STUDENT ARTICLES

BARGAINING IN THE SHADOW OF UNCERTAINTY: UNDERSTANDING THE FAILURE OF THE ACF AND ACT COMPACTS

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INTRODUCTION

Midnight of August 31, 2003, marked the failure of a bold joint venture among three states and the federal government to resolve one of the most intractable interstate conflicts in recent decades. That evening, the Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact), an interstate agreement that had taken years of work and millions of dollars in federal and state funds to negotiate, expired unmourned.

Signed by Alabama, Florida, and Georgia in 1996, the ACF Compact sought to apportion the contested waters of the Apalachicola-Chattahoochee-Flint River Basin, a 19,600-square-mile river basin that straddles the three states' common borders. A companion agreement signed only by Alabama and Georgia, the nearly identical Alabama-Coosa-Tallapoosa River Basin Compact (ACT Compact), sought to allocate the waters of the neighboring ACT basin, which spans only those two states. Such agreements have long been used to apportion contested interstate waters, but seldom in the East and never since the rise of pervasive federal environmental protection of interstate waters.[1] The ACF and ACT compacts were also novel in that, rather than directly specifying an allocation of waters among the states (and forcing negotiators immediately to resolve the difficult question of allocation), they set up a framework for future negotiations among the states, in the

[1] *See infra* Part I.B.

hopes that mutual interest, goodwill among the parties, and liberal technical and financial assistance from the federal government would bring the parties to agreement within a year.

Consensus, however, proved elusive. Despite promising signs (or at least optimistic statements from the parties), negotiations dragged on for seven years without agreement.[2] In 2003, Florida finally pulled the plug, declining to approve yet another of the numerous extensions that had kept negotiations alive long past the original statutory deadline.[3] Alabama and Georgia extended the ACT Compact through the summer of 2004, but, at the end of July, Alabama Governor Bob Riley called a halt to negotiations, leaving the states no closer to agreement than they were in 1990.[4] Despite the parties' tremendous investment in the negotiations, the expiration of the ACF and ACT compacts was not lamented by the states, which have resumed litigation in the United States district courts and are preparing for the likely next stage of the dispute—litigation in the United States Supreme Court.[5]

Arid western states have long grappled with controversies over scarce water, but the relative abundance of water in the Southeast, along with relatively slow population growth until the latter half of the twentieth century, meant that bitter rivalries over water supply were relatively rare in the South.[6] However, with rapid population growth, and with climate change that may lead to more severe drought conditions in the future, such interstate "water wars" are likely to be the rule, rather than the exception, in the Southeast. Understanding the failure of the ACF/ACT Compact negotiations, originally conceived as a model for future water conflict resolution, may provide federal and state actors valuable insight into dealing with the ACF and ACT conflicts, as well as

[2] Nick Lackeos, *Rivers Meeting May End Feud*, MONTGOMERY ADVERTISER (ALA.), June 11, 2003, 2003 WL 57007799.

[3] Stacy Shelton, *Water Talks a Washout*, ATLANTA J.-CONST., Sept. 6, 2003, 2003 WL 61733836.

[4] Donna Adams, *Water Battle Returns to Court*, MONTGOMERY ADVERTISER (ALA.), Aug. 7, 2004, 2004 WL 84752028.

[5] Charles Seabrook, *Water Costs Likely to Rise*, ATLANTA J.-CONST., Sept. 8, 2003, at F1. *But see* Stacy Shelton, *Ga., Fla. Try to Avoid Court Fight Over Water*, ATLANTA J.-CONST., July 26, 2004, 2004 WLNR 6345068.

[6] *See generally* Thomas L. Sansonetti & Sylvia Quast, *Not Just a Western Issue Anymore: Water Disputes in the Eastern United States*, 34 CUMB. L. REV. 185 (2004) (discussing how water disputes, once rare in the East, are now more commonplace in nonwestern states).

future water disputes.

Scholars have devoted a great deal of attention to the obstacles to agreement in the ACF/ACT controversy.[7] Rightfully so, this commentary has focused almost entirely on the substantive (and arguably irreconcilable) conflicts of interest between the parties. To a lesser degree, observers of the controversy have suggested that parties' strategic behavior has proved an additional impediment to agreement.[8] There has been little focus, however, on the ways in which the *structure* of the ACF and ACT negotiations, as dictated by the compacts, has hindered agreement on the allocation of the rivers.

This Note will focus on that issue, examining the failure of the ACF Compact through the lens of negotiation theory in an attempt to discern the ways in which the negotiating structure might have blocked agreement. It will then suggest some ways in which this structure might be changed, or other steps taken, to foster agreement.

Of course, if the parties' interests are fundamentally irreconcilable—if no mutually beneficial arrangement is theoretically possible, much less attainable through negotiation, however structured—then it will fall upon Congress or the United States Supreme Court to resolve the conflict. It is the author's belief that an accommodation among conflicting interests in the ACF and ACT basins is possible, if not permanently, then at least for the next several decades. However, given the current status of the conflict and the enduring political obstacles to negotiation, whether the parties can work out an agreement among themselves is anyone's guess.

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[7] *See, e.g.*, Jeffrey Uhlman Beaverstock, *Learning To Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact*, 49 ALA. L. REV. 993 (1998); Carl Erhardt, *The Battle Over "The Hooch": The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 STAN. ENVTL. L.J. 200 (1992); C. Grady Moore, *Water Wars: Interstate Water Allocation in the Southeast*, 14-SUM NAT. RESOURCES & ENV'T 5 (1999); George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-first Century: Is it Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764 (2005).

[8] *Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee and Flint River Basin Compact: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 107th Cong. 66 (Dec. 19, 2001) [hereinafter *Sherk Testimony*] (testimony of Mr. George William Sherk), *available at* http://commdocs.house.gov/committees/judiciary/hju76809.000/hju76809_0f.htm.

I. THE CURRENT CONFLICT AND THE COMPACTS

A. *Background on the Conflict and Negotiation of the Compacts*

The ACF river basin is one of the largest in the southeastern United States, encompassing 19,600 square miles and draining an area measuring 385 miles from north to south.[9] It is fed by the Chattahoochee and Flint Rivers, which originate in north Georgia and then join to form the Apalachicola River at the Florida-Georgia border. The Apalachicola runs through the Florida Panhandle and empties into Apalachicola Bay on the Gulf of Mexico. For much of its length, the Chattahoochee River forms the border between Georgia and Alabama. The ACF basin is bounded to the west by the ACT basin, whose headwaters are also in north Georgia, but which courses to the southwest through Alabama, then empties into the Gulf at Mobile Bay without flowing through Florida. The population of the ACF basin is approximately four million people, about eighty-nine percent of whom live in Georgia, eight percent in Alabama, and three percent in Florida.[10]

On their way to the Gulf, the waters of the two basins are put to many beneficial uses. They facilitate navigation and recreation along the rivers, supply water for industry, feed agricultural interests in south Georgia and Alabama, aid in the generation of hydroelectric power at sixteen dams on the three major rivers, and provide habitat for the flora and fauna of the basin.[11] The ACF also provides sustenance for oyster beds in Florida's Apalachicola Bay, from which are harvested ninety percent of the oysters eaten in Florida and more than ten percent of those consumed nationwide.[12] The oyster harvest alone is worth more than $16 million annually, and the outflow from the river supports an estuary important for other fisheries in the Gulf of Mexico.[13]

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[9] U.S. ARMY CORPS OF ENG'RS, WATER ALLOCATION FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT (ACF) RIVER BASIN (ALABAMA, FLORIDA, AND GEORGIA): DRAFT ENVIRONMENTAL IMPACT STATEMENT ES-2 (1998) [hereinafter DRAFT EIS].

[10] *Id*. at 4-205 tbl.4-48.

[11] *Id*.

[12] Bob Mahlburg, *Florida Abandons Tri-state Water Pact: Disputed Sharing Plan Heads Back to Courts*, ORLANDO SENTINEL, Sept. 2, 2003, 2003 WL 61858237; Ron Word, *Water Dispute Ends Up in Court; Florida, States Can't Agree*, BRADENTON HERALD, Sept. 2, 2003, 2003 WL 58621949.

[13] JEFFRY S. WADE ET AL., NORTHWEST FLA. WATER MGMT. DIST.,

The most demanding consumers of the basins' waters, however, have been north Georgia municipalities. Urban development in north Georgia has exploded since 1950, resulting in tremendous increases in water demands.[14] The Atlanta metropolitan area, which comprises twenty Georgia counties (not all of them actually in the ACF basin), accounts for the bulk of this growth. In 1995, it is estimated that 3.6 million Georgians lived in the ACF basin.[15] The population of Atlanta, 500,000 in 1950, rose to almost three million in 1990 and more than four million in 2000.[16] Residential land use in the basin is expected to increase more than sixty percent between 1995 and 2050, and commercial and industrial land use is expected to increase by forty percent over the same interval.[17]

In 1981, 1986, and 1988, the Southeast endured a series of record-setting droughts, forcing water rationing in Atlanta, sharply curtailing navigation on the Apalachicola River, and causing severe economic and environmental damage throughout the basin.[18] Understanding that future droughts could imperil metropolitan Atlanta's explosive urban growth, Georgia pursued a deal with the Army Corps of Engineers (the Corps), responsible for the operation of federally constructed dams along the river, to increase Atlanta's withdrawals of water from Lake Lanier, a large man-made reservoir on the upper Chattahoochee, guaranteeing water sufficient to meet its municipal demands until 2010.[19]

ALTERNATIVE STRATEGIES FOR BASINWIDE MANAGEMENT OF THE ACF BASIN: THE FLORIDA PERSPECTIVE 2 (Mar. 24, 1994) [hereinafter ALTERNATIVE STRATEGIES].

[14] DRAFT EIS, *supra* note 9, at ES-2.

[15] *Id*. at 4-205 tbl.4-48.

[16] *Id*. at 1-3.

[17] *Id*. at ES-14. Land devoted to agriculture, now comprising twenty-four percent of the basin's 12.3 million acres, is projected to increase by only two percent over that time. *Id*.

[18] The 1986 drought resulted in more than $1 billion in agricultural losses in Georgia and Alabama, causing every county in Alabama to be declared a disaster area. Industrial water supply and power generation were also severely affected. DRAFT EIS, *supra* note 9, at 1-2; *see also* Mary R. Hawk, *Interstate Compacts: Allocate Surface Water Resources from the Alabama-Coosa-Tallapoosa River Basin Between Georgia And Alabama; Allocate Surface Water Resources from the Apalachicola-Chattahoochee-Flint River Basin Among Alabama, Florida, and Georgia*, 14 GA. ST. U. L. REV. 47, 48 (1997); Charles Seabrook, *Water Wars Take Shape Between Ga., Neighbors*, ATLANTA J.-CONST., Nov. 27, 1989, 1989 WL 6093221.

[19] Charles Seabrook, *Atlanta to Get More Water from Lanier*, ATLANTA J.-

Alabama, fearing the supply of water to farmers in the southeast corner of the state would be endangered, filed suit against the Corps in the United States District Court for the Northern District of Alabama, challenging the validity of the arrangement, on June 29, 1990.[20] Florida subsequently intervened in the suit on the basis that the Corps deal would endanger Apalachicola Bay, and Georgia also intervened to protect its arrangement with the Corps.[21]

Understanding the potentially enormous costs of litigation over the waters of the basin, and with the encouragement of members of Congress, the three states and the Corps agreed to a joint stay of the court proceedings while they negotiated their differences.[22] On January 3, 1992, the three state governors and the Assistant Secretary of the Army signed a Memorandum of Agreement "commit[ing] to a process for cooperative management and development of regional water resources"—that is, the ACF and ACT river basins.[23] The parties pledged, via further informal negotiations, to seek "a more formal relationship" that would facilitate a durable resolution of the conflict.[24] As part of this process, the parties committed to support a comprehensive joint study of the water resources in the region. Congress appropriated $11 million for the Joint Comprehensive Study of the Two Tri-Rivers Basins (Comprehensive Study), which was also aided by

CONST., June 10, 1988, Access World News Rec. No. 880601079; Seabrook, *supra* note 18.

[20] *See* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691, 693 (N.D. Ga. 2004); *see also* ROY R. CARRIKER, INST. OF FOOD & AGRIC. SCI., WATER WARS: WATER ALLOCATION LAW AND THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN 3 (Nov. 2000) [hereinafter CARRIKER, WATER WARS] (on file with journal), *available at* http://edis.ifas.ufl.edu/pdffiles/FE/FE20800.pdf; Carrie Teegardin, *The Shot Heard Round the Hooch: Suit Takes Aim at Metro Atlanta Efforts to Slake a Growing Thirst*, ATLANTA J.-CONST., June 29, 1990, 1990 WL 7002481. Alabama claimed the action violated Alabama's common law water rights, as well as the National Environmental Policy Act (NEPA). *Id.*

[21] *See* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. at 694; *see also* CARRIKER, WATER WARS, *supra* note 20, at 3. Also joining the suit were the Alabama Wildlife Federation and the cities of Montgomery, Alabama; Gadsden, Alabama; and Cartersville, Georgia. *Id.*

[22] CARRIKER, WATER WARS, *supra* note 20, at 3.

[23] Memorandum of Agreement by, between, and among the State of Alabama, the State of Florida, the State of Georgia, and the United States Department of the Army (Jan. 3, 1992) [hereinafter January 3 MOA] (on file with journal).

[24] *Id*. at 2.

the efforts of U.S. Geological Survey, the Army Corps of Engineers, EPA, the Bureau of Transportation, NASA, the National Oceanic and Atmospheric Administration, and the National Weather Service.[25] The three states pledged to contribute about $4 million in cash, as well as the assistance of their respective environmental agencies.[26]

The Comprehensive Study originally was scheduled for completion by January 3, 1995, but experienced substantial delays.[27] In the meantime, the three states, with substantial assistance from interested members of Congress, had negotiated an agreement that, it was hoped, would lead to a durable resolution of the ACF/ACT conflict. This agreement took the form of two interstate compacts, constitutionally sanctioned contracts between the states that would require the approval of Congress to take effect.[28] While interstate compacts have long been used to apportion contested waters between neighboring states,[29] these twin agreements, the ACF and ACT compacts, differed markedly from any that had come before.

B. *Interstate Water Compacts*

Although novel in form, the ACF/ACT compacts are part of a

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[25] *See* Charles Seabrook, *State Releases Details of Plans on Waterways Formulas to Be Worked Out with Fla., Ala.*, ATLANTA J.-CONST., Dec. 12, 1996, 1996 WL 8245987; Charles Seabrook, *Water Wars: Three States Near Showdown*, ATLANTA J.-CONST., Sept. 9, 1996, 1996 WL 8230619; *see also* DRAFT EIS, *supra* note 9, at 1-6 to 1-10; January 3 MOA, *supra* note 23, at 5.

[26] The final cost of the Comprehensive Study was more than $27 million. Moore, *supra* note 7, at 7.

[27] *See* Supplemental Memorandum of Agreement by, between, and among the State of Alabama, the State of Florida, the State of Georgia, and the United States Department of the Army (Jan. 18, 1994) (on file with journal); Supplemental Memorandum of Agreement by, between, and among the State of Alabama, the State of Florida, the State of Georgia, and the United States Department of the Army (Nov. 20, 1997) (on file with journal). A draft report was released in August 1996. *See* WILLIAM J. WERICK ET AL., BASINWIDE MANAGEMENT OF WATER IN THE ALABAMA-COOSA-TALLAPOOSA AND APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASINS: DRAFT REPORT (Aug. 1996), *available at* http://www.iwr.usace.army.mil/iwr/pdf/ACTACFdraftreport.pdf.

[28] Charles Seabrook, *Heading Off a Tri-State Water War*, ATLANTA J.-CONST., Feb. 19, 1998, 1998 WL 3682003.

[29] *See* WILLIAM K. VOIT & GARY NITTING, COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS AND AGENCIES 118–33 (1995) (listing compacts between states regarding the apportionment of transboundary waters), *available at* http://www.csg.org.

long tradition of interstate compacts as vehicles for the resolution of interstate conflicts. An interstate compact is a binding agreement between states, agreed to in their capacity as semi-sovereign entities. Article I, Section 10 of the Constitution provides that "[n]o state shall, without the consent of Congress, . . . enter into any agreement or compact with another state."[30] This clause has been construed to give Congress affirmative power to approve the formation of such compacts.[31] Sometimes described as the analog of international treaties within the federal system,[32] interstate compacts have been used since before the ratification of the Constitution to resolve interstate disputes and implement multistate policies in a variety of contexts.[33]

The first water allocation compact to receive congressional consent was the Colorado River Compact, apportioning the waters of the Colorado River Basin among the seven states of the basin.[34] More than twenty other compacts apportioning the scarce waters of western states followed.[35] Not until 1961, however, did the Delaware River Basin Compact (DRBC) first apportion the waters

[30] U.S. CONST. art. I, § 10.

