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**WATER RIGHTS****INTERSTATE COMPACTS**

In *Tarrant Regional Water District v. Herrmann*, the U.S. Supreme Court has reaffirmed its long-standing deference to the laws of individual states governing the allocation and use of water, concluding that the Texas-based Tarrant Regional Water District could not appropriate water within the State of Oklahoma under the terms of the Red River Compact. Interstate water disputes are likely to become difficult to resolve as our nation faces increasingly widespread and long-lasting droughts, and as population growth and other sources of demand for water continue to tax available resources in many states, the author writes. Negotiation of interstate compacts should remain the first and best choice for nearly every state, and the court's opinion in *Tarrant* clearly reinforces that point.

## **Interstate Water Compacts: The Supreme Court Once Again Endorses State Sovereignty Over Water Resources**

By L. WILLIAM STAUDENMAIER

For more than a century, both Congress and the U.S. Supreme Court have afforded great deference to the laws of individual states governing the allocation and use of water. In *Tarrant Regional Water District v. Herrmann*, the Supreme Court reaffirmed this long-standing deference in a unanimous opinion; concluding that a Texas-based entity (Tarrant Regional Water District) could not appropriate water within the State of Oklahoma.<sup>1</sup> The court based its decision on the terms of the Red River Compact, a congressionally approved interstate agreement among the states of Oklahoma, Texas, Arkansas, and Louisiana that allocates the waters of the Red River and its tributaries. This decision will have broad implications—both for the states involved in the immediate dispute and for many other states that share water resources, particularly rivers that cross state lines.

<sup>1</sup> *Tarrant Regional Water District v. Herrmann*, U.S., No. 11-889, 6/13/13. See 2013 WLPM, 6/19/13.

### **Setting the Stage**

#### **I. Interstate Compacts and the Compacts Clause**

The compacts clause of the United States Constitution provides that “No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State.”<sup>2</sup> Although stated in the negative, the compacts clause has often been used by groups of neighboring states as a positive opportunity to reach agreement on issues of shared concern. In fact, particularly on the subject of interstate waters, the Supreme Court has endorsed the use of compacts as a preferable means for states to resolve disputes, rather than resorting to litigation. As the court stated in *Tarrant*, “[a]bsent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts, *Arizona v. California*, 460

<sup>2</sup> U.S. Const., Art. I, Sec. 10, cl. 3.

U.S. 605, 609 (1983), which often results in protracted and costly legal proceedings.”<sup>3</sup>

The example cited by the court, *Arizona v. California*, clearly illustrates the point. The case, an interstate dispute involving the Colorado River, was initiated by Arizona in 1952 with the filing of a petition to invoke the Supreme Court’s original jurisdiction over disputes between states. The court, however, did not issue its initial decree in the case until 1963. Moreover, the court has exercised continuing jurisdiction over the case and has issued a number of supplemental decrees, including one as recently as 2006.<sup>4</sup> Given this history of time-consuming and costly litigation, it is no surprise that the court favors negotiated compacts over litigation of interstate water disputes.

## II. The Red River Compact

Perhaps taking a cue from the Supreme Court’s preference for interstate compacts over litigation, the states of Oklahoma, Texas, Arkansas and Louisiana negotiated the Red River Compact to allocate the waters of the Red River and its tributaries. The Red River flows through portions of all four states from its headwaters in the panhandle of Texas to its mouth along the lower Mississippi River in Louisiana.

The Compact establishes a detailed scheme for managing and allocating the waters of the Red River and its tributaries. For both administrative and allocation purposes, the river is divided into five “reaches,” each of which is identified with a roman numeral—from I through V. Reach I comprises the headwaters of the river in the Texas panhandle and a number of tributaries that originate in north Texas and western Oklahoma. Reach I ends at Lake Texoma, a major reservoir on the mainstem of the Red River. Downstream of Lake Texoma, Reach II begins. Reach II straddles the border between Oklahoma and Texas and includes numerous tributaries in each state, as well as a number of tributaries in Arkansas. The waters of one portion of Reach II—specifically, Subbasin 5—were the focus of Tarrant’s claims in this case. Reaches III, IV and V are downstream of Oklahoma and are located primarily in Texas, Arkansas and Louisiana, respectively. The water in these downstream reaches did not play a role in the Tarrant litigation.

