

# REFLECTIONS ON THE A.C.F. AND A.C.T. BASIN COMPACTS

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**Abstract.** Over a fourteen-year period that began in 1990 and ended with the termination of the ACF and ACT Basin Compacts, the State of Georgia endeavored to develop with Alabama and Florida agreements that would guarantee the downstream States a fair and reasonable supply of water while safeguarding, to the maximum extent possible, Georgia's flexibility to manage its waters for the benefit of all Georgians. From the perspective of Georgia's negotiators, Georgia offered meaningful state-line stream flow guarantees and limitations on Georgia's water use. Ultimately, the three States could not reach agreement. Nevertheless, the years of interstate and federal-state study, cooperation, and negotiation greatly advanced the level of knowledge regarding the water resources of the ACF and ACT Basins and could help provide the foundation for a future resolution of the disputes.

## INTRODUCTION

Interstate compacts are contracts among states. According to the Council of State Governments, there are more than 200 interstate compacts currently in effect nationwide,<sup>1</sup> over forty of which relate in some way to water allocation or water resources management.<sup>2</sup> Interstate water compacts are one of three ways that water can be allocated among states, the other two being direct congressional apportionment (which has occurred only twice<sup>3</sup>), and equitable apportionment by the

Supreme Court of the United States. Compacts commonly are viewed as the preferred alternative because they allow states, which often are most knowledgeable about their own water resources and needs for water, to do the apportioning, and they can result in better relations between the states. That being said, experience has shown that many interstate compacts ultimately end up the subject of litigation.

Georgia shares the Apalachicola-Chattahoochee-Flint (ACF) River Basin with Alabama and Florida, and the Alabama-Coosa-Tallapoosa (ACT) River Basin with Alabama. Approximately 74% of the drainage area of the ACF Basin and 23% of the ACT Basin are in Georgia.<sup>4</sup> Georgians are highly dependent upon these Basins in a variety of ways. The Chattahoochee River, including Lake Lanier, is the primary source of water supply for the metropolitan north Georgia region<sup>5</sup> as well as for many Georgians downstream. Lake Allatoona and the rivers and streams of the ACT Basin are another major source of water supply to metropolitan Atlanta as well as the City of Rome and other communities in Georgia. The ACF Basin in Georgia is a rich agricultural region, and Georgia's farmers rely upon its surface and ground waters for irrigation. The waters of the ACF and ACT Basins support a rich diversity of fish and wildlife species.<sup>6</sup> The federal reservoirs in the ACF and ACT Basins are among the nation's most visited for

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<sup>1</sup> Mountjoy, John J., "National Center for Interstate Compacts: A New Initiative," *Spectrum: The Journal of State Government*, Fall 2004. Available at website for National Center for Interstate Compacts, The Council of State Governments, [www.csg.org](http://www.csg.org).

<sup>2</sup> Database of Interstate Compacts, National Center for Interstate Compacts, The Council on State Governments.

<sup>3</sup> The Lower Colorado River and Truckee-Carson-Pyramid Lake were apportioned by Acts of Congress.

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<sup>4</sup> U.S. Army Corps of Engineers, et al., *Draft Environmental Impact Statement for the Water Allocation Formula for the ACF River Basin (ACF EIS)* (September 1998), at 4-10; U.S. Army Corps of Engineers, et al., *Draft Environmental Impact Statement for the Water Allocation Formula for the ACT River Basin (ACT EIS)* (September 1998), at 4-11.

<sup>5</sup> Metropolitan North Georgia Water Planning District, *Water Supply and Water Conservation Management Plan*, September 2003, at 3-1.

<sup>6</sup> *ACF EIS* at ES-12; *ACT EIS* at ES-12.

recreation<sup>7</sup>, and Lake Lanier alone has been estimated to contribute well in excess of a billion dollars in revenue attributable to recreation.<sup>8</sup> Federal dams and reservoirs in the ACF and ACT Basins also produce hydropower and provide limited support for commercial navigation.