[31] Agreements not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," do not fall within the scope of the Clause and do not require congressional consent. Cuyler v. Adams, 449 U.S. 433, 440 (1981) (quoting U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978)). Because of the pervasive federal regulation of interstate waters, and of environmental affairs in general, most environmental compacts require consent.

[32] JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 43 (2002).

[33] WELDON V. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 3–4 (1967); COUNCIL OF STATE GOVERNMENTS, BACKGROUNDER: INTERSTATE COMPACTS (2004), *available at* http://ssl.csg.org/compactlaws/compact backgrounder.doc. Even before the ratification of the Constitution, compacts were in widespread use in the American colonies as a vehicle for the durable resolution of boundary disputes between neighboring states. After the founding of the Republic, the formation of compacts was sanctioned by both the Articles of Confederation and the Constitution. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692–94 (1925).

[34] COLO. REV. STAT. §§ 37-61-101 to 37-67-104 (1925); *see also* Boulder Canyon Project Act, ch. 42, 42 Stat. 1057 (1928). Only six of the seven basin states approved the compact initially, with Arizona waiting until 1944 to do so. (A 1925 amendment to the compact had eliminated the requirement of unanimous consent.) *See* VOIT & NITTING, *supra* note 29, at 122; *see also* Frankfurter & Landis, *supra* note 33, at 701–02.

[35] See VOIT & NITTING, *supra* note 29, at 118–28.

of a river in the relatively water-rich eastern United States,[36] and few others have followed in the East. The ACF/ACT compacts are the first such compacts in the Southeast,[37] and the first in any region since the passage of the modern Clean Water Act in the 1970s.[38]

Compacts are enormously flexible devices whose substantive terms are limited only by the imagination of the drafters, the will of the compacting states, and the consent of Congress. Some compacts are narrowly drawn to resolve a single issue of contention between signatories; at the other end of the spectrum, some compacts establish independent regulatory commissions with broad mandates, policymaking ability, and the power to enforce their decisions against signatory states and private parties.[39] Such commissions are often part of compacts meant to address long-running and dynamic conflicts, such as those concerning interstate water resources.[40] Neither the U.S. Constitution nor federal statute governs the process of compact formation. Traditionally, the process starts with the drafting of a tentative compact by a commission of negotiators from potential signatory states; once agreement is reached, state legislators enact more or less identical versions of the compact; finally, Congress gives its consent to a final version of the compact.[41] Although states have increasingly

[36] *Id.*; *see* Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) [hereinafter Delaware River Basin Compact].

[37] Charles Seabrook, *Georgia, Neighbors See End to Water War*, ATLANTA J.-CONST., Feb. 17, 1998, at A1, ProQuest Doc. ID 26432772.

[38] 33 U.S.C. § 1251 (2000). The CWA is emblematic of increased federal regulatory demands on interstate waters. *See infra* Part III.C.2.

[39] The Delaware River Basin Commission, for example, is responsible for comprehensive water planning in the basin; among its duties are the allocation of basin water among the signatory states and the approval of all federal or state water projects that affect the basin. *See* Delaware River Basin Compact, *supra* note 36, art. 3.

[40] *See, e.g.*, *id.* § 2.1; Susquehanna River Basin Compact, Pub. L. No. 91-575, § 2.1, 84 Stat. 1509, 1512 (1970).

[41] ZIMMERMAN, *supra* note 32, at 43. Though generally not at issue with respect to water compacts, the question of congressional consent has been among the most contentious issues surrounding interstate compacts. Under current law, only those agreements that increase "the political power or influence of the states affected, and thus encroach . . . upon the full and free exercise of Federal authority" require consent. Virginia v. Tennessee, 148 U.S. 503, 520 (1893). However, it is generally accepted that the pervasive federal regulation of navigable interstate waters indicates that compacts allocating such waters require consent. *See Sherk Testimony*, *supra* note 8. Such consent may be express or implied, and may in some cases be granted in advance of state ratification.

departed from this procedure, water allocation compacts still tend to be negotiated in this fashion.[42]

Interstate compacts enjoy unique status in the federal system. Though they are essentially contracts (and are treated as such by courts),[43] compacts are also creatures of state public law, and depending on the terms of their drafting often exhibit some features of federal law as well. As contracts, compacts are binding on states and subject to judicial enforcement. Remedies may be stipulated in the compact itself but may also include monetary damages and specific performance of compact obligations.[44] However, judicial resolution of conflicts arising under water compacts may be almost as cumbersome as litigation conducted in the absence of an agreement.[45]

When enacted, compacts supersede existing state law. States also are barred from later enacting conflicting legislation, unless the terms of the compact allow for such amendment.[46] Likewise, signatories cannot unilaterally withdraw from a compact, unless specified in the agreement. Congress, on the other hand, is not bound to comply with the terms of a compact. It may pass conflicting or pre-emptive legislation, and may unilaterally withdraw from or abrogate a compact.[47] The law of congressionally approved compacts has also been found to constitute federal law, subject to the jurisdiction of federal district courts or, in cases of litigation between states, the United States Supreme Court.[48]

Cuyler v. Adams, 449 U.S. 433, 441 (1981); Virginia v. Tennessee, 148 U.S. at 521.

[42] FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 16–17 (1976), *available at* http://www.csg.org/CSG/Programs/National+Center+for+Interstate+Compacts/library.htm.

[43] Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 279 (1959).

[44] *See, e.g.*, Kansas v. Colorado, 533 U.S. 1 (2001) (granting specific performance for water delivery obligations under Arkansas River Compact).

[45] See *infra* Part II.A.2.

[46] ZIMMERMAN & WENDELL, *supra* note 42, at 27.

[47] Federal takings doctrine may curtail Congress's ability to change the terms of a compact. "Congress can change federal policy, but it cannot write on a blank slate. . . . Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment." Madera Irrigation Dist. v. Hancock, 985 F.2d 1397, 1400 (9th Cir. 1993); *cf.* Natural Res. Def. Council v. Houston, 146 F.3d 1118 (9th Cir. 1998).

[48] Cuyler v. Adams, 449 U.S. 433, 434 (1981) ("[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation,

A variation on the traditional interstate compact structure that has drawn the attention of many observers of interstate water conflicts is the federal-interstate compact. In such compacts, the federal government is a signatory to the compact along with the states, and is represented on any commission set up by the compact. This continuing representation of federal interests allows federal-interstate compacts to subordinate some federal policies to the will of the compact commission. For example, the Delaware River Basin Compact, a federal-interstate compact, set up a basinwide water planning commission (the Delaware River Basin Commission) responsible for planning and management of the basin's water resources.[49] All new federal water projects in the basin must submit to the planning authority of the commission, which has a voting federal representative (possessed of some powers, exceeding those of the state commissioners, enabling the federal representative to safeguard federal interests).[50]

Because this structure affords federal-interstate compacts greater flexibility to independently manage their water resources, several commentators have suggested its use in the ACF/ACT conflict.[51] The drafters of those compacts, however, followed a more traditional model.

C. *The ACF/ACT Compacts*

The ACF and ACT compacts, "entered into for the purposes of promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface waters of the ACF [and ACT], engaging in water planning, and developing and sharing common data bases," was approved by Congress on November 20, 1997.[52] The compacts conformed to the basic

Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question."); *see also* U.S. CONST. art. III, § 2, cl. 2 (original jurisdiction of Supreme Court); 28 U.S.C. § 1331 (2000) (federal question jurisdiction).

[49] Delaware River Basin Compact, *supra* note 36, § 2.1.

[50] *See id*. §§ 2.2, 2.5, 3.8.

[51] David N. Copas, Jr., *The Southeastern Water Compact, Panacea or Pandora's Box? A Law and Economics Analysis of the Viability of Interstate Water Compacts*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 697, 730 (1997).

[52] Apalachicola-Chattahoochee-Flint River Basin Compact, art. I, Pub. L. No. 105-104, 111 Stat. 2219, 2219 (1997) [hereinafter ACF Compact]; Alabama-Coosa-Tallapoosa River Basin Compact, art. I, Pub. L. No. 105-105, 111 Stat. 2233, 2233 (1997) [hereinafter ACT Compact].

model of state negotiation and enactment followed by congressional approval, with two important exceptions.[53] First, unlike all previous water allocation compacts, the compacts contained neither an allocation formula for the waters of the basin nor provision for a joint commission with the power to develop a binding allocation of water among the signatories.[54] Instead, the compacts created a commission to develop an allocation formula[55] for the apportionment of basin waters, which then had to be approved unanimously by the states.[56] In other words, the drafters of the ACF and ACT compacts, although they hashed out essential structural and technical details of the agreement before ratification, "punted" on the most important issue: the actual allocation of the waters.[57]

Second, the ACF and ACT compacts introduced an additional layer of federal consent to the process by requiring that the federal member of the commission consent to any allocation formula.[58] While the state commissioners had absolute discretion to reject proposed allocation formulas, the federal commissioner could only withhold consent for reasons "based solely upon federal law."[59]

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[53] Members of Congress involved in the initial compact formation indicated that they hoped the ACF and ACT compacts would serve as structural models for the resolution of future water controversies. *Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee and Flint River Basin Compact: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 107th Cong. 15 (2001) [hereinafter *Gingrich Testimony*] (testimony of the Honorable Newt Gingrich), *available at* http://commdocs.house.gov/committees/judiciary/index.htm.

[54] In contrast, such a commission is specified in the Delaware River Basin Compact. *See* Delaware River Basin Compact, *supra* note 36, art. 3.

[55] The compact defines an "allocation formula" as the methodology, in whatever form, by which the ACF Basin Commission determines an equitable apportionment of surface waters within the ACF Basin among the three states. Such formula may be represented by a table, chart, mathematical calculation, or any other expression of the Commission's apportionment of waters pursuant to this compact. ACF Compact, *supra* note 52, art. IV(b).

[56] *Id.* art. VII(a).

[57] *See Water Pacts Head to Legislatures*, FT. LAUDERDALE SUN-SENTINEL, Dec. 13, 1996, at 12B, Access World News Rec. No. 9612120487; *see also* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691, 694 (N.D. Ga. 2004). In the words of Judge Story, "The Compact did not contain a formula for determining how much water each state was entitled to receive; rather, it was essentially an agreement to agree." *Id.*

[58] ACF Compact, *supra* note 52, art. VII(a).

[59] *Sherk Testimony*, *supra* note 8.

D. *Post-Compact Negotiations, and the Failure of the Agreements*

Far from constituting a final settlement, the ACF and ACT compacts merely set the stage for a far more contentious round of negotiations in which the states would have to hash out the actual apportionment of the waters.

The negotiations proved tortuous. The ACF Compact originally set a deadline of December 31, 1998, by which date the compact would terminate if no allocation agreement were reached.[60] The compact, however, allowed extension of the deadline on unanimous consent of the commissioners.[61] This may have been the most useful provision of the compact, as the commissioners approved at least a dozen extensions over the next six years.[62]

The initial outlook was optimistic, but as the negotiations dragged on, sharp divisions emerged. There were many lines of contention during the negotiations, but the most basic disagreement among the parties with respect to the ACF basin was whether Georgia would be responsible only for delivering minimum flows of water (far below the normal river flow levels) to the Florida border, or whether the allocation agreement would impose direct limitations on Georgia's—and particularly Atlanta's—consumption of basin water.[63]

Florida insisted on limits to Georgia's consumptive use, citing two reasons why the minimum flows Georgia was prepared to guarantee would be insufficient to protect the sensitive estuary in Apalachicola Bay. First, the low minimum flows would force Florida to bear the risk of sustained drought, rather than providing for "shared adversity," whereby reductions in use would be imposed on both sides of the state border in times of drought, rather than only downstream.[64] Second, Florida voiced fears that as Atlanta's population continued to grow and more water was withdrawn from the upper basin, flow levels intended to express

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[60] ACF Compact, *supra* note 52, art. VIII(a)(3).

[61] *Id.*

[62] The count was up to twelve by January 31, 2003. Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1247 (11th Cir. 2002).

[63] *See* Stacy Shelton, *Water Feud Likely to Spill into Court*, ATLANTA J.-CONST., Sept. 2, 2003, at A1.

[64] Bruce Ritchie, *River Pact Moves Closer*, TALLAHASSEE DEMOCRAT, July 23, 2003, at A1, Access World News Rec. No. 0308140031.

minimum, drought-condition flows would instead become "targets" for water delivery.[65] Either eventuality could devastate the estuary.

According to David Struhs, secretary of the Florida Department of Environmental Protection, "Florida was unable to accept only minimum flows, plus whatever else the upstream states were not able to consume or store. This would place too great a risk on one of the most naturally productive rivers and bays in the United States."[66] Alabama expressed similar concerns about relying on minimum flow requirements rather than consumptive use limits to determine the amount of water flowing downstream from Georgia.[67] Georgia, on the other hand, refused to accept outside control over its use of water, declaring it an infringement of its sovereignty, and refusing to allow downstream users to "micromanage[]" Georgia's disposition of its own water resources.[68]

Despite these differences, the states appeared in the summer of 2003 finally to be nearing agreement, signing on July 22 a Memorandum of Understanding reporting that the states had "reached substantial agreement in principle regarding many of the terms of an allocation formula," setting forth some agreed-upon terms of the allocation, and committing the states to further negotiations.[69] Little progress was made, however, and on midnight of August 31, 2003, after a flurry of last-minute calls and e-mail messages, the ACF Compact quietly expired. Alabama and Georgia were quick to cast blame on Florida for abandoning negotiations,[70] while Florida maintained that the other states' intransigence left it no choice but to pull out and seek redress

[65] Fla. Dep't of Envtl. Prot., Statement of Intent to Accompany the Memorandum of Understanding Regarding Initial Allocation Formula for the ACF River Basins (July 22, 2003) (on file with journal), *available at* http://www.dep.state.fl.us/secretary/news/2003/july/0722_acf.htm#intent.

[66] Word, *supra* note 12.

[67] Press Release, Office of Gov. Bob Riley, Riley: Georgia Positions Unacceptable (Aug. 2, 2004) (on file with journal), *available at* http://www.governorpress.state.al.us/pr/pr-2004-08-02-01-watercompact.asp; *see also* Adam Snyder, *Alabama Needs Better Water Use Pact*, MONTGOMERY ADVERTISER, July 8, 2003, 2003 WL 57008780.

[68] *See* Mahlburg, *supra* note 12; Shelton, *supra* note 3.

[69] Memorandum of Understanding Regarding Initial Allocation Formula for the ACF River Basin (July 22, 2003) (on file with journal), *available at* http://www.acfcompact.alabama.gov/pdfs/ACFMOU.pdf.

[70] *See* Shelton, *supra* note 3; Word, *supra* note 12.

elsewhere.[71] Alabama withdrew its support for the ACT Compact in July 2004, claiming that Georgia's negotiating position made agreement impossible.[72]

While the ACF/ACT negotiations were still in progress, Georgia had been pursuing an alternative strategy for securing water for its municipal use. In May 2000, Georgia Governor Sonny Perdue requested that the Army Corps of Engineers commit by contract to releasing sufficient water from Lake Lanier to supply Atlanta's needs until 2030; the Corps did not respond, and Georgia filed suit in the United States District Court for the Northern District of Georgia to compel it to grant the request.[73] The State of Florida filed a motion to intervene as a defendant, which was denied by the district court but granted by the Eleventh Circuit Court of Appeals.[74]

Meanwhile, another suit had been instituted in the United States District Court for the District of Columbia by Southeastern Federal Power Customers, Inc. (SeFPC), a corporate consortium of power providers purchasing hydropower from Buford Dam on Lake Lanier, who had been paying higher prices for power as the Corps increasingly diverted Lanier water to Atlanta municipal use. SeFPC filed suit against the Corps on December 12, 2000, claiming that the Corps' practice of allowing municipal users to withdraw water from Lake Lanier violated state and federal law.[75] Georgia and several Atlanta-area water supply utilities were allowed to participate in closed mediation, with SeFPC and the Corps. In January 2003, a settlement was reached that would guarantee Atlanta 210 million gallons a day of additional water

[71] *See* Charles Seabrook, *Tri-state Water Talks End in Failure: Florida, Georgia Disagree on Metro Atlanta Consumption*, ATLANTA J.-CONST., Mar. 19, 2002, at A1, ProQuest Doc. ID 110617849; Shelton, *supra* note 63.