While negotiation may be preferable to interstate litigation, it nevertheless took the four states more than 20 years—from 1955 to 1978—to negotiate the Red River Compact. Congress formally approved the Compact in 1980, effectively transforming a contract among the states into federal law. Given their dual status as both contracts and federal law, interstate compacts are very carefully construed by the Supreme Court—a fact that appears to have benefitted Oklahoma in this case.<sup>5</sup>

<sup>3</sup> *Tarrant v. Herrmann*, Slip. Op. at 2.

<sup>4</sup> *Arizona v. California*, 547 U.S. 150 (2006).

<sup>5</sup> See, e.g., *Alabama v. North Carolina*, 130 S.Ct. 2295, 2312-13, 70 ERC 1353, 2010 BL 121571 (“But an interstate compact is not just a contract; it is a federal statute enacted by Congress. . . . We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign states to which the political branches consented.”)

## The Dispute

### I. Tarrant Regional Water District Seeks Water in Oklahoma

The Tarrant Regional Water District is an entity created under the laws of Texas to secure and deliver water to customers in north-central Texas, including Fort Worth and other municipalities in the Dallas area. As a rapidly growing state with a largely dry climate and frequent droughts, Texas has struggled in recent years to identify sufficient water supplies for anticipated future growth. In an effort to meet its needs, Tarrant ultimately looked north—across the Red River and into the neighboring state of Oklahoma (the south vegetation line of the Red River forms the border between Oklahoma and Texas). Initially, Tarrant and a number of other Texas water districts attempted to negotiate a purchase of water from Oklahoma and the Choctaw and Chickasaw Nations, both of which are located in Oklahoma. According to Oklahoma, Tarrant and the other Texas districts offered more than \$1 billion dollars to purchase more than 100 billion gallons of water annually from a tributary of the Red River.<sup>6</sup> These negotiations, however, broke down in 2002, and Tarrant subsequently shifted its approach from negotiation to litigation.

In 2007, Tarrant filed applications to take 310,000 acre-feet<sup>7</sup> of water per year from the Kiamichi River, a tributary of the Red River located in southeastern Oklahoma, and export that water across the state line to Tarrant’s service area in Texas. Simultaneously, Tarrant filed suit against the members of the Oklahoma Water Resources Board, the entity responsible for administering water rights and resources in Oklahoma and for granting or denying permits to appropriate water within the state. In its complaint, Tarrant asserted that a number of Oklahoma statutes are designed to, and in fact operate to, preclude Tarrant and other out-of-state entities from appropriating water within Oklahoma for export to another state. Tarrant argued that these statutes were invalid for two reasons. First, Tarrant argued that the statutes were inconsistent with the right of the State of Texas under the Red River Compact to access water within Reach II, Subbasin 5. Second, Tarrant argued that the Oklahoma statutes violate the commerce clause of the U.S. Constitution. The Supreme Court rejected both of these arguments.

## The Opinion

### I. Interpretation of the Red River Compact

After noting that “[i]nterstate compacts are construed as contracts under the principles of contract law,”<sup>8</sup> the court analyzed—and rejected—each element of Tarrant’s Compact-based claims.

Tarrant primarily focused on the text of Section 5.05(b)(1) of the Compact. This provision states that, when the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second

<sup>6</sup> Brief for Respondents, *Tarrant v. Herrmann*, filed March 21, 2013, at 19.

<sup>7</sup> An acre-foot is a measure of water volume equating to 325,851 gallons. Thus, 310,000 acre-feet equals slightly more than 100 billion gallons.