In 1997, Alabama, Georgia, and Florida enacted laws establishing the ACF and ACT Basin Compacts. Congress subsequently passed the Compacts as federal legislation, and President Clinton signed them into law.<sup>9</sup> The Compacts arose after several years of cooperation among the States and federal government on the ACT/ACF Comprehensive Study. The Compacts, which are identical to one another, established the legal authority and process for the Governors (of Alabama and Georgia in the case of the ACT, and of all three States for the ACF) to develop formulas for allocating the waters of the ACF and ACT Basins among the States.

#### KEY FEATURES OF THE ACF AND ACT COMPACTS

The Compacts created the ACF and ACT Basin Commissions, which consisted of the Governors (as voting members) and a Federal Commissioner (non-

voting) for each Commission.<sup>10</sup> The Federal Commissioner represented the federal agencies having an interest in the water resources of the two Basins. Each Compact authorized the Commission to develop a formula for equitably apportioning the waters of the Basin “while protecting the water quality, ecology, and biodiversity of the Basin as provided in the Clean Water Act, ESA, . . . and other applicable federal laws.”<sup>11</sup> While this did not establish an affirmative obligation to protect water quality and biodiversity apart from existing federal laws,<sup>12</sup> it clarified that the Compacts gave the States no authority to violate those laws. The Compacts continued the “live and let live” policy that the States had adopted in prior Memoranda of Agreement, which provided that the States would not oppose reasonable increases in water use within the other States during the pendency of the Compacts.<sup>13</sup>

While the Compacts did not prohibit all confidential (non-public) discussions among the States, they required the Commission to hold its formal meetings in public.<sup>14</sup> Each Compact established an initial deadline of December 31, 1998 for the States to reach agreement on an allocation formula but allowed the States to extend that deadline.<sup>15</sup> If the States did not reach agreement by an ultimate deadline, the Compact would terminate automatically. The ACF Compact so terminated as of September 1, 2003, and the ACT Compact terminated as of August 1, 2004.

Each Compact instructed that if an allocation formula were adopted and approved, the federal agencies were to exercise their power, authority, and discretion in a manner consistent with the allocation formula so long as doing so did not conflict with federal law.<sup>16</sup> This was a significant provision given the important role that the United States Army Corps of Engineers and other federal agencies would play in helping implement a formula agreement. The Compacts established a process by

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<sup>7</sup> U.S. Army Corps of Engineers, Mobile District, <http://water.sam.usace.army.mil/recreat.htm>.

<sup>8</sup> McCrary, Joseph L., Kundell, James E., Thompson, Steffney, and Miller, Alice E., Management Options for Lake Lanier, *Diagnostic/Feasibility Study of Lake Sidney Lanier*, Chapter 7, Carl Vinson Institute of Government, University of Georgia, (1998). The authors acknowledge that other reported estimates of the economic impact of recreation at Lake Lanier far exceed \$1 billion.

<sup>9</sup> **ACF Compact:** Alabama Acts 1997, No. 97-67, § 1, Ala. Code § 33-19-1, signed by the Governor of Alabama on February 25, 1997; 1997 Fla. Laws ch. 97-25, § 1, Fla. Stat. § 373.71, signed by the Governor of Florida on February 25, 1997; Ga. L. 1997, p. 29, § 1, O.C.G.A. § 12-10-100, signed by the Governor of Georgia on February 25, 1997; and Public Law No. 105-104, 111 Stat. 2219, signed by the President of the United States on November 20, 1997; **ACT Compact:** Alabama Acts 1997, No. 97-66, § 1, Ala. Code § 33-18-1, signed by the Governor of Alabama on February 25, 1997; Ga. L. 1997, p. 15, § 1, O.C.G.A. § 12-10-110, signed by the Governor of Georgia on February 25, 1997; and Public Law No. 105-105, 111 Stat. 2223, passed by the United States Congress on November 7, 1997, and signed by the President of the United States on November 20, 1997.

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<sup>10</sup> ACF and ACT Compacts at Article VI.

<sup>11</sup> Article VII.

<sup>12</sup> The authors acknowledge that some observers of the Compact negotiations interpret the Compacts to impose such an affirmative obligation.

<sup>13</sup> Article VII(c).

<sup>14</sup> Article XI.

<sup>15</sup> Article VIII(a)(3).

<sup>16</sup> Article VII(b).

which the Governors, after providing an opportunity for notice and comment, could adopt a formula by unanimous agreement, after which the Federal Commissioner would review the agreement to determine whether it complied with federal law. The Federal Commissioner could either issue a letter of concurrence, upon the issuance of which the formula agreement would become effective; issue a letter of nonconcurrence, which would invalidate the agreement; or issue nothing, in which case the agreement would become effective.<sup>17</sup>

That the Compacts did not contain allocation formulas but instead authorized the States to develop them made the Compacts somewhat unique. With very few exceptions (the Red River Compact being another), interstate water compacts include the apportionment or formula for apportionment. Thus, the States in this instance held a rare and valuable opportunity to develop formulas that, unless vetoed by the Federal Commissioner, would command compliance by the federal agencies to the extent allowed by law. At the same time, this presented extraordinary challenges to negotiate in the public eye comprehensive and complex agreements for protecting each State's needs for many years into the future.

#### FORMULA PROPOSALS AND ULTIMATE OBSTACLES TO AGREEMENT

The three States devoted extraordinary resources to the more than seven years of Compact negotiations. Over the course of the negotiations, the States developed a general framework for agreement for each Basin that focused primarily on operation of the federal reservoirs to meet reasonable water needs while supplying, at a minimum, specified stream flows at the state lines. The States also developed general rules for ongoing governance by the Commissions, as well as flow and water quality monitoring, and information sharing among the States and federal government.

A few of the more significant matters upon which the States ultimately were unable to agree during the Compact negotiations were the following:

##### **Flows in Excess of Minimum Flow Requirements.**

After the States negotiated the numeric flows that, at a minimum, were to be maintained, Florida and Alabama sought substantial commitments to guarantee that these numeric flows would be exceeded. While Georgia was willing to acknowledge that certain of the minimum flows as a matter of fact naturally would be exceeded much if not all of the time and eventually agreed to certain limits on its water use, the particular assurances

that Florida and Alabama demanded created too great a risk for Georgia that the United States Army Corps of Engineers could be pressured to operate the federal reservoirs to significantly exceed the minimum flows at the expense of maintaining acceptable reservoir levels upstream.

**Reservoir Operations.** In a related issue, the States did not have a meeting of the minds on the rules pursuant to which the Corps of Engineers would operate the federal reservoirs, including desired reservoir elevations and the amount of mandated or desired hydropower production.

**Consumption Caps.** Early in the negotiations, Florida and Alabama each expressed a preference for state-line flow guarantees over consumption caps within Georgia. From Georgia's perspective, the flow commitments were negotiated under the assumption that, if Georgia satisfied specified flow commitments, Georgia would retain the flexibility to manage its own water use. Eventually, Georgia nevertheless agreed to certain standards and requirements governing water use within Georgia, such as interbasin transfer limits and standards for new withdrawals and non-federal reservoirs, and was willing to continue to abide by the already-stringent standards governing water use under Georgia law. Florida and Alabama ultimately demanded numeric caps on Georgia's consumption on top of all of the other commitments, however, and Georgia considered this demand to be unreasonable and unduly risky given the other commitments that Georgia already was making.

**Effect of Unanticipated Conditions.** All three States initially agreed that if, due to a record drought, a change in federal law, discovery of an erroneous assumption underlying the formula, or some other unexpected event, complying with the agreement became significantly more harmful to any State than had been anticipated, the formula would be suspended while the States determined how to respond to the event. Florida and Alabama changed their minds, however, and opposed the suspension provision. The States could not agree on any other approach for responding to such events.

#### CONCLUSIONS

From Georgia's perspective, the fourteen years during which it, with its downstream neighbor States, studied and negotiated over allocation formula agreements for the ACF and ACT Basins must be viewed as an era of both accomplishment and missed opportunity. The Comprehensive Study and the Compacts offered the opportunity for prolonged and intense interstate and federal-state cooperation. The ACT/ACF Comprehensive Study has advanced the body of knowledge regarding the water resources of the two basins. The Compact negotiations identified and narrowed areas of dispute.

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<sup>17</sup> Article VII(a).

Though the Compacts have terminated, the achievements and experiences of this period will inform state and federal policymakers and likely will contribute in some way to future resolution of the complex issues regarding the sharing of the waters of the ACF and ACT Basins among Georgia, Alabama, and Florida.

#### LITERATURE CITED

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