[72] Press Release, Office of Gov. Bob Riley, *supra* note 67; *see also* Adams, *supra* note 4.

[73] *See* Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1247–48 (11th Cir. 2002); *see also* Letter from Rep. Bob Barr to Gov.-Elect Sonny Perdue, In Re: Settlement of U.S. Army Corps of Engineers Litigation; Potential Adverse Impacts on Your Administration (Nov. 19, 2002) [hereinafter Barr-Perdue Letter] (on file with journal).

[74] Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d at 1260. An association of hydropower customers operating on Lake Lanier also intervened on the side of the Corps. *See id.* at 1248.

[75] *See* S. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 30 (D.D.C. 2004).

from Lake Lanier.[76]

Florida and Alabama were not party to the mediation or settlement, but intervened in the D.C. district court to challenge the validity of the settlement.[77] The district court approved the settlement on February 10, 2004.[78] Although the settlement was not approved until after the demise of the ACF Compact, some commentators claim that the prospect of the settlement contributed significantly to the failure of negotiations by giving Georgia an allotment of water for Atlanta without requiring the state to make concessions to Florida and Alabama.[79]

The D.C. district court's order provided that the SeFPC-Georgia-Corps settlement would not go into effect until the dissolution of a preliminary injunction issued by the United States District for the Northern District of Alabama—the court in which Alabama's original suit against the Corps had been brought.[80] That litigation, stayed in 1990, had been revived by Florida and Alabama while the D.C. settlement was in closed negotiations.[81] Alabama and Florida filed a motion for a preliminary injunction against the implementation of any settlement between Georgia and the Corps, claiming that it would violate the terms of the stay entered (with the consent of the parties) in September 1990. The terms of the stay prohibited the Corps from entering into any further water supply contracts without Alabama and Florida's consent.[82] On October 15, 2003, District Judge Bowdre had granted Florida and Alabama's motion, enjoining implementation of the settlement until Alabama's original challenge could be heard on the merits.[83]

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[76] *See* Jay Reeves, *Alabama, Florida Seek to Block New Water Allotments for Georgia*, COLUMBUS LEDGER-ENQUIRER, Sept. 29, 2004, http://www.ledger-enquirer.com/mld/ledgerenquirer/news/local/9791332.htm.

[77] *S. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30.

[78] *Id*.

[79] Bruce Ritchie, *Georgia Wins Out in Water Fight Federal Judge Gives State Go-Ahead To Take Water From Lake Lanier*, TALLAHASSEE DEMOCRAT, Feb. 12, 2004, at B1; *see also* Stacy Shelton, *Court Win Gives State Water to Grow on*, ATLANTA J.-CONST., Feb. 11, 2004, at B1.

[80] *See S. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 35.

[81] *See id.* at 30.

[82] Order Granting Motion To Stay Proceedings To Permit Parties To Conduct Settlement Negotiations [41-1] As Set Forth in This Order, Alabama v. U.S. Corps of Eng'rs (N.D. Ala. Sept. 19, 1990) (No. 90-1331).

[83] Order Granting Motion for Preliminary Injunction, Alabama v. U.S. Corps of Eng'rs (N.D. Ala. Oct. 15, 2003) (No. 90-1331).

Federal officials urged the states to continue negotiating despite the demise of the compacts,[84] but the states (unsurprisingly) all voiced their willingness to litigate, despite the likely cost and delay of such proceedings.[85] Florida declared its intent to file an equitable apportionment suit in the Supreme Court, although it has not yet done so.[86] Shortly after the end of the compact, Florida reported that it had already allocated $500,000 for litigation costs, while Georgia had allocated $900,000.[87] Especially given the litigation that has already transpired in the last few years, this amount is unlikely to be nearly enough.

II. OTHER APPROACHES TO INTERSTATE WATER ALLOCATION

To understand why the ACF/ACT compact negotiations failed, it may be helpful to understand the other means of dispute resolution at the states' disposal. States unable or unwilling to resolve interstate water disputes by interstate compact have at least two institutionalized alternatives. They may ask the United States Supreme Court to exercise its original jurisdiction over interstate conflicts and "equitably apportion" the disputed waters among the states.[88] Congress also has the power to allocate interstate waters. Federal authorities, however, are generally reluctant to intervene so heavy-handedly in interstate water disputes, preferring that states solve these primarily regional problems by compact. This Part will discuss these alternative means of allocation and their historical role in water conflict resolution.

A. *Judicial Allocation*

1. *Equitable Apportionment*

Article III of the Constitution gives the United States Supreme Court original jurisdiction over suits between States, allowing it to hear suits demanding the apportionment of interstate waters.[89] It

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[84] *See* Bruce Ritchie, *Feds Urge Cooperation Between States on Water*, BRADENTON HERALD, Sept. 6, 2003, 2003 WL 58622138.

[85] *See* Seabrook, *supra* note 5.

[86] *See* Bob Mahlburg, *Florida Abandons Tri-state Water Pact: Disputed Sharing Plan Heads Back to Courts*, ORLANDO SENTINEL, Sept. 2, 2003, 2003 WL 61858237.

[87] *See id*.

[88] *See* U.S. CONST. art. III, § 2, cl. 2.

[89] *Id.*

first did so in 1907, when Kansas asked the Court to enjoin Colorado's upstream irrigation diversions of the Arkansas River.[90] Rejecting both States' respective claims of absolute right to the waters of the Arkansas, the Court, announcing a doctrine of equitable apportionment, allowed Colorado to continue its diversions.[91]

For decades after this first exercise of its equitable apportionment power, the Supreme Court struggled to define its jurisdiction over water controversies, sometimes decreeing allocations but imposing demanding standards of harm and ripeness for states who sought redress in the Court.[92] During this time, it also confronted and rejected challenges to its jurisdiction on Eleventh Amendment and Political Question Doctrine grounds.[93]

In later years, the equitable apportionment doctrine had to adjust to the federal government's increasing assertion of authority to regulate and allocate natural resources such as interstate waters.[94] Initially, such regulation consisted primarily of flood control and water reclamation projects, but over time that gave way to health and safety regulation and environmental protections, both of which became increasingly pervasive in the latter half of the last century. Equitable apportionment (which has always incorporated elements of state water law) thus increasingly had to balance federal and state interests.

Equitable apportionment is at its root a doctrine of fairness, and decisions proceeding under it have inevitably been heavily fact-bound. The Court considers many factors in allocation, a partial list of which it offered in *Nebraska v. Wyoming*:

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared

[90] Kansas v. Colorado, 206 U.S. 46 (1907).

[91] *Id*. at 117.

[92] A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 385–94 (1985).

[93] *Id*. at 388–92.

[94] *Id*. In 1963, the Supreme Court confirmed Congress's power to allocate interstate waters. Arizona v. Colorado, 373 U.S. 546 (1963); *see also infra* Part III.C.2.

> to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors.[95]

The fact-bound, ad hoc nature of equitable apportionment decisions is prominent among the grounds for criticism of the doctrine.

2. *Criticism of Judicial Allocation*

Despite its frequent use, Supreme Court adjudication of water controversies has been criticized on a number of grounds.[96] A common criticism is that the factual and technical complexity of water disputes puts them outside the Court's institutional competence:

> [T]he Court is inherently incapable of fully understanding the technicalities that are necessary in providing for an equitable solution. While the Court in all earnestness may attempt to rule in a manner it perceives to be fair, the lack of truly informed decision-making in this process may cause unpredictable results.[97]

This difficulty is moderated by the Court's appointment of special masters to take evidence and make preliminary findings of fact.[98] The parties may challenge these findings, and the Court may accept, reject, or modify them in issuing its order.[99] Nonetheless, it cannot be argued that the Court has anything approaching the wherewithal of Congress or the states to investigate and resolve technical issues related to water allocation.

A related criticism of judicial apportionment focuses on the cost and delay of litigation. States inevitably incur millions of

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[95] Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

[96] *See, e.g.*, *Gingrich Testimony*, *supra* note 53, at 100 (responses from Newt Gingrich to questions from Representative Barr); Erhardt, *supra* note 7; Tarlock, *supra* note 92, at 382 (describing the pervasive opinion that "lawsuits are an inferior method of apportioning interstate waters compared to compacts and congressional apportionment"). *But see* Tarlock, *supra* note 92. Tarlock argues that "the equitable apportionment doctrine has more potential for the successful resolution of interstate debates than has previously been suggested . . . . [T]he Court has generally struck a sensible balance between local law and transcendent national doctrines and . . . has been sensitive to the economic impacts of its allocations." *Id*. at 383–84.

[97] Erhardt, *supra* note 7, at 213–14.

[98] Copas, Jr., *supra* note 51, at 717 n.128; *see* William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 NEB. L. REV. 734, 736 (1987); *see also* FED. R. CIV. P. 53.

[99] FED. R. CIV. P. 53(g).

dollars in legal fees,[100] and controversies may linger in the Court for decades.[101] For example, a Nebraska-Wyoming dispute over the waters of the North Platte River went through fifteen years of litigation, costing Nebraska taxpayers $24.7 million, before it was settled in 2001.[102]

With respect to the ACF/ACT controversy, it has been estimated that litigation may cost each state $3–5 million a year, and drag on for years or even decades.[103] On the other hand, other means of conflict resolution may be equally costly: the ACF/ACT controversies remained unresolved for many years before the expiration of the compacts, and the cost of the Comprehensive Study has exceeded $27 million, exclusive of the states' legal fees and other costs of negotiation.[104] Thus, it is not clear that Supreme Court litigation is appreciably more expensive or time-consuming than alternatives—although it certainly seems expensive when, as appears to be the case with the ACF/ACT conflict, it comes *after* millions of dollars and years of unsuccessful negotiations.[105]

Far more trenchant criticisms of litigation focus on the uncertainties associated with it. There are at least two sources of this uncertainty: the vagueness of the equitable apportionment doctrine itself, and the impermanence of adjudicated "solutions."

Commentators disagree over the degree to which they believe the jurisprudence of equitable apportionment can give guidance to

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[100] For example, counsel for the state of California in *Arizona v. California*, 373 U.S. 546 (1963), estimated the total costs of litigation to approach $50 million. *See* Erhardt, *supra* note 7, at 214 n.74 (citing CHARLES MEYERS & A. DAN TARLOCK, WATER RESOURCE MANAGEMENT: A COURSEBOOK IN LAW AND PUBLIC POLICY 402 (2d ed. 1980)).

[101] The longest-lasting western water litigation is in its sixth decade in the Supreme Court. *Gingrich Testimony*, *supra* note 53, at 17.

[102] *See* Nebraska v. Wyoming, 543 U.S. 40 (2001) (approving final stipulated settlement); Seabrook, *supra* note 18.

[103] *Gingrich Testimony*, *supra* note 53, at 100 (responses from Newt Gingrich to questions from Representative Barr); *see also* Bruce Ritchie, *Putting Water-use Debate in Court's Hands May Be Costly*, TALLAHASSEE DEMOCRAT, Sept. 3, 2003, 2003 WL 62466870.

[104] *See* Moore, *supra* note 7, at 7.

[105] One potential source of enormous cost, should litigation proceed, stems from the possibility that a Special Master would impose a moratorium on further withdrawals from the river basins while litigation proceeded. Though it would arguably prevent strategic behavior and benefit downstream parties, such a moratorium could exact a huge economic toll on north Georgia. *See Gingrich Testimony*, *supra* note 53, at 100 (responses from Newt Gingrich to questions from Representative Barr); *see also* Ritchie, *supra* note 103.

parties. Some claim that the doctrine yields reasonably predictable results,[106] while others criticize it as ambiguous and unpredictable.[107] It is certain, at any rate, to undergo significant evolution in the near future: increasingly pervasive federal environmental regulation of interstate waters in recent decades combined with a relatively small number of equitable apportionment cases decided over the same period has forced adjustments to the doctrine without affording the Court many opportunities to stabilize and elaborate on these adjustments.[108]

In at least some contexts, the parties to the ACF controversy expressed considerable uncertainty over how the Supreme Court would decide an allocation case concerning the basin. With regard to the collapse of negotiations, Walter Stevenson, Jr., Alabama's former negotiator, said the states were "missing a golden opportunity that probably will not occur again in our lifetimes. . . . It's really a toss of the dice taking it to court."[109]

There is general agreement, however, that water allocations decided in the Supreme Court tend not to stay decided.[110] The Supreme Court has limited flexibility in fashioning remedies in equitable allocation cases, resulting in conflict "resolutions" with limited capacity to adjust to changing environmental, economic, demographic, and legal conditions.[111] This fact did not escape the parties to the ACF negotiation. In the words of the secretary of the Florida Department of Environmental Protection, David Struhs, "A judge could say, 'Here is how we are going to allocate water[] . . . . Five years, 10 years later, you could be back in court allocating it all over again."[112] Such instability could be extremely detrimental even to a state that prevails in the Supreme Court.[113]

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[106] *See generally* Tarlock, *supra* note 92.

[107] *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 137, 750 (2d ed. 1991); Erhardt, *supra* note 7, at 213.

[108] *See generally* Erhardt, *supra* note 7. The Supreme Court has not heard an equitable apportionment case since deciding *Colorado v. New Mexico*, 467 U.S. 310 (1984), although it has heard cases brought by parties accusing co-riparian states of violating existing apportionments. *See, e.g.*, Nebraska v. Wyoming, 555 U.S. 1 (1995).

[109] Shelton, *supra* note 63.

[110] Copas, Jr., *supra* note 51, at 718; Erhardt, *supra* note 7, at 214.

[111] *Id.*

[112] Bruce Ritchie, *Tentative Water-Sharing Agreement Reached; Historic Proposal Helps Apalachicola Oysters, Cuts Off Atlanta's Supply by 2030*, TALLAHASSEE DEMOCRAT, Jan. 16, 2002, at A1.

[113] The effects of uncertainty are further discussed in Part III.A.4.

3. *Judicial Reluctance to Allocate*

Perhaps recognizing the drawbacks of litigation, the Supreme Court generally has been reluctant to exercise jurisdiction over such controversies, preferring that states resolve water conflicts among themselves. The Court has said of interstate water allocation: "[S]o awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause."[114] Complex regional or interstate disputes are "more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted."[115]

This reluctance finds expression in the strict standard of harm parties must demonstrate before the Court will exercise jurisdiction over interstate water conflicts. Plaintiffs seeking an allocation must prove the existence of substantial harm caused by the other state's use of the water: "[T]he Supreme Court generally refuses jurisdiction unless there is imminent injury, a condition that does not usually arise until a stream is overappropriated."[116] This doctrine could keep the ACF/ACT conflict out of the Court for some time: because the controversy concerns Atlanta's *future* withdrawals of water from the basins, rather than any current use, Florida and Alabama could have difficulty making the required showing of harm.[117] Furthermore, Florida's probable claims in an equitable apportionment suit, which would focus on environmental

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[114] Dyer v. Sims, 341 U.S. 22, 27 (1951).

[115] New York v. New Jersey, 256 U.S. 296, 313 (1921) (suit by the state of New York against the state of New Jersey to enjoin the discharge of sewage into Upper New York Bay).

[116] A. DAN TARLOCK ET AL., LAW OF WATER RIGHTS AND RESOURCES 864 (4th ed. 1993); *see also* Missouri v. Illinois, 200 U.S. 496, 521 (1906); J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47, 51 (2003); A. Dan Tarlock, *Equitable Apportionment Revisited*, 56 U. COLO. L. REV. 381, 392–94 (1985).

[117] *See* Ruhl, *supra* note 116, at 52–53. Moreover, a state seeking an equitable apportionment must demonstrate by "clear and convincing evidence" that it is being harmed by the upstream state's use of interstate water resources. *See* Colorado v. New Mexico, 467 U.S. 310 (1984); *see also* George William Sherk, *Equitable Apportionment After* Vermejo*: The Demise of a Doctrine*, 29 NAT. RESOURCES J. 565, 577 (1989). Sherk argues that the demanding standard of proof developed by the Court is an expression of "its displeasure with its role in resolving interstate water conflicts." *Id.* at 579.

rather than economic harm (although the former is in some sense reducible to the latter), may not comport with the Court's traditional concept of harm; on the other hand, the doctrine of harm appears to be in flux, and some suggest that broadening the concept of substantial injury to include this sort of damage would be a reasonable evolution of existing doctrine.[118]

4. *Collateral Litigation*

As the history of the ACF/ACT conflict demonstrates, the Supreme Court is not the only forum in which interstate water disputes may be litigated. Suits in the federal district courts may be of great strategic significance to an ongoing conflict. This may be so even before the merits of such cases are reached. For example, the 1990 lawsuit brought by Alabama against the Corps of Engineers, even though stayed and not re-opened until after the demise of the compacts, appears to have attracted the attention of concerned legislators and drawn the parties to the bargaining table in the first place.[119] Litigation also seems to have precipitated the 2003 settlement between the state of Georgia, SeFPC, the Corps, and north Georgia water suppliers.[120] Although subsequently challenged (unsuccessfully) by Alabama and Florida, the settlement effected a significant realignment of interests by giving the parties to the settlement, whose interests initially were in direct conflict, a common interest in defending the integrity of the settlement in court.

Despite their significance as strategic moves in the larger conflict, however, lawsuits in the lower federal courts cannot effect a complete allocation of the waters of the basin. Only the Supreme Court, which has original jurisdiction over equitable apportionment suits between states, can fully allocate (if only temporarily) the river's waters.[121] As Judge Thomas Penfield Jackson of the D.C. district court observed in his opinion approving the settlement between Georgia and the Corps:

> The settlement . . . represents no more than an armistice in a decades-long conflict between the constituencies who share the

[118] *See* Ruhl, *supra* note 116, at 52–55.

[119] *See Gingrich Testimony*, *supra* note 53; *infra* Part II.B.

[120] *See* S. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 30 (D.D.C. 2004).

[121] *See* 28 U.S.C. § 1251(a) (2000).

> benefits and burdens of proximity to the Chattahoochee River, Buford Dam, and the reservoir created by the dam known as Lake Lanier in the State of Georgia.
>
> If approved by the Court, the settlement will not end the controversy over the waters of the Chattahoochee; it will merely moot for a time the dispute between the original protagonists in this case and the assenting intervenors. . . . The dissenting intervenors (and others), moreover, will surely continue the contest elsewhere.[122]

B. *Congressional Allocation*

If the parties do not file suit in the Supreme Court, or if the Court declines to exercise jurisdiction over the case, Congress could directly allocate the waters of the ACT and ACF basins. Congress's power to allocate interstate waters was first recognized in 1963,[123] when the Supreme Court concluded that Congress had impliedly exercised that power in the Boulder Canyon Project Act of 1928, conferring upon the Secretary of the Interior the power to allocate the waters of the lower Colorado River basin among Arizona, California, and Nevada.[124]

Since 1967, Congress has deliberately invoked its power to apportion interstate waters only once, with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990 (Truckee-Carson Act).[125] The Truckee-Carson Act apportioned the waters of the Truckee and Carson Rivers and Lake Tahoe between California and Nevada. This apportionment, however, did not originate in Congress, but rather codified a settlement formulated (but not unanimously agreed to) by the interested states, after a long process of litigation and negotiation.[126]

There are good reasons for members of Congress *not* to want

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[122] *S. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 28.

[123] *See* Arizona v. California, 373 U.S. 546, 564–66 (1963). Prior to *Arizona v. California*, Congress had been held not to have this authority. *See* Kansas v. Colorado, 206 U.S. 46 (1907).

[124] Arizona v. California, 373 U.S. at 564–66; *see also* Jerome C. Muys, *Approaches and Considerations for Allocation of Interstate Waters*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 311, 311 (Kathleen Marion Carr & James D. Crammond eds., 1995).

[125] Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289.

[126] *See also* Muys, *supra* note 124, at 312.

to intervene directly in interstate water disputes. First, the allocation of water is a fiercely contested regional rather than national issue, whose significance to the long-term development of the region concerned cannot be overstated.[127] Congress's ability to devise an adequate solution to such a conflict is debatable, and such an action would certainly raise concerns of federalism and state sovereignty because any interstate allocation inevitably will implicate intrastate water policy as well.[128]

Perhaps more importantly, members of Congress from outside the region are unlikely to see any political benefit to intervention, and are unlikely to expend time, energy, or political capital on such an initiative. And with respect to members from the interested states,[129] congressional maneuvering on the issue is likely to do little more than replicate the negotiations carried out among the interested states.[130] Moreover, a single interested member can effectively stall any such regional legislation merely by indicating a willingness to filibuster the issue.[131]

Members of Congress showed a strong preference for resolution of the ACF/ACT conflicts by compact, while expressing no desire to take the task of allocation upon themselves. For example, Speaker of the House Newt Gingrich took an active hand in forging the original compact and in promoting later negotiations.[132] Representative Bob Barr of Georgia's Seventh District showed a great deal of interest in the post-compact negotiations, keeping in contact with the state governors and submitting comments on several occasions.[133] While this assistance from members of Congress was undoubtedly valuable (especially in the initial compact formation), such a strongly demonstrated preference for congressional nonintervention on the

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[127] *See* SAX ET AL., *supra* note 107, at 731.

[128] Sax et al. suggest that "[f]or Congress to take sides would destabilize the precept that each of the states is equal in the control of shared water resources." *Id*.

[129] *Id*. at 731.

[130] *See id*.

[131] *See* Teegardin, *supra* note 20. On the other hand, Speaker Gingrich, who represented the Sixth District of Georgia (comprising three prosperous counties just north of Atlanta), was decidedly nonparochial in his involvement with the matter, criticizing Atlanta on a number of occasions (mostly after he left office).

[132] *See Gingrich Testimony*, *supra* note 53, at 16–17.

[133] *See* Barr-Perdue Letter, *supra* note 73. *See generally Sherk Testimony*, *supra* note 8.

issue of allocation may actually have impeded agreement by removing the perceived threat of federal intervention should negotiations fail.[134]

The practical disadvantages to federal legislative or judicial resolution of interstate water conflicts have resulted in Congress's and the Supreme Court's understandable reluctance to intervene in such controversies. As will be discussed in the next Part, this reluctance may have had some very significant consequences for the course of bargaining over the ACF Compact.

III. THE FAILURE OF THE ACF/ACT COMPACTS AS A PROBLEM OF NEGOTIATION

This Section will explore the failure of the ACF/ACT compacts through the lens of bargaining theory and attempt to provide a partial account of why, despite the possibility of a mutually beneficial agreement, negotiations failed. It is not an exhaustive account, and although the substantive conflicts of interest among the parties will be discussed, the focus of the inquiry will be on problems arising from the dynamics of the negotiations themselves. These problems included the parties' difficulty in identifying and prioritizing the interests at stake, legal uncertainties that affected parties' assessment of their bargaining positions, and factual uncertainties that impeded parties' evaluation of proposed solutions and likely resulted in strategic behavior. The final Section will suggest some ways by which federal or state actors may try to alleviate these problems.

A. *Interests at Stake in the ACF/ACT Negotiations*

Before delving into theoretical considerations, it is useful to describe the major interests at stake for the states in the ACF/ACT negotiations. The stakeholders and interests were and are extremely diverse even within the negotiating states, and this is by no means a complete account. However, briefly identifying the major interests of the parties, and the fault lines between them, may help distinguish substantive conflicts of interest from impasses caused by the dynamics of bargaining.

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[134] *See infra* Parts III.C.3, IV.C.

1. *Georgia's Interests*

The vast majority of the land and population of the ACF and ACT basins are in Georgia, and Georgia had the most diverse (and often conflicting) set of interests in play. Although there are several issues of common interest statewide, much of the controversy pitted Atlanta and other upstream municipalities against downstream municipal and agricultural interests, and against those concerned with property values and recreational uses on Lake Lanier and downstream.

a. *Upstream Interests*

Atlanta is the economic and demographic powerhouse of Georgia and the largest city in the Southeast; its explosive urban growth in the past decades has resulted in sharply increased demand for present and future water.[135] Accordingly, Atlanta's primary interest in the negotiations has been securing the right to future withdrawals from the ACF/ACT basins, a right it claims is crucial to future growth.[136]

Increased withdrawals, however, are not the only claims Atlanta pursued in the negotiation. Atlanta also firmly resisted calls by downstream users for conservation measures that would reduce Atlanta's per capita water consumption. Such conservation measures could have included mandating low-flow toilets and faucets, enforcing progressive rate structures that would discourage heavy users, making "gray water" available for some

[135] *See supra* Part I.A; *see also* John L. Fortuna, *Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water*, 38 GA. L. REV. 1009, 1009–10 (2004).

[136] The Atlanta Regional Commission, which oversees planning for the metropolitan governments within the Atlanta area, estimates that without additional water, the Atlanta region's population projections for the year 2010 would drop from 3.7 million to 2.8 million, the rest of Georgia would lose 200,000 new residents, and $127 billion in wages that would have been earned in Georgia would go elsewhere. *See* Carrie Teegardin, *River Sustains Millions Through Three States*, ATLANTA J.-CONST., Aug. 19, 1990, at E08, 1990 WL 7013294. The Corps, in its preliminary Environmental Impact Statement on the proposed allocations of water under the ACF Compact, forecast significant, though not nearly so profound, impacts if Atlanta's demands were not met. Under the various flow scenarios evaluated by the Corps, the average annual cost to an upstream municipality to replace water not withdrawn from the basin would range from $1 million to $13.4 million. DRAFT EIS, *supra* note 9, at ES-16.

uses, encouraging less water-intensive landscaping methods, and upgrading water infrastructure to reduce leakage and loss.[137] One stated reason for Atlanta's resistance to such measures was the effort and expense involved, which it claimed would stifle economic growth. Water utilities, an important municipal constituency, also may have resisted measures that would reduce demand for their product.[138]

This aversion to enforceable treatment measures conforms to a broader pattern of negotiation with respect to the entire Georgia delegation—that of resistance to *any* infringement, by an allocation agreement, on what Georgia claimed was sovereignty over the disposition of its own waters. Simply put, Georgia wanted to limit its obligations under the compact to providing minimum stream flows at the state lines, rather than allowing external controls over its consumption patterns.[139]

Upstream interests are not entirely unitary, however. Additional withdrawals from Atlanta would lower the water levels in Lake Lanier, forty-five miles northeast of the city. In addition to supplying more than sixty percent of the water storage for the ACF river system, the lake is an important recreational destination, attracting more than seven million visitors a year.[140] Official state figures estimate the economic impact of Lake Lanier tourism to be $2 billion annually.[141] Lanier is impounded by Buford Dam, a hydropower facility owned and operated by the Corps, with a generating capacity of 105 MW.[142] Drawdowns in Lake Lanier water levels would have significant adverse effects on tourism income, as well as on property values around the lake.[143] Reduced flow would also increase the cost of water to generators of hydroelectric power;[144] however, as part of their original agreement with the Corps, metro Atlanta governments had agreed

[137] Teegardin, *supra* note 20.

[138] *See id*.

[139] *See* Moore, *supra* note 7, at 8; Shelton, *supra* note 3.

[140] Marie Hardin, *Upstream, Downstream*, GEORGIA TREND, Feb. 1, 2003, at 75.

[141] *Id*.

[142] CHATTAHOOCHEE RIVER LAND PROTECTION CAMPAIGN, CHATTAHOOCHEE RIVER GREENWAY PLANNING AND IMPLEMENTATION HANDBOOK 100 (Fall 2000), *available at* http://www.dnr.state.ga.us/greenspace/c_index.html.

[143] Teegardin, *supra* note 136.

[144] *See* S. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 30 (D.D.C. 2004).

to compensate power companies $62.5 million for the loss.[145]

b. *Downstream Interests*

Stakeholders in downstream Georgia shared some of the Lake Lanier community's concerns that reduced water levels would result in decreased tourism income and depressed property values, but also advanced their own set of distinct and sometimes adverse interests.[146]

Downstream municipalities feared that increased withdrawals by Atlanta would conflict with their own consumptive needs, depriving them of water necessary for future growth.[147] Columbus, Georgia, and other downstream communities actually intervened along with Florida and Alabama to invalidate Georgia's 2003 settlement with the Corps and SeFPC.[148] Downstream agricultural interests also demanded more water for irrigation.[149]

For downstream users, the quality of water flowing downriver was at least as important as its quantity. Increased upstream consumption and decreased flow result in less dilution of waste and therefore higher concentrations of noxious substances in the river.[150] The quality of water flowing from Atlanta has long been an issue of downstream concern; for years the city has had difficulty complying with its discharge permits under the Clean Water Act, incurring more than $20 million in fines in the last

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[145] *Id*.

[146] *See id*.

[147] *See* Seabrook, *supra* note 18. Although Atlanta already gets a significant proportion of its drinking water from Lake Lanier, the State of Georgia and the Corps are locked in a legal dispute over whether this municipal water supply is a use sanctioned by the federal law authorizing the lake. *See* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691 (N.D. Ga. 2004)

[148] *See* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. at 695 (noting that Judge Jackson of the District of Columbia District Court had allowed the Middle Chattahoochee River Users, which included Columbus and other downstream Georgia communities, to intervene to contest the settlement); *S. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30; *infra* Part III.C.1.

[149] Southwest Georgia is the most agriculturally fruitful region of the state. Farms in the area produce corn, peanuts, sorghum, soybeans, cotton, oats, and rye. Beef cattle, dairy cows, and pigs are also raised in the area. GA. AGRIC. STATISTICS SERV., GA. DEP'T OF AGRIC., GEORGIA COUNTY ESTIMATES (Oct. 8, 2004), *at* http://www.nass.usda.gov/ga/estpages/ctyests.htm.

[150] In its Draft Environmental Impact Statement for the ACF Compact, the Corps predicted that reduced downstream flows would have "substantial adverse effects on water quality" because of dilution. DRAFT EIS, *supra* note 9, at ES-11.

decade,[151] and the city is currently subject to two consent orders mandating that it repair and upgrade its dilapidated wastewater management system.[152] Downstream stakeholders in the compact negotiations were virtually unanimous in their demands for stricter quality controls on Atlanta's discharges.[153] Throughout negotiations, however, Atlanta resisted attempts by downstream users concerned about water quality to secure a commitment to improved treatment of its municipal waste.

Speaker Gingrich expressed little sympathy for Atlanta on this issue, testifying in 2001 before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law:

> I would start by saying that the disgraceful—and I use this word deliberately—the disgraceful mismanagement of water and sewage by the City of Atlanta is a prime reason that no one downstream ever feels comfortable relying on [Atlanta's] good will [in negotiations].[154]

Water quality thus proved a major issue of contention in intrastate as well as interstate negotiations.

c. *Statewide Concerns*

There were some issues of concern to stakeholders statewide, although their importance was somewhat eclipsed by the upstream/downstream conflicts in intrastate negotiations. Grassroots environmental organizations came to the negotiations with myriad concerns, most of which pertained to issues of water quality and consumptive use. These issues included municipal and industrial water conservation; preventing the sale or transfer of water out of the basin; monitoring and preventing discharges in violation of the Clean Water Act; controlling stormwater runoff

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[151] Seabrook, *supra* note 18; Stacy Shelton, *Atlanta Pushes for U.S. Sewer Funds*, ATLANTA J.-CONST., Nov. 16, 2003, at G1.

[152] D.L. Bennett, *Sewer Project Problems Outlined*, ATLANTA J.-CONST., Sept. 8, 2003, at D1, 2003 WL 61734135; *see also* Stacy Shelton, *EPD Denies Delay for City Sewer Fix*, ATLANTA J.-CONST., May 29, 2003, at B3, 2003 WL 56078270.

[153] Hardin, *supra* note 140, at 75.

[154] *Gingrich Testimony*, *supra* note 53, at 3. The Georgia state legislature may not be helping matters, however—"recent state budget cuts eliminated funding for planning by the Metro Atlanta Water District, which [would include] conservation measures and limits on storm water pollution." Editorial, *Georgia Must Dive, Not Dip, into Water-sharing Process*, ATLANTA J.-CONST., Sept. 4, 2003, at A16, 2003 WL 61733595.

and other nonpoint sources of pollution; and safeguarding wetlands and other sensitive habitats from development or degradation.[155]

Generators of hydropower formed another statewide stakeholder group that did not fall neatly into the upstream or downstream camp. There are thirteen generating dams in the ACF basin, with a total generating capacity of 635 MW. Although the Corps owns several of these dams, a number are privately owned by such companies as Georgia Power, who were concerned with maintaining sufficient flows at their respective dams to generate cheap power.[156] Hydropower generators naturally favor minimizing consumptive uses of water, keeping more water in the river for generation.

2. *Alabama's Interests*

Parties in Alabama have some of the same concerns as downstream Georgia, but the relative weight of these concerns differs greatly. For example, although Alabamians hope to reserve water for future industrial and municipal growth,[157] such development concerns are far less important in Alabama than navigation, agriculture, and hydropower, [158] which appear to have been at the top of the state's negotiating priorities. Water quality has also been an issue of concern.[159]

Navigation has been a contentious issue in the ACF/ACT negotiations. Alabama has been determined to guarantee sufficient flows in the lower basin to allow barge traffic, which it sees as crucial to economic and industrial development in the state.[160] The lower Chattahoochee River forms the border between Alabama

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[155] Ben Young, *Fighting the Good Fight: Throughout the State, Grassroots Organizations Are Making a Difference in Water Quality and Quantity*, GEORGIA TREND, Sept. 1, 2003, 2003 WL 11551961 (discussing environmentalists' interests). Environmental interests will be discussed at greater length *infra* Part II.B.2.

[156] *See* DRAFT EIS, *supra* note 9, at ES-16.

[157] ALTERNATIVE STRATEGIES, *supra* note 13, at 7. Some Alabama municipalities have expressed concern that, by appropriating the lion's share of the waters in the short term, Atlanta will come to dominate water management in the basin, inhibiting Alabama's growth. *Id*.

[158] Seabrook, *supra* note 18. Alabama also wanted to secure water for consumptive use in *nuclear* power plants. Teegardin, *supra* note 136. For example, at the Farley nuclear power plant northwest of Dothan, Alabama, 1.5 million gallons of river water per hour are consumed as steam. *Id*.

[159] Seabrook, *supra* note 18.

[160] Teegardin, *supra* note 136.

and Georgia, giving Alabama users access to the Gulf of Mexico at Apalachicola Bay. Navigation in the lower ACF basin is generally unproblematic when water levels are high, but, during seasonal low-flow periods and droughts, additional water must be released from dams upstream to keep the river deep enough for barges to pass.[161] Navigation on the river also requires the maintenance of a 9- by 100-foot navigational channel along 107 miles of the lower Apalachicola River.[162]

Some claim that reduced downstream flows would halt navigation and bring ruin to local industries that rely on inexpensive barge transport.[163] However, barge traffic on the river has been decreasing since the late 1980s, and the Corps predicted that none of the allocations considered during the compact negotiations would have significant economic effects on navigation.[164] Although there are proponents of navigation in southwest Georgia,[165] most of the state has lobbied against it, as the additional flows delivered to the mouth of the river would reduce the water available for upstream consumption. Environmental groups in Georgia and Florida, who tend to favor reduced consumption and higher stream flows throughout the basin, also opposed navigation because of the environmental impact of dredging.[166]

3. *Florida's Interests*

Environmental concerns going far beyond dredging and

[161] For example, the Corps reported on March 15, 2004, an "unusually dry" month in the ACF basin, that navigation depth would be between 5.0 and 5.5 feet for the following ten days. Technical Support Branch, U.S. Army Corps of Engineers, Navigation Bulletin No. 04-07, Notice to Navigation Interests: Apalachicola, Chattahoochee, Flint River System, Florida, Georgia and Alabama (Mar. 15, 2004) (on file with journal).

[162] U.S. Army Corps of Eng'rs, *Information Paper: Navigation on the Apalachicola* 1 (n.d.) (on file with journal), *available at* http://www.sam.usace.army.mil/webdoc/apalachicola.pdf (last visited Apr. 2, 2005).

[163] Seabrook, *supra* note 18.

[164] DRAFT EIS, *supra* note 9, at ES-16; *see also* Editorial, *Ship Out: River Dredging Can't be Justified*, TALLAHASSEE DEMOCRAT, Apr. 14, 2005, at E4.

[165] *See* Ed Lightsey, *Raising Expectations: Southwest Georgia Economic Developers See This as a Time of Optimism*, GEORGIA TREND, Dec. 1, 2003, at 75, 2003 WL 11552030 (discussing southwest Georgia industry interests).

[166] Harry Franklin, *Water Issues Remain on Table; Aug. 29 Allocation Deadline in Jeopardy*, COLUMBUS LEDGER-ENQUIRER, Aug. 22, 2003, at C1, www.ledger-enquirer.com.

navigation were at the forefront of Florida's concerns in negotiation.[167] The state steadfastly opposed further navigation in the lower ACF basin because dredging operations degrade both the river channel and the banks where dredged material is disposed of.[168] The dredging necessary to maintain the nine-foot deep navigation channel in the lower Apalachicola River has left miles of riverbank severely degraded. Furthermore, ill-timed water releases to facilitate navigation can trigger unseasonal spawning behavior in some species of fish, resulting in massive fish kills.[169]

The states, however, do not control the fate of navigation in the lower Apalachicola. Federal law authorizes the Corps of Engineers to maintain the ACF basin as a commercial navigation channel,[170] which it accomplishes through dredging operations and control of water levels in the basin, and only a change in federal policy can end navigation in the lower basin.[171] Citing environmental concerns as well as the expense of maintaining the channel, Florida Senator Bob Graham requested in 2001 that Congress and the Corps end navigation in the basin.[172] The Assistant Secretary of the Army for Civil Works also recommended that navigation be deauthorized; despite months of meetings on the subject, no action was taken.[173] In March 2004, Florida Senators Graham and Bill Nelson introduced the Restore the Apalachicola River Ecosystem Act,[174] which would have

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[167] The Florida delegation made no secret of its prioritization of environmental issues: its first Draft Allocation Proposal was prepared with assistance from the Nature Conservancy. *See* CARRIKER, WATER WARS, *supra* note 20, at 13.

[168] *See* ALTERNATIVE STRATEGIES, *supra* note 13, at 3.

[169] Press Release, Office of Senator Bob Graham, Senator Asks Corps to End Practice That Throws Millions Down the River (Mar. 15, 2001), *at* http://graham.senate.gov/pr031501.html.

[170] ALTERNATIVE STRATEGIES, *supra* note 13, at 3.

[171] *See* Franklin, *supra* note 166.

[172] *Id*.

[173] *Gingrich Testimony*, *supra* note 53. The Corps' official position, as expressed in a 1999 information paper, is that,

> before deauthorization of navigation is accomplished in law, a study should be conducted and a post-authorization report prepared that documents potential impacts to other project purposes, changes to maintenance and operation procedures necessitated by deauthorization, opportunities for environmental restoration, and revised reservoir water control operations.

U.S. Army Corps of Eng'rs, *supra* note 162, at 3.

[174] Restore the Apalachicola River Ecosystem Act, S. 2169, 108th Cong.

deauthorized navigation in the Apalachicola and required the Corps to develop a comprehensive plan to restore the ecological integrity of the ACF basin; the bill was referred to the Committee on Environment and Public Works. Parallel legislation was introduced in the House by Representative Allen Boyd of northwest Florida in 2003.[175] In April 2005, the Florida Department of Environmental Protection denied the Corps an extension of its state permit to continue dredging the Apalachicola, casting doubt on the future of barge navigation in the lower basin.[176]

Most prominent among Florida's environmental concerns has been the preservation of the Apalachicola Bay estuary, which Florida has repeatedly declared to be its foremost goal in negotiations.[177] Preservation of the estuary's oyster beds and spawning grounds is not only a matter of the quantity of water delivered downstream, or even its quality. Once minimal requirements of quality and quantity are met, the timing of releases becomes a critical issue. Marine estuaries occur where freshwater rivers transition into saltwater environments, and their ecological processes depend on seasonal ebb and flow of salt and fresh water.[178] The Apalachicola oyster fishery, for example, requires freshwater flows in spring and winter to reduce the salinity of the bay.[179]

(2004). The Senators had also introduced the Act in 2002. *See* S. 2730, 107th Cong. (2002).

[175] Restore the Apalachicola River Ecosystem Act, H.R. 1665, 108th Cong. (2003).

[176] Press Release, American Rivers, Florida Halts Apalachicola Dredging (Apr. 15, 2005) (on file with journal), *at* http://www.americanrivers.org/site/News2?page=NewsArticle&id=7239&news_iv_ctrl=-1; *see also Army Corps Extension Denied*, TALLAHASSEE DEMOCRAT, Apr. 14, 2005, at B2.

[177] ALTERNATIVE STRATEGIES, *supra* note 13, at 2.

[178] The Environmental Protection Agency (EPA) defines an estuary as "a partially enclosed body of water formed where freshwater from rivers and streams flows into the ocean, mixing with the salty sea water." Nat'l Estuary Program, EPA, *About Estuaries*, *at* http://www.epa.gov/owow/estuaries/about1.htm (last updated Mar. 9, 2005). Healthy estuaries are extremely productive habitats, characterized by unusual abundance and diversity of wildlife. Estuaries are often the breeding grounds for both riverine and oceangoing species of aquatic life; thus their ecological significance extends far beyond their geographical boundaries. *Id*.

[179] Seabrook, *supra* note 18; Stacy Shelton, *3-State Fight Over Water Is On Again*, ATLANTA J.-CONST., Aug. 23, 2003, at E4, ProQuest Doc. ID 387693121; Teegardin, *supra* note 136.

Because dams regulate the flow of the Apalachicola River, these flow cycles no longer occur naturally, but they can be simulated by appropriately timed releases of water from upstream reservoirs. Guaranteeing such a natural flow regime was an issue so important to Florida that its negotiators made plain its preference to receive less water overall, provided the "water that does flow down the Apalachicola [would arrive] in a pattern very like the historic hydrograph."[180] Accepting Atlanta's offer of minimum flows at the state border[181] would have meant that in times of drought Florida would be unable to duplicate those natural flows, endangering the estuary.

The prospect of navigation raised the stakes, from Florida's standpoint, of the quantity of water delivered by Georgia: if upstream withdrawals were to reduce the flow of water in the lower basin, even more intensive and damaging structural work would be necessary to keep navigation channels open—an outcome Florida emphatically sought to avoid.[182]

If Florida's interests are more or less unitary, this is largely because the Apalachicola river flows through the state for a relatively short distance (about 107 miles) and relatively few Floridians (about 130,000, versus about 3,600,000 Georgians) live in the basin.[183] However, the fact that many stakeholders in Georgia and Alabama embraced Florida's environmental concerns while bitterly contesting the claims of others in their own states highlights an important feature of the controversy—that there is little correspondence between political subdivisions and interest groups. For example, along with Alabamians, some Georgians strongly favor maintaining navigation in the lower basin, while most Georgians strongly oppose it (but generally for different

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[180] Moore, *supra* note 7, at 9.

[181] *See supra* Part I.D.

[182] ALTERNATIVE STRATEGIES, *supra* note 13, at 3, 7.

[183] *See* DRAFT EIS, *supra* note 9, at 4-205 (1995 estimated population statistics); The Nature Conservancy, *Sustainable Waters Program: Apalachicola River, Florida*, *at* http://www.nature.org/initiatives/freshwater/work/apalachicola.html (last visited May 16, 2005); *see also* U.S. GEOLOGICAL SURVEY, APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN NAWQA STUDY, ACF LAND USE MAP (showing urban land in ACF basin concentrated around Atlanta, GA, Columbus, AL, and Albany, GA, with essentially no urban land in Florida), *at* http://ga.water.usgs.gov/nawqa/graphics/ACF.landuse.gif (last modified July 28, 2004).

reasons than Floridians do).[184] And upstream and downstream Georgia municipalities are bitterly divided over whether Atlanta should face consumptive use limits.[185]

Nonetheless, the primary actors in the ACF/ACT conflict have been the states. The noncorrespondence between these political subdivisions and stakeholder groups has adversely affected conflict negotiations by reducing the voice of diverse stakeholders into unitary state negotiating positions.[186] As will be discussed in Part III.C, state negotiators as a result may have had difficulty adequately representing the interests of their constituents.

4. *Common Interests*

Despite the wide variety of goals and interests the three states and their citizens pursued in the negotiations, it is important to note the parties' common interest in minimizing the uncertainty associated with the conflict. Georgia's emphasis on water planning has been discussed in Part II.A.2, but all the players were concerned with the instability of the situation, and the common interest in legal certainty deserves elaboration.

The likely result of the failure of the parties to reach agreement under the compacts is interstate litigation, the outcome of which is highly uncertain.[187] Such extreme uncertainty is anathema to the states, which are inherently risk-averse. Especially with respect to rapidly developing states, uncertainty about water can seriously inhibit economic planning and development. In the words of one prominent commentator:

> [R]esolution of interstate conflicts over rights in streams is a *sine qua non* of major development, whether conducted by private enterprise or by the state or federal government. Until

[184] *See* Lightsey, *supra* note 165.

[185] *See id*.; Franklin, *supra* note 166.

[186] Another less significant impact is that affinity groups whose membership spans political boundaries—for example, environmentalists, who reside in all three states—find their influence split among states, while those groups wholly contained within a single state—for example, metro Atlanta—concentrate their influence in a single jurisdiction (and on a single negotiating delegation).

[187] The demise of the compacts has already led to the revival of litigation in the United States District Court for the Northern District of Alabama, as well as continued litigation in U.S. district courts in Georgia and the District of Columbia. *See supra* Part I.D (discussing currently pending litigation); *supra* Part II.A (discussing possible Supreme Court litigation).

> state claims have been reduced to definite rights in specified quantities of water, private capital cannot afford the investment risk, states will have difficulty selling bonds, and even the federal government will not authorize projects.[188]

According to Joel Stone, planning and programming director for the Atlanta Regional Commission, water insecurity would seriously undermine banks' willingness to make new construction loans and inhibit city and county efforts to sell bonds for new water projects.[189] Atlanta has faced an additional source of water insecurity arising from its inability to meet federal standards for its sewage disposal system: EPA threatened to impose a moratorium on new water hookups if Atlanta failed to meet court-ordered deadlines for sewer improvements.[190] Mayor Shirley Franklin and others publicly acknowledged the chilling effects of the moratorium on growth in Atlanta.[191]

Georgia, perhaps as a consequence, has justified its initial proposals to the Corps and its subsequent involvement in the negotiations by reference to its need to plan for the future.[192] To provide long-term security, the ACF/ACT compacts were thus conceived to provide a thirty-year planning horizon.[193]

Alabama's public assessment of the costs of failure was as follows:

> [T]he most significant outcome of failure to achieve an agreement is uncertainty—uncertainty for both the near-term and great uncertainty towards the future. Without an agreement, virtually any action affecting the water resources of any portion of the ACT Basin can be proposed and, on an equal

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[188] MEYERS & TARLOCK, *supra* note 100, at 831.

[189] Teegardin, *supra* note 20; *see also* Seabrook, *supra* note 18; Shelton, *supra* note 3.

[190] Walter Woods, *Sewer Deadlock Scary for Builders*, ATLANTA J.-CONST., Dec. 13, 2003, at D1; *see also* Ty Tagami & Robert Lake, *City's Credit on the Ropes*, ATLANTA J.-CONST., Dec. 4, 2003, at A1.

[191] Woods, *supra* note 190. With the passage of water rate increases and a citywide sales tax in 2004 to facilitate sewer upgrades, the threat of the moratorium seems to have passed.

[192] *See* Greg Jaffe, *Water Deal May Settle Old Dispute*, WALL ST. J., Sept. 11, 1996, at S1, 1996 WL-WSJ 11797957 ("Georgia is willing to agree to a compact because it needs decisions made now . . . . A compact would give the state some certainty over how much water will be available for future development." (quoting Doug Kenney, Research Associate, Natural Resources Law Center, University of Colorado)).

[193] Seabrook, *supra* note 18; Shelton, *supra* note 63.

> basis, is open to legal challenge. . . . Future planning and assumptions by municipalities, industry, and economic development interests would be much less certain. . . . [W]ater resource decisions would probably take place on a case-by-case basis with little to no regard for potential future problems or issues nor with much consideration for basinwide management impacts.[194]

The point of identifying these shared interests is to emphasize the fact that, despite conflicting interests of the states, there would have been tremendous mutual gains from a negotiated agreement—gains that will be forgone if litigation over the ACF continues.

B. *Bargaining Theory*

Most scholarship on the dynamics of negotiation recognizes that when parties in conflict come to the bargaining table, a negotiated agreement can occur if such an arrangement would be Pareto-superior to a nonnegotiated outcome (usually litigation).[195] That is, such an outcome would leave each party at least as well-off as it would be if no agreement were reached. The descriptive aspect of bargaining theory explores why such beneficial agreements may not be consummated; its normative dimensions suggest ways in which parties or nonparties interested in the negotiation may promote agreement.[196]

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[194] Office of Water Resources, Alabama Department of Economic and Community Affairs, *Alabama-Coosa-Tallapoosa River Basin Compact Draft Water Allocation Formula of May 1, 2003 Frequently Asked Questions (FAQ) List* 9 (May 1, 2003), *available at* http://www.actcompact.alabama.gov/pdfs/20030501%20-%20ACT%20FAQ%20Sheet.pdf.

[195] *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979) (In discussing negotiation among divorcing parents, Mnookin and Kornhauser note that "[t]he range of negotiated outcomes would be limited to those that leave both parents as well off as they would be in the absence of a bargain."); Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003). A corollary is that *only* Pareto-efficient agreements will emerge from negotiations between two rational parties because each party must consent. For multiparty negotiations, negotiated outcomes are guaranteed to be Pareto-efficient only if parties must be unanimous in their acceptance of an agreement—as is the case with interstate compacts like the ACF. However, the dynamics of negotiation may be significantly more complicated in multiparty negotiations. *See generally id.* at 3–4.

[196] *See generally* Mnookin, *supra* note 195.

A central insight of bargaining theory is that in most cases negotiations are conducted "in the shadow of the law"—that is, the law that governs the expected outcome should negotiations fail heavily influences the course of negotiations themselves. One commentator recognized the importance of such "shadow" negotiations, choosing to study how "the rules and procedures . . . for adjudicating disputes affect the bargaining process that occurs between [parties] *outside* the courtroom."[197]

In other words, background law affects the parties' assessments of what they stand to gain from negotiation.[198] Bargaining theory counsels that parties should begin negotiations with some concept of what they can hope for if negotiation falls through—their Best Alternative To a Negotiated Agreement, or BATNA.[199] If at some point a party realizes that the only possible negotiated outcomes are inferior to its BATNA, that party should walk away from negotiations.[200] In the context of legal disputes, the expected payout of alternatives such as litigation (minus the associated transaction costs) will determine a party's BATNA.

This aspect of the theory should hold true in all bargaining situations. Not all negotiations are created equal, however, and bargaining theory offers several ways in which to distinguish types of negotiations.[201] One useful distinction is between "distributive"

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[197] Mnookin & Kornhauser, *supra* note 195, at 951 (emphasis in original). With respect to water conflicts, Tarlock suggests that Supreme Court doctrine influences the course of political debates over water allocation. Tarlock, *supra* note 92, at 382–83.

[198] There are other ways in which background law may affect the course of negotiation—for example, by forbidding private parties from making certain kinds of agreements—but expectations of gain are most relevant in these circumstances. *See* Mnookin & Kornhauser, *supra* note 195, at 952–56 (discussing legal limitations on the range of agreements divorcing spouses may enter into).

[199] *See, e.g.*, ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–107 (2d ed. 1991); Mnookin, *supra* note 195, at 5; Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1794–97 (2000).

[200] Imagine, for example, two parties negotiating a settlement to a personal injury lawsuit. If the plaintiff expects that if the case went to trial she would win $50,000 after attorney fees, then she should reject any settlement offer of less than that amount ($50,000 is the plaintiff's Best Alternative To a Negotiated Agreement (BATNA)). If, on the other hand, the defendant expects a jury award of $100,000, then he should be willing to offer up to that amount (plus his own litigation costs) to avoid going to trial. FISHER ET AL., *supra* note 199, at 98–100.

[201] *See, e.g.*, GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 18–40 (1983) (distinguishing cooperative from competitive bargaining);

and "integrative" bargaining.[202] Distributive (or "allocative") bargaining focuses on the *allocation* of finite resources or benefits[203] and typically is characterized in part by the parties' less than full candor with each other as to their respective preferences, resources, interests, and alternatives to bargaining.[204] Integrative bargaining, by contrast, focuses on the *creation* of value in negotiation. Theory suggests that parties can facilitate value creation by focusing on the underlying needs and interests of the parties, rather than on the parties' stated negotiating positions.[205] This requires that parties be capable of understanding and prioritizing (at least in some rough way) their own interests.[206] There are several potential sources of value creation in negotiations: differences between the parties in terms of resources, preferences, and expectations; shared goals or interests; and economies of scale and scope.[207]

The first potential source of value creation, differences among the parties, is of the most significance in the context of the ACF/ACT conflict. When parties attach different values to the items under negotiation, they may trade some they value less for

Korobkin, *supra* note 199, at 1789–92 (distinguishing zone definition from surplus allocation).

[202] *See, e.g.*, Mnookin, *supra* note 195, at 12; ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 9–43 (2000); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33, 131 (1982); Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 370 (1996). For a criticism of the purported dichotomy between distributive and integrative bargaining, see Korobkin, *supra* note 199, at 1791.

[203] Gary Goodpaster, *Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error*, 8 OHIO ST. J. ON DISP. RESOL. 299, 301 ("In competitive or distributional bargaining, parties compete or fight over presumed fixed sums or positions to get the most for themselves out of a deal—'to win.'").

[204] Mnookin, *supra* note 195, at 13. If one party knows the other's BATNA, for example, it knows exactly how much of the distributed resource it can insist on before the other party walks away from the table.

[205] *See, e.g.*, Goodpaster, *supra* note 203, at 307–08; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795–801 (1984). The interest-position distinction is one of the fundamental insights of proscriptive bargaining theory. *See* FISHER ET AL., *supra* note 199.

[206] Menkel-Meadow, *supra* note 205, at 803–04.

[207] Mnookin, *supra* note 195, at 12–13. Mnookin also cites the cooperative reduction of transaction costs as a potential source of created value. *Id*. at 13; *see also* Goodpaster, *supra* note 203, at 307–08; Menkel-Meadow, *supra* note 205, at 795.

others they value more (and that the other party values less), creating a surplus.[208] Such opportunities for "logrolling" are more prevalent in complex, multithreaded negotiations like those concerning the ACF. However, the process of identifying and evaluating one's preferences in such a context may be daunting. This kind of trading would require that parties be able to decide which interests are most important to them, and which interests they are willing to compromise on.

Almost all negotiations have both integrative and distributive aspects. In the ACF/ACT negotiations, as in many other contexts, some of the parties' interests are compatible in the sense that they may be traded against one another to create a surplus, while other interests are so closely related as to preclude such trading; the value of these interests may only be allocated among the parties through a process of distributive negotiation.[209] For example, negotiators could have capitalized on Florida's expressed preference for timing over quantity in the release of water from upstream dams (and Georgia's probable preference for quantity over timing) to create a surplus. On the other hand, consumptive upstream uses like municipal water supply conflict directly with consumptive downstream uses such as agriculture, so that any direct bargaining between the proponents of these two interests is likely to be distributive, rather than integrative.

There is a fundamental tension between the tasks of value creation and value distribution, a tension driven primarily by information.[210] To identify potential sources of value, parties must have accurate information about each other's preferences and opportunities. However, disclosing such information during integrative bargaining may compromise one's position in distributive bargaining over the additional surplus that emerges, especially if the other party is not equally forthcoming with

[208] Mnookin identifies five types of differences that may be exploited to create value: differences in resources, relative valuations, forecasts, risk preferences, and time preferences. Mnookin, *supra* note 195, at 12; *see also* Goodpaster, *supra* note 203, at 302 ("The discovery that the parties have common or complementary interests creates possibilities of mutually beneficial joint action."); Menkel-Meadow, *supra* note 205, at 800 n.171.

[209] See Moore, *supra* note 7, at 8 (discerning "two types of stakeholders" in the ACF/ACT negotiations: "those who promote their interests in compatible technical terms and those who do not").

[210] Mnookin, *supra* note 195, at 13.

information.[211] This reluctance to disclose can result in many forgone opportunities for the creation of value, and may reduce the payoffs to the parties so much that negotiation is no longer profitable.

C. Impediments to Negotiation

Despite the common interests strongly favoring accommodation, the states were unable to reach agreement on an allocation formula, and Florida, at least, ultimately decided that a mutually beneficial agreement would be impossible. This Section will explore from the standpoint of bargaining theory what, aside from their obvious conflicting interests, might have prevented a profitable agreement from being reached.

Significant problems arise from the quality and scope of the information available to the parties in bargaining. This includes not only current factual and legal information, but also information about the parties' own interests and the interests of the other parties, the parties' evaluation of those interests, and information about possible negotiated and nonnegotiated outcomes.

1. *Identifying the Interests at Stake*

a. *Assessing the Parties' Own Interests*

To bargain effectively and identify opportunities for mutual gain, a party must understand the issues under consideration and the interests it has at stake.[212] It must also have some way of prioritizing its interests so that it can make the often difficult decision to compromise some goals in order to advance others.[213]

Although understanding one's own interests in a technically complex situation like a water allocation dispute is no mean feat, the states had available (thanks in part to the Joint Comprehensive Study and the efforts of the Corps) a great deal of data to help identify and quantify the economic interests at stake. Other interests less amenable to quantification, such as ecological and cultural interests, were also considered in the study and by the

[211] *See id.* at 13; *see also* Goodpaster, *supra* note 203, at 306. For example, during the ACF negotiations, Alabama accused Georgia of presenting "positional" information when it presented its computer models of river flows, reservoir levels, and future water demands. Moore, *supra* note 7, at 8.

[212] Goodpaster, *supra* note 203, at 308.

[213] *Id.* at 337–38.

states.[214] Where the parties ran into the most difficulty was in prioritizing those interests. The states ran into more difficulty, however, in prioritizing the interests of their constituencies.

Theories of agency help to explain the nature of these problems, which can arise whenever the interests of an agent diverge from those of the principal it represents. Those problems may be especially intractable when an agent represents multiple principals with conflicting interests.[215] In negotiations, as in other regulatory contexts, defining and prioritizing the interests of multiple principals may be extraordinarily difficult, especially when the power dynamics among those principals change over time.[216] Without an effective and equitable means of resolving conflicts among principals, the negotiating agent may be unable to choose among the principals' interests, resulting in the refusal of potentially acceptable settlement offers, or it may seek or accept outcomes that inequitably represent the interests of some principals at the expense of others.

Georgia suffered from just such problems during negotiations. Many observers claimed that the state's ACF delegation, nominated by Governor Roy E. Barnes (generally perceived to be more responsive to Atlanta's interests in the dispute), was negotiating on behalf of Georgia, with little regard for the interests of other in-state parties.[217] Over the course of negotiations, the Georgia delegation remained steadfast in its refusal to allow any controls over consumptive use in the upper basin.[218] More tellingly, while the allocation formula was still under negotiation, the state of Georgia not only participated in collateral negotiations

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[214] *See* DRAFT EIS, *supra* note 9, at 1-11, 4-137 to 4-189, 4-252 to 4-260.

[215] *See* Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 131 (2002).

[216] *See* Murray J. Horn & Kenneth A. Shepsle, *Commentary on 'Administrative Arrangements and the Political Control of Agencies': Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 502 (1989) (discussing McClubbin, Noll, and Weingast's study on implications of conflict of interests on the administrative process).

[217] *Sherk Testimony*, *supra* note 8 ("With regard to the management and allocation of water resources within the state of Georgia, the Atlanta metropolitan area is the proverbial eight hundred pound gorilla."); Hardin, *supra* note 140; Barr-Perdue Letter, *supra* note 73.

[218] Donna Adams, *Water Battle Returns to Court*, *supra* note 4; Seabrook, *supra* note 71.

with the Corps and SeFPC on withdrawals from Lake Lanier,[219] but also filed suit to compel the Corps to disburse to Atlanta municipalities the waters of Lake Lanier[220]—the same waters, observed Georgia Representative and House Assistant Majority Whip Bob Barr, which were to be allocated under the ACF Compact.[221] And when the City of LaGrange and Troup County, Georgia, both downstream from Atlanta, intervened along with Florida and Alabama to block the SeFPC settlement, Governor Perdue in retaliation blocked a million-dollar EPA grant for watershed protection on the middle Chattahoochee River, despite the fact that Georgia successfully rebuffed the legal challenge.[222]

On the other hand, other groups of stakeholders—those representing Lake Lanier property owners, for example—also proved surprisingly effective in getting their interests represented in the negotiations.[223] Georgia Senator Sam Nunn described the state delegation as divided on the issue of disbursements from Lake Lanier.[224] It thus might be more accurate to describe the Georgia delegation as sharply divided over its own interests, rather than merely Atlanta-dominated.[225]

Unfortunately, neither the compacts nor the state government provided a way for Georgia stakeholders to resolve publicly their differences before bringing them into the tri-state negotiations; rather, these disputes were hashed out either in the contentious context of the commission meetings or in the later, closed-door negotiations of the commissioners and state governors.[226]

In any event, Georgia found itself unable to accept proposals that would impose limits on the consumptive use of water by

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[219] *See supra* Part I.D.

[220] Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691 (N.D. Ga. 2004); *see also* Ritchie, *supra* note 79; Shelton, *supra* note 79; Shelton, *supra* note 3; *supra* Part I.D.

[221] *See* Barr-Perdue Letter, *supra* note 73, at 6.

[222] *See* Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691; Ritchie, *supra* note 79; Stacy Shelton, *City Pays Price for Defying Perdue: Governor Kills $1 Million EPA Grant to Columbus for Opposing His Position in Water Wars*, ATLANTA J.-CONST., Feb. 11, 2004, at A1, 2004 WL 68883693; *see also* Barr-Perdue Letter, *supra* note 73.

[223] Hardin, *supra* note 140.

[224] Teegardin, *supra* note 20.

[225] *See* Charles Seabrook, *Three States Near Showdown*, ATLANTA J.-CONST., Sept. 9, 1996, at B7.

[226] *See infra* note 233 and accompanying text.

metro Atlanta—proposals that, while they might benefit downstream users disproportionately, would unquestionably benefit the entire state by avoiding the cost and uncertainty of litigation. Whether this position reflected the "real" interests of the state of Georgia, the parochial interests of Atlanta, or the simple inability to come to consensus on the issues that were most important to the delegation, is open to speculation.

Another form of agency problem arises from the tendency of public officials to avoid making politically painful policy decisions. As discussed, successful negotiations often require the parties to sacrifice some goals in order to obtain others they value more highly. For an elected official representing multiple constituencies—for example, a Georgia state official negotiating on behalf of both Atlanta municipal water suppliers and in-state hydropower companies—this may mean "selling out" one constituency in order to satisfy the demands of another. Although such sacrifices may be necessary to consummate a settlement that would result in the greatest collective benefit to the official's constituency, if the negotiator judges the political cost of making the trade-off to exceed the political cost of failed negotiations, the negotiator may refuse to accept such a trade-off.

One strategy for an official unwilling to make such sacrifices may be to prolong negotiations, either in the hope that some breakthrough on another front might lead to resolution of the conflict, or (in the case of elected officials or political appointees) that difficult trade-offs might be deferred until his or her term of office had passed. Judging by the repeated deadline extensions approved for the ACF and ACT compact negotiations, it would not be unreasonable to suspect that some officials might have been interested in prolonging negotiations as long as possible. However, indefinite delay is itself costly if the public sees negotiators as indecisive, inefficient, or—worse—uninterested in resolving the problem.

A negotiator not willing to delay resolution indefinitely but equally uninterested in "selling out" any of his or her constituencies may instead try to "hide behind the robes of the court"—in other words, to shift responsibility for imposing unpalatable sacrifices onto the courts. In doing so, the official may reduce the cost of failure in negotiations by blaming the breakdown on the other side's "refusal to deal" (even though a mutually beneficial offer might be on the table), and by pledging to

continue the fight in the courts. This kind of behavior may be observed (or at least imputed) in a wide variety of contexts.[227]

In the context of the ACF/ACT conflict, where the threat of litigation has always cast a shadow on negotiations, this strategy might be especially favorable.

b. *Understanding Other Parties' Interests*

For parties to propose solutions that involve beneficial trades, the negotiators must also have some concept of what the other parties' interests are,[228] so that they may exploit differences between parties for mutual gain.[229] In this case, the public and open process by which the allocation agreements were negotiated initially may have inhibited the parties' understanding of each other's interests. The terms of the compacts dictated that all meetings of the compact commissions be open to the public,[230] a situation which Georgia negotiator Bob Kerr, Director of the Pollution Prevention Assistance Division of the state's Department of Natural Resources, described in 1999 as "probably one of the most insane ways to do negotiations that you could ever hope to talk about. . . . [A]t any given time there may be as many as 50 to 150 stakeholder groups or representatives of stakeholder groups in the audience hanging on to every word we say."[231] The presence of so many stakeholders at a tri-state meeting, Kerr asserted, reduced meetings to "statement[s] of positions" rather than considerations of interests, and hindered the ability of the negotiators to probe their differences.[232]

The parties did take steps to rectify this: eventually, the state delegations opted to conduct closed-door negotiations, including several rounds of private mediation.[233] Draft allocation

[227] *See, e.g.*, Editorial, *Make Fall Election a Bridge Referendum*, ALBUQUERQUE J., Aug. 10, 1995, at A16, ProQuest Doc. ID 65439411 (accusing local officials of avoiding resolution of a difficult political controversy regarding construction of a bridge and of instead allowing, by default, a court to determine the outcome).

[228] Korobkin, *supra* note 199, at 1797–99.

[229] Goodpaster, *supra* note 203, at 307–08; *see also supra* Part III.B.

[230] ACF Compact, *supra* note 52, arts. VI(f), XI.

[231] Interview by Joshua Azriel with Bob Kerr, Director, Pollution Prevention Assistance Division, Georgia Department of Natural Resources (June 1999), *at* http://www.wuftfm.org/rivers/ikerr.html.

[232] *Id.*

[233] *See* Press Release, Florida Department of Environmental Protection,

agreements were submitted for public notice and comment. Although these proceedings resulted in additional memoranda of understanding[234] and many public statements by the negotiators that they were close to reaching agreement, they drew substantial criticism about the exclusion of the public from the process, and ultimately failed to generate consensus.[235]

2. *Assessing Negotiated Outcomes*

A second informational, impediment to negotiation arises when parties lack full information about the value of proposed agreements. Such uncertainty may lead a risk-averse party to discount the value of such alternatives, making it less likely they will be accepted.[236] Furthermore, when parties are engaged in allocative bargaining and a proposal of uncertain value is on the table, a "hard bargainer" (one interested in capturing as much of the surplus as possible) is likely to take a position that understates the value of the proposal to itself, and overstate its value to other parties.

Reducing uncertainty can reduce transaction costs and opportunities for strategic behavior, increasing the prospects for successful negotiations.[237] There were at least two sources of significant uncertainty in evaluating possible outcomes of the

Florida, Georgia, Alabama Resume ACF Negotiations (May 8, 2001) (on file with journal); *see also* Sherk, *supra* note 7, at 811 n.221; Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 105 (2000). The ACF Compact provides for mediation to resolve disputes over compliance with an allocation formula, but not to resolve conflicts over the formula itself. *See* ACF Compact, *supra* note 52, art. XIII(a).

[234] *See* Linda Sanders, *Governors Adopt Memo on Water*, POST-SEARCHLIGHT (Bainbridge, Ga.), July 25, 2003, www.thepostsearchlight.com.

[235] *See* Jason Landers, Editorial, ROME NEWS-TRIBUNE, Feb. 15, 2000 (on file with journal).

[236] A simple illustration of this concept is the old game show, *Let's Make a Deal*, where a contestant is given a choice between a known, moderately valuable prize (a dinette set, for example), and another prize remaining hidden behind Door Number 2. That prize is either a new car or a donkey in a top hat. A risk-averse contestant is more likely than a risk-neutral one to choose the prize in hand because he doesn't like to gamble. A risk-preferring contestant, on the other hand, is more willing than a risk-neutral one to gamble on the possibility of getting the car. This characterization is admittedly reductive, but conveys the important point that risk-neutral actors tend to choose more modest but certain returns over greater but uncertain ones. A variety of factors beyond individual personality affect risk preferences.

[237] *See* Goodpaster, *supra* note 203, at 319.

ACF/ACT negotiations: factual uncertainty about the future effects of the proposed allocation formulas, and uncertainty about the extent of federal claims on the waters of the basin.

a. *Factual Uncertainty*

The complex physical dynamics of the ACF and ACT river basins and the difficulty of modeling the effects of various allocation formulas decades into the future created tremendous factual uncertainty in negotiations.[238] In addition to obscuring the parties' judgments of the relative values of these plans, nominally factual disputes about the basin appear to have been stalking horses for simple disputes over who would be entitled to the benefits of the river.

Factual disputes figured prominently in the public rhetoric of the negotiations. For example, when Georgia first sought to withdraw water from Lake Lanier, it publicly claimed that its withdrawals would have no negative impact downstream, despite Florida's protestations to the contrary.[239] In the final stages of negotiation, Alabama also disputed Florida's claim that minimum flow conditions advanced by Alabama and Georgia would actually harm Apalachicola Bay.[240]

Atlanta's resistance to water conservation may also have been a means of preserving factual uncertainty for strategic ends. If it could be demonstrated that conservation would reduce significantly Atlanta's consumptive needs, the city's demands for extensive water withdrawals would become far less tenable both in interstate negotiation and any apportionment litigation. If, on the other hand, the effectiveness of conservation remains undemonstrated, Atlanta can stake out larger claims now and implement conservation measures after securing those claims, ensuring itself a more comfortable surplus down the road. It is impossible to know whether these factual disputes were genuine or strategic, but the states clearly seemed less interested in resolving factual disputes than in preserving them for strategic advantage.[241]

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[238] See *Gingrich Testimony*, *supra* note 53, at 101 (responses from Newt Gingrich to questions from Representative Barr).

[239] Teegardin, *supra* note 136.

[240] Mahlburg, *supra* note 12.

[241] Note that Atlanta's position on certain water conservation measures has changed substantially in the last few years, as it has aggressively attempted to comply with 1998 and 1999 consent decrees mandating improvements to its

Although the Comprehensive Study went a long way towards resolving factual uncertainties before the compact negotiations started,[242] it left significant factual questions unanswered, and the states were criticized for resisting the development of better information so as to advance their own interests. The water demand modeling technologies in use by the parties differed so much that in mid-2002, the Corps of Engineers presented data suggesting that water use in metropolitan Atlanta during 1999 and 2000 actually exceeded expected water use for the year 2030, and that demand would continue to increase by sixteen million gallons per day per year. The Georgia State Environmental Protection Division, relying on different models, disputed that conclusion and asserted that "everything is on track for meeting the 2030 water demands."[243]

Speaker Gingrich, instrumental in the development and ratification of the original compacts, excoriated the states for their refusal to adopt newer and more refined techniques for modeling the river basin and their continuing use of older, less accurate computer models whose results were more useful to them in negotiations.[244] Said Gingrich in December 2001 testimony before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law:

> [O]ne of the more disappointing aspects of the last 4 years has been the failure, in parallel with the negotiations, to develop the database [with which to model the effects of water allocations on the ACF basin]. There does not exist today a modern database and a modern model of one of the most important river systems in the United States . . . .
>
> So if the Federal Government would decide tomorrow morning to intervene, it would not have dramatically better information than we had back in 1997.[245]

Speaker Gingrich's suggestions were never implemented, however, and factual uncertainties remained a significant barrier to agreement throughout negotiations.

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water and sewer infrastructure. *See infra* Part IV.D.

[242] *See supra* Part I.A.

[243] Charles Seabrook, *Atlanta Comes Up Dry in Bid for More Water*, ATLANTA J.-CONST., May 26, 2002, at A1, ProQuest Doc. ID 121668748.

[244] *Gingrich Testimony*, *supra* note 53, at 101 (responses from Newt Gingrich to questions from Representative Barr).

[245] *Id.* at 70.

b. *Uncertain Federal Claims on the River*

Another source of persistent uncertainty was the extent of federal claims on the waters of the basin. Although the federal government was not, strictly speaking, a party to the apportionment negotiations, it has substantial claims on these waters, the extent of which remains unclear. The primary source of these claims is statutory. A staggering number of federal laws regulate the waters of the ACF basin; many of them have the practical effect of removing some amount of water from that available for use by the states.[246] For example, section 9 of the Endangered Species Act, which renders unlawful the "taking" of a listed species within the United States or its territorial waters, would limit the ability of municipalities along the river basin to withdraw water for consumptive use if such action would harm an endangered animal species.[247] This amounts to a federal reservation of certain waters for the preservation of endangered species and their habitat.

Cognizant of these likely federal demands on the river, the state representatives negotiating the original compact attempted to draft it so as to circumvent these demands. Early drafts of the ACF and ACT compacts provided that the allocation formulas developed by the states under the compacts would trump conflicting federal law, including environmental protection laws.[248] These drafts were rejected by Attorney General Janet Reno and other federal officials who reviewed them on the grounds they would be unacceptable to Congress, and arguably unconstitutional.[249] Under the version of the compacts ultimately

[246] Some of these laws have already been alluded to: federal support for navigation on the Apalachicola River is authorized by the Rivers and Harbors Acts and Flood Control Acts, while the Federal Power Act may subject private hydropower generation facilities in the basin to the authority of the Federal Energy Regulatory Commission. *See generally* Sherk, *supra* note 7 (discussing array of federal law that must be taken into consideration in ACF river basin); *see also Sherk Testimony*, *supra* note 8. Among the other federal laws regulating the water of the basin are the Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, Fish and Wildlife Coordination Act, and Coastal Zone Management Act.

[247] See DRAFT EIS, *supra* note 9, at 4-174.

[248] *Sherk Testimony*, *supra* note 8; Hawk, *supra* note 18, at 52.

[249] *See* Letters from Janet Reno, Attorney General, to Lawton Chiles, Governor of the State of Florida, to Zell Miller, Governor of the State of Georgia, and to Fob James, Jr., Governor of the State of Alabama (Jan. 9, 1997) (on file with journal).

enacted, allocation formulas approved by the states would require federal approval, and in any event could not override existing federal law.[250]

Even though the terms of the newly passed compacts required federal approval, state negotiators tried to exclude federal officials from closed-door meetings at which allocation formulas were negotiated.[251] This was not the intent of the members of Congress who facilitated the formation of the compacts. According to Speaker Gingrich:

> It was also our intent . . . for the Federal commissioners and the Federal Government to be intimately involved in the entire process . . . and not to simply be the recipient of State political maneuvering.
>
> And let me say . . . I think the three States have consistently fallen below the mark. I think this is—this entire process has been a process of politicians seeking to protect development, seeking to protect the interest of each State in a parochial manner.[252]

Some commentators characterized the early drafts of the compacts and the subsequent exclusion of federal officials from negotiation as irresponsible attempts to circumvent federal authority and avoid environmental regulation.[253] There is likely some truth to this characterization; however, in addition to reducing the magnitude of federal claims on the river, the state negotiators might more charitably be said to have been trying to reduce *the uncertainty* of those federal claims, so that negotiators could better understand the effects of proposed solutions. The states' disinclination to work with the many federal officials involved in negotiations casts doubt on this characterization. However, this alternative characterization of the states' actions highlights the fact that reducing the uncertainty of federal regulatory claims to the extent possible could, like reducing factual

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[250] *See, e.g.*, ACT Compact, *supra* note 52, arts. VII(a), X(a).

[251] *Gingrich Testimony*, *supra* note 53, at 99 (responses from Newt Gingrich to questions from Representative Barr).

[252] *Gingrich Testimony*, *supra* note 53, at 16.

[253] *See, e.g.*, *Sherk Testimony*, *supra* note 8, at 51–54. According to Newt Gingrich, "The States have acted in a parochial manner in this process and have attempted to rescind Federal Agency authority." *Gingrich Testimony*, *supra* note 53, at 97 (responses from Newt Gingrich to questions from Representative Barr); *see also* Sherk, *supra* note 7.

uncertainty, reduce transaction costs and strategic behavior and substantially improve the prospects of a negotiated agreement.

3. *Bargaining in the Shadow of the Law: Understanding the Fallback Position*

Even if the parties fully understand the expected value of proffered solutions, to be able to accept or reject them (and to know how hard they can "push" their own proposals), the negotiating parties must have reasonably accurate conceptions of what their respective fallback positions are. In contexts where litigation or other legal intervention is the likely result of a failure to agree, a party's BATNA is the expected value of that outcome to the party. It follows that changing background law (or merely changing a party's assessment of it) can change bargaining behavior.

When parties have inconsistent ideas about what the nonnegotiated outcome will be, this may unduly limit the range of possible negotiated outcomes. For example, if two parties to a dispute each overestimate their chances of success in court, they may fail to reach a negotiated solution that is in reality better for both, because each thinks his or her BATNA is better than what the other party is offering.[254] There is evidence that parties in such situations routinely overestimate their odds of success.[255]

In the case of the ACF/ACT compacts, the most obvious fallback outcome is an equitable apportionment by the Supreme Court. The value of such an allocation to the parties must factor in the delay and cost of litigation, as well as the uncertainty of the outcome. In any event, it is entirely uncertain that the Supreme Court would even exercise jurisdiction over the conflict.[256] From the standpoint of downstream states, such refusal could be

[254] This might be thought of as narrowing the "bargaining zone." The bargining zone contains the range of outcomes in which all parties benefit compared to not reaching an agreement, the distance between each party's reservation point at which each party will walk away (usually defined by reference to its BATNA). *See* Korobkin, *supra* note 199, at 1792–94, 1798–99.

[255] *See* Vilhelm Aubert, *Courts and Conflict Resolution*, 11 J. CONFLICT RESOL. 40, 44 (1967); Korobkin, *supra* note 199, at 1798; Mnookin & Kornhauser, *supra* note 195, at 975 ("[I]t has been suggested that litigants typically overestimate their chances of winning."); *see also* George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993).

[256] *See supra* Part II.A.3.

disastrous; for Georgia, it would be a mixed blessing.

Clearly, Georgia, like its neighbors to the south and west, would benefit from the (relative) certainty and stability of a judicial apportionment, regardless of whether it got all it wanted in the apportionment itself.[257] On the other hand, the uncertainty experienced in the thirteen years since Alabama first sued to enjoin Atlanta's withdrawals from Lake Lanier has not appreciably inhibited growth in Atlanta or north Georgia: from 1990 to 2000, metropolitan Atlanta's population increased by almost forty percent.[258]

Moreover, a long delay before a judicial allocation might actually be to Georgia's advantage. The longer the delay, the larger Atlanta will grow and the more water Georgia will appropriate from the ACF and ACT basins—especially if, as seems to be the case, Atlanta's refusal to implement large-scale water conservation measures continues. This outcome is exactly what Alabama feared when it instituted the 1990 litigation.[259] If Georgia's recent deal with the Corps survives[260] and these increased diversions become the status quo, they may become far more difficult to challenge in court. The Eleventh Circuit Court of Appeals, in allowing the Florida to intervene in Georgia's suit against the Corps of Engineers in the U.S. District Court for the Northern District of Georgia, recognized this possibility:

> [E]ven if no vested right under the Compact is achieved pursuant to this lawsuit, there exists the possibility that . . . the three states will remain at an impasse regarding the allocation of water. In that event, should Georgia prevail in [compelling the Corps to disburse water from Lake Lanier for Atlanta municipal water supply], any negative impact upon the Apalachicola resulting from increased withdrawals from Lake Lanier would continue unabated for the duration of the impasse. . . . Thus, the disposition of this action could impair or impede Florida's interests until such time, if any, that the

[257] *See supra* Part III.A.4 (discussing Georgia's need for long-term planning).

[258] CensusScope, Census Trend Charts: Population Growth—Atlanta, GA (analyzing 2000 census data), *at* http://www.censusscope.org/us/m520/chart_popl.html (last visited Feb. 1, 2005).

[259] *See* Complaint ¶¶ 18-21, Alabama v. U.S. Army Corps of Eng'rs (N.D. Ala. 1990) (Civil No. 90-1331).

[260] *See supra* Part I.D.

parties reach agreement under the Compact.[261]

Another potential outcome, however, would be a congressional allocation of the waters of the basin. In the unlikely event such an allocation did occur, it is foreseeable that Florida would fare better than Georgia or Alabama. Atlanta may be the dominant figure in the ACF conflict, but Florida is a much more populous state than Georgia, with considerably more power in the House of Representatives. Moreover, members of Congress from south and west Georgia would be unlikely to advance the interests of Atlanta at their constituents' expense in the House. If Florida representatives from outside the Panhandle could be convinced to exercise their influence on behalf of Apalachicola, it is unlikely that a congressional allocation would fail to reflect Florida's interests.