<sup>8</sup> *Tarrant*, Slip. Op. at 11.

or higher, “[t]he *Signatory States shall have equal rights* to the use of runoff originating in Subbasin 5 and undesignated water flowing into Subbasin 5 . . . provided no state is entitled to more than 25 percent of the water in excess of 3,000 [cubic feet per second].” (emphasis added). Tarrant argued that this language, which makes no reference to state boundaries, granted to Texas the right to appropriate water in the Oklahoma portion of Subbasin 5 in order to export that water for use in Texas. Tarrant argued that various other provisions of the compact do refer to state boundaries and therefore the absence of any such reference in Section 5.05(b)(1) must mean that state boundaries are irrelevant for purposes of securing each state’s “equal rights” to water in Subbasin 5.

In response to these arguments, the court stated that “[u]nravelling the meaning of § 5.05(b)(1)’s silence with respect to state lines is the key to resolving whether the Compact pre-empts the Oklahoma water statutes.”<sup>9</sup> The court then stated that if this silence “reflects the background understanding on the part of the Compact’s drafters that state borders were to be respected within the Compact’s allocation, then the Oklahoma statutes do not conflict with the Compact’s allocation of water.” For several distinct reasons, the court then rejected Tarrant’s arguments and concluded that Oklahoma’s statutes are consistent with the compact.

## II. ‘Commonsense’ Interpretation

First, the court analyzed multiple sections of the compact and compared them to Section 5.05(b)(1). Some of these provisions included references to state boundaries, while others did not. In conducting this comparison, the court noted the need to: (i) “avoid absurd results;” (ii) apply “commonsense reason;” and (iii) avoid a “counterintuitive outcome” that “would thwart the self-evident purposes of the Compact.”<sup>10</sup> After reviewing these provisions, the court concluded that “[a]t the very least, the problems that arise from Tarrant’s proposed reading suggest that § 5.05(b)(1)’s silence is ambiguous regarding cross-border rights under the Compact.”<sup>11</sup> As a result, the court turned to “other interpretive tools to shed light on the intent of the Compact’s drafters.”<sup>12</sup> Specifically, the court considered “the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties’ course of dealing” under the Red River Compact.<sup>13</sup> The court then expounded on each of these points.

## III. State Sovereign Powers

On the first of these points, the court said that “[w]e have long understood that as sovereign entities in our federal system, the States possess an ‘absolute right to all their navigable waters and the soils under them for

<sup>9</sup> *Id.* at 10. With regard to preemption of state statutes, the court noted that because a compact is approved by Congress, it is federal law and under the Supremacy Clause of the Constitution, the terms of the Compact will prevail over any inconsistent terms of a state statute. *Id.*, n. 8.

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

their own common use.’”<sup>14</sup> The court also noted that “when confronted with silence in compacts touching on the States’ authority to control their waters, we have concluded that ‘[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.’”<sup>15</sup> Applying these principles, the court concluded:

States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence. We think that the better understanding of Section 5.05(b)(1)’s silence is that the parties drafted the Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the Compact.

...

Adopting Tarrant’s reading would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over the water within their borders when they agreed to the Compact. Given the background principles we have described above, we find this unlikely to have been the intent of the Compact’s signatories.<sup>16</sup>

## IV. Cross-Border Rights in Other Interstate Water Compacts

Next, the court considered how other interstate water compacts have addressed the issue of cross-border rights conferred on signatory states. There are approximately 23 interstate water compacts in the United States. As the court noted, “[m]any of these other compacts feature language that unambiguously permits signatory states to cross each other’s borders to fulfill obligations under the compacts. . . . The absence of comparable language in the Red River Compact counts heavily against Tarrant’s reading of it.”<sup>17</sup>

Moreover, as the court noted, most of the compacts that allow cross-border access to water include detailed terms governing the “mechanics of how such cross-border relationships will operate,” including provisions addressing who can assert cross-border rights, who will bear any costs involved, and how cross-border diversions will be administered.<sup>18</sup> Yet, no such terms are included in the Red River Compact. This fact led the court to conclude that “the end result [of adopting Tarrant’s interpretation of the Compact] would be a jurisdictional and administrative quagmire.”<sup>19</sup>

## V. Prior Conduct of the Parties under the Compact

After addressing state sovereignty issues and the terms of other interstate compacts, the court focused on

<sup>14</sup> *Id.* at 14-15 (quoting *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842)). More broadly, the court also has held that, throughout the long history of the relationship between the federal and state governments regarding water, there runs “a consistent thread of purposeful and continued deference to state water law by Congress.” *California v. United States*, 438 U.S. 645, 653 (1978).

<sup>15</sup> *Tarrant*, Slip Op. at 15 (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)).

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 16-17.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 18.

the prior conduct of the parties to the Red River Compact. The court noted that “[s]ince the Compact was approved by Congress in 1980, no signatory State had pressed for a cross-border diversion under the Compact until Tarrant filed its suit in 2007. . . . Indeed, Tarrant attempted to purchase water from Oklahoma over the course of 2000 until 2002 . . . a strange offer if Tarrant believed it was entitled to demand such water without payment under the Compact.”<sup>20</sup> Thus, the court used Tarrant’s own prior conduct as a reason to reject Tarrant’s belated interpretation of the compact.<sup>21</sup>

As it reached the end of this part of its opinion, the court concluded with the following holding: “Tarrant’s theory that Oklahoma’s water statutes are pre-empted because they prevent Texas from exercising its rights under the Compact must fail for the reason that the Compact does not create any cross-border rights in signatory States.”<sup>22</sup>

## VI. Tarrant’s Dormant Commerce Clause Argument

After dispensing with Tarrant’s compact-based arguments, the court briefly addressed Tarrant’s dormant commerce clause argument. The dormant commerce clause has been applied by the Supreme Court in numerous cases to strike down protectionist state legislation that either favors a state’s residents or discriminates against non-residents, thereby adversely affecting interstate commerce.<sup>23</sup> In this case, Tarrant argued that Oklahoma’s statutes limiting Tarrant’s right to export water to Texas impermissibly discriminated against Texas by precluding access to water in the Red River basin that had been left “unallocated” by the Compact. The court made short work of this argument, concluding that “[t]he Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated water because the Compact leaves no waters unallocated. Tarrant’s commerce clause argument founders on this point.”<sup>24</sup>

With that, the court concluded its opinion by affirming the judgment of the lower courts that had previously rejected Tarrant’s arguments.

### Implications of Tarrant

At its core, *Tarrant* is a case about compact (*i.e.*, contract) interpretation. The court devoted most of its attention to the question of whether the Red River Compact should be interpreted to grant Texas and its political subdivisions a right to appropriate water in Oklahoma and export that water for use in Texas. The court concluded that no such right was conferred by the compact.

For all of the reasons described above, this result is not particularly surprising. The signatory states could

have, but did not, expressly provide such a right. Because implying such a right from the silence in the compact would undermine the court’s long-standing deference to the sovereign rights of individual states to control the water resources within their borders, the court concluded that silence was not enough. The court’s deference to state sovereignty, along with its comparisons to other interstate compacts that expressly addressed cross-border issues, and Tarrant’s own past course of conduct (*i.e.*, its attempts to purchase water before claiming it for free), largely dictated the outcome of the case.

Surprising or not, *Tarrant* is a strong reaffirmation of the court’s traditional deference to individual states in the realm of water rights and water resource management. Many, if not most, states will likely consider this a good thing. Throughout our nation’s history, states have jealously guarded their respective jurisdictional controls over the waters within their borders. Because *Tarrant* largely turns on respect for that individual state prerogative, the decision will likely be viewed positively in many jurisdