states to develop allocation formula agreements. The definition of "allocation formula" contained in both Compacts included representation of the apportionment via "a table, chart, mathematical calculation or any other expression of the Commission's apportionment of waters." The draft allocation formula agreements that have been prepared to date go far beyond the scope of the "allocation agreement" as defined in the Compacts. For all intents and purposes, the draft allocation agreements are management plans for both the ACF and the ACT River Basins. As such, the draft agreements increase the "political power in the states" and appears to "encroach upon or interfere with the just supremacy of the United States[.]" Consequently, as the Supreme Court has made clear, the draft allocation agreements would require congressional ratification. (Muys, 2001)

CONCLUSIONS

The allocation formula agreements that have been drafted for the ACF and ACT River Basins are both substantively and procedurally inadequate. They are substantively inadequate in that they are based on a fundamental misinterpretation of the ACF and ACT Compacts. Neither Compact, either directly or indirectly, authorized the states to change the requirements of federal law. Furthermore, Congress could not authorize the states to do what the states attempted to do though the draft allocation agreements without violating the nondelegation doctrine.

The draft allocation agreements are procedurally flawed in that the federal agencies and related organizations that are directly affected by the agreements were not involved in drafting them. As a result, if submitted to Congress for ratification, it is quite likely that the draft allocation agreements would face serious opposition by numerous governmental instrumentalities. Furthermore, the draft agreements fail to acknowledge either (a) that the states bear the burden of proving that the allocation agreements are consistent with the requirements of federal law or (b) that the allocation agreements will require congressional ratification.

Consequently, in their present form, the draft allocation agreements are neither good law nor good policy. Except as first drafts of subsequent agreements, the draft allocation formula agreements warrant no further consideration.

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