However, members of Congress have given every indication that they do not wish to intervene in the conflict. Such clear signals of noninterference could only have induced Georgia to raise its estimated BATNA—and appropriately so, if these signals represent genuine congressional refusal to intervene in the dispute. If, on the other hand, these public signals understate Congress's willingness to intervene in the dispute, they could actually undermine prospects for agreement.

In considering the genuine prospects for congressional allocation, it is worth noting that the one deliberate congressional allocation of interstate waters, the Truckee-Carson-Pyramid Lake Act,[262] followed a failed interstate compact and an equitable apportionment suit rejected by the Supreme Court.[263] The allocation codified in that case was based on prior judicial decrees as well as an allocation plan devised but disputed by the interested states.[264] It is thus conceivable that Congress could build on the draft allocations proposed by Alabama, Florida, and Georgia, and make essentially political decisions with respect to the major issues of contention in the negotiations.[265] If the ACF/ACT

[261] Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1253 (11th Cir. 2002).

[262] *See supra* Part II.B.

[263] *See* United States v. Nevada & California, 412 U.S. 534 (1973).

[264] *See* Sherk, *supra* note 7, at 817–18 (describing the Truckee-Carson-Pyramid Lake conflict and resolution).

[265] This prospect was discussed in Subcommittee hearings on the subject. *See Gingrich Testimony*, *supra* note 53, at 70 ("So presumably the Federal

dispute were resolved on the floor of Congress, there would also be more opportunities for "log-rolling" with respect to other areas of interest to the states—areas outside the limited purview of the compact commissions.[266] This ability to "log-roll" would do little to solve to problem of attracting attention from legislators representing constituencies outside the region, but it might help alleviate the "politician's problem": to the extent a politician from the area would lose political capital by making hard decisions or needed sacrifices in negotiation, she could rebuild support with other constituencies by bringing home concessions on other issues.[267]

In sum, although a congressional allocation might be the most definitive way to address the conflict, given the considerable disincentives of individual legislators to intervene,[268] it is unrealistic to expect such an intervention.

IV. WHAT COULD BE DONE?

Some of the major barriers to a negotiated solution having been identified, the final Part of this Note will discuss ways in which state and federal actors could have helped to bring the states to agreement on an allocation formula. With the demise of the compacts, and the renewed litigation of the controversy, some of these options may no longer be feasible. Others might be available, however, and any of them could bear on future interstate water conflicts.

Although these measures may differ significantly in their

Government could impose—now whether you could get the three State delegations to agree to something which the three States don't agree to is a different issue.").

[266] This might not be the most democratic way to do things, but it would facilitate the resolution of the dispute. See Edwin Haefele, *A Utility Theory of Representative Government*, 61 AM. ECON. REV. 350 (1971) for a (somewhat abstract) discussion of the advantages of log-rolling and "vote-trading."

[267] Again, this is arguably not the most democratic way to solve water conflicts. *See* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997) (discussing the conflict between long-term contracts by governments and democratic principles). However (as Chancellor Bismarck suggested), "the making of laws, like the making of sausage, is something from which the fastidious person would often be well advised to avert his or her gaze." Jung v. Ass'n of Am. Med. Colls., 339 F. Supp. 2d 26, 40 (D.D.C. 2004).

[268] *See supra* Part II.B.

effect on the substantive outcome of negotiations (i.e., the allocation plan agreed upon) and on the future management of the river basin,[269] this discussion will focus on less on substantive outcomes and more on strategies for dealing with the dynamics of negotiation. It will also attempt to provide recommendations for fostering productive negotiations and consensus-based solutions among the states, rather than imposing a federal resolution over their objections.

A. *Help the Parties Understand and Evaluate Their Interests*

As discussed in Part III.A, integrative bargaining and the acceptance of beneficial agreements require a reasonable understanding of all the parties' interests. In this respect, the process by which the parties tried to negotiate an ACF allocation formula was less than ideal. Most of the burden for understanding and prioritizing their own interests necessarily lies with the states, but there are some measures federal actors could take to facilitate this.

Georgia's ACF delegation clearly faced significant problems balancing the conflicting interests of in-state stakeholders. The negotiations presumably would have benefited from Georgia having some institutionalized way to resolve those intrastate conflicts before bringing them to the Commission meetings.[270] It would clearly be for the states to set up such intra-state mechanisms—there is probably little that federal actors could do in this respect aside from providing resources and guidance.

Unfortunately, there may be a strong disincentive to any state's setting up such a mechanism. Making substantive decisions with respect to the prioritization of interests (as opposed to just "clearing the air") in a public forum might reveal too much about a state's interests to other parties, yielding a strategic advantage to a state's adversaries in the distributive phase of negotiation.[271] For

[269] A substantial body of scholarship exists on the pros and cons of various means of federal intervention, with respect to the ACF/ACT issue and water allocation conflicts in general. *See, e.g.*, Muys, *supra* note 124; Sherk, *supra* note 7.

[270] "Resolve" may be too strong a word: any decision the delegation made with respect to the balancing of intrastate interests would undoubtedly have been unsatisfactory to some stakeholders, who would presumably bring their unresolved concerns to the public meetings of the tri-state commission.

[271] *See supra* Part III.B.

example, for Georgia officially to acknowledge in an intrastate proceeding that upstream municipal and industrial uses would take priority over downstream agricultural ones would impede Georgia's ability to stake out initial (strategic) positions claiming that the state needed additional water for agriculture. Furthermore, from a practical standpoint, state elected officials who acknowledge to their constituents that sacrifices will have to be made in negotiations are likely to lose their positions to candidates who claim, however unrealistically, that they can guarantee the interests of in-state stakeholders.[272]

Alternatively, federal actors could opt to change the dynamics of negotiation entirely. Many commentators have suggested, as an alternative to an ACF-style interstate compact, a "federal-interstate compact" along the lines of the Delaware River Basin Compact.[273] Unlike the federal representative in the ACF Compact, who was empowered only to veto proposed allocation formulas on narrow grounds of conflict with federal law, the federal representative on the DRBC Commission fully participates in commission meetings and has voting power equal to that of the state commissioners.[274] This federal representation allows the DRBC Commission to take on regulatory powers that expand far beyond the negotiation and implementation of a single allocation formula, which is what the ACF is charged with.[275] In essence, the DRBC Commission provides a forum in which stakeholders can represent their own interests without mediation by their state's negotiating authority, and the attendant agency problems.[276] There may be significant obstacles to the adoption of a federal-interstate compact, however. Especially in the Southeast, a region with a tradition of resistance

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[272] *See supra* Part III.C.3.

[273] *See, e.g.*, CARRIKER, WATER WARS, *supra* note 20, at 11; Erhardt, *supra* note 7, at 224–26; Sherk, *supra* note 7, at 820–26.

[274] *See* Delaware River Basin Compact, *supra* note 36, arts. 2, 11.

[275] The panoply of federal interests on the river, as well as federal agencies' role in managing the waters, makes a commission with broad regulatory powers but no federal representative impossible.

[276] Rather than address problems of agency by modifying the relationship between the agent (the state legislator or negotiator) and its principals (the competing constituencies), the DRBC model breaks that agency relationship entirely, and instead makes the Commission the agent for all of the various constituencies in the basin. Such a regionally oriented body is arguably better suited to dealing with a resource or problem that pays little attention to political boundaries. *See* CARRIKER, WATER WARS, *supra* note 20, at 11; Erhardt, *supra* note 7, at 224–25.

to muscular exercises of federal authority, states may be see the delegation of power over water allocation to a federal-interstate commission as an unacceptable infringement of state sovereignty. Certainly, Georgia's strident resistance to the "micro-management" of its water resources by other parties to the ACF Compact does not bode well for a federal-interstate ACF compact.

B. *Reduce Factual Uncertainty*

With respect to generating information about conditions in the basins, the federal government provided enormous assistance to the states by aiding and partially funding the Joint Comprehensive Study. Despite this assistance, however, significant factual disputes remain with respect to the modeling of future conditions.

Former Speaker Gingrich has also recommended that federal agencies like the EPA and Fish and Wildlife Service build working relationships with the state university systems of Alabama, Georgia, and Florida, all of which devoted considerable resources to generating scientific data about the ACF and ACT basins. Perhaps the most important aspect of this would be the development of a common database and a common method for modeling future conditions in the basin.[277] It might be argued that allowing the states to develop their own models would ultimately provide more accurate information (and generate fewer sovereignty concerns) than federally mandating a single model. However, for purposes of negotiation, the resolution of *conflicts* about information—and the reduction in strategic behavior that might follow—may become as important as the development of objectively more accurate data.

C. *Reduce Legal Uncertainty*

Resolving uncertainties about background law could also reduce strategic behavior and improve prospects for negotiation. Legal uncertainties, however, may prove far more difficult to resolve than factual ones. Because background law has such an influence on the parties' bargaining positions, some legal ambiguities cannot be resolved without direct intervention in the dispute—in other words, resolution of "abstract" legal principles of allocation could be as outcome-determinative as direct

[277] *See Gingrich Testimony*, *supra* note 53, at 102; *Sherk Testimony*, *supra* note 4, at 83–84.

intervention. Increasing legal certainty may thus be helpful for averting future water allocation disputes, but is difficult if not impossible to do in the context of an active dispute like the ACF/ACT conflict.

This is clearly true with respect to the Supreme Court's equitable allocation doctrine. States deciding whether to pursue water litigation in the Court could benefit from a doctrine that provides more guidance to parties with respect to both the conditions required for the Court to take jurisdiction (e.g., the standard of harm that downstream states must show), and the substantive outcomes favored by the court. These are essentially fact-bound inquiries, however, and the Court cannot clarify them too much without compromising the doctrine's flexibility. Moreover, because the Court does not render advisory opinions, it can only develop its jurisprudence by deciding the cases brought before it. Although the ACF/ACT controversy may provide the Court with an excellent opportunity to refine or solidify its equitable apportionment doctrine, clearer doctrine in the future is little help to the parties currently trying to find a negotiated solution to the conflict.

Under the right conditions, however, the Court could pursue another strategy that might help the ACF parties. Rather than develop a complete allocation formula, it could decree a *partial* allocation of the waters of the ACF basin, developing a legal baseline upon which further negotiations could proceed. Such a partial allocation potentially could be achieved by the Supreme Court without the cost and delay of a full apportionment, while affording the states the opportunity to resolve other aspects of the conflict among themselves. However, the Court can only issue such a decree if the litigants ask for it.

There is, however, precedent for such an approach: the first Delaware River Basin Compact was itself formed only after a conflict over the waters of the Delaware basin had already gone to the Supreme Court twice.[278] The Court's resolution of the consumptive rights of New York City thus took that highly contentious issue off the table, reducing the uncertainty under which the parties were negotiating and facilitating agreement on an issue that had vexed the states for decades. And, in the case of the

[278] *See* New Jersey v. New York, 347 U.S. 995 (1954); New Jersey v. New York, 283 U.S. 336 (1931); *see also* Tarlock, *supra* note 92, at 396–97.

Carson-Truckee Act, judicial decrees amounting to partial allocations facilitated congressional resolution of the conflict.[279] A partial allocation in this context could involve establishing Atlanta's entitlement to water from Lake Lanier, as the pre-DRBC litigation established New York City's consumption limits. Such litigation need not take place in the Supreme Court: litigation along the lines of that pending between Atlanta and the Corps might be sufficient.

Admittedly, a unilateral congressional allocation of the waters of the ACF hardly seems the best way to encourage negotiation among interested states. However, as has been discussed, states' perceptions of what Congress is likely to do if negotiations fail may significantly affect their behavior in negotiations.[280]

In his extensive study of the use of interstate compacts in the United States, Joseph Zimmerman observed that the threat of federal regulation has on many occasions spurred the negotiation of interstate compacts.[281] The threat of regulation may provide internal political support for negotiation by state policymakers, lend an additional sense of urgency to negotiators' efforts, or foster a sense of common cause among negotiators—an awareness that, rather than being adversaries, they are engaged in a collaborative effort to prevent federal intervention (to which states are presumably adverse).[282]

Throughout (and even after) the ACF negotiations, members of Congress repeatedly signaled their unwillingness to play any more than a supporting role in the resolution of the controversy, effectively removing any threat of federal regulation.[283] A more productive strategy would be to re-establish the threat of regulation by publicly exploring the prospects of congressional intervention without necessarily endorsing such a solution. At the very least, it would seem advisable that members of Congress not commit themselves to the opposite approach.

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[279] *See* Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155, 158 (2002); E. Leif Reid, Note, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145, 147, 153 (1995).

[280] *See supra* Part II.B.

[281] ZIMMERMAN & WENDELL, *supra* note 42, at 111–33.

[282] *Id.*

[283] *See supra* Part II.B.

D. *Conclusion: Could Negotiations Succeed?*

The ACF and ACT compacts were originally supposed to represent a comprehensive solution to the problem of water allocation in the basins. This Note has attempted to demonstrate that the structure adopted by the compacts was for a variety of reasons insufficient to address the considerable problems of bargaining dynamics that arise when political bodies acting on behalf of multiple constituencies come to the table in an atmosphere of great legal and factual uncertainty. Although there are structural improvements that might be made (for example, the adoption of a federal-interstate compact along the lines of the DRBC), there remains the possibility that in a conflict of this nature, where battles can be fought in a variety of forums (for example, in legislatures, in courts, or in closed-door negotiations with other parties), any single mechanism might be incapable of providing a comprehensive resolution. As long as a party dissatisfied with the results of its efforts in one forum can take the fight to another forum—either by going to the courts, the Corps, or Congress—a comprehensive solution will remain elusive.

Like the settlement worked out by the Corps, hydroelectric power generators, and Georgia and approved by the D.C. district court, any single solution may prove to be "no more than an armistice in a decades-long conflict" over the waters of the ACF and ACT basins.[284] There are some reasons to hope for progress in the ACF/ACT conflict, though. For example, Atlanta (perhaps motivated by the two consent decrees[285]) has in the last few years taken measures to reduce consumptive use and improve the quality of water flowing downstream. Under the leadership of Mayor Shirley Franklin (who took office in 2002), the city has committed to a $3.2 billion overhaul of its water and sewer infrastructure, which will reduced waste and decrease downstream emissions.[286]

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[284] S. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 28 (D.D.C. 2004).

[285] *See* Consolidated Consent Decree, Upper Chattahoochee Riverkeeper Fund v. City of Atlanta (N.D. Ga. Sept. 24, 1998) (No. 95-2250), *available at* http://www.cleanwateratlanta.org/Library/atlanta-cd.pdf; First Amended Consent Decree, United States v. City of Atlanta (N.D. Ga. 1999) (No. 98-1956), *available at* http://www.cleanwateratlanta.org/Library/atlanta-facd.pdf.

[286] *See* Ty Tagami, *City Breaks Ground on Sewer Overhaul; Project Starts with Larger Water Mains*, ATLANTA J.-CONST., Jan. 22, 2005, at E3, 2005 WLNR 900618; *The 5 Best Big-City Mayors: Shirley Franklin*, TIME, Apr. 25, 2005, at 16; *see also* Clean Water Atlanta, *at* http://www.cleanwateratlanta.org

The project includes a $210 million underground sewer tunnel, eight miles long and twenty-seven feet in diameter, to reduce sewer overflow into streams and rivers in times of heavy rain. The sewer overhaul is funded by a combination of drastically increased water and sewer fees, municipal borrowing, and a one percent sales tax overwhelmingly approved by Atlanta voters.[287]

Improved infrastructure notwithstanding, in the long run nothing will reduce Atlanta's demands for water but an end to growth. Given the considerable uncertainty as to what the future will hold, economically, demographically, and climatologically, any agreement, however temporary, would be no mean feat.

And even if Atlanta's explosive expansion begins to ebb, growth will undoubtedly intensify elsewhere in the region. Increased growth will lead to increased demands on finite water resources, which will lead to further conflict—if not in the ACF and ACT basins, then over other rivers and other basins in the Southeast. State and municipal leaders in the region, as well as interested federal regulators, would thus be well advised to keep the lessons of the Apalachicola-Chattahoochee-Flint and the Alabama-Coosa-Tallapoosa in mind as they plan for the future.

(last visited May 1, 2005).

[287] *See* Tagami, *supra* note 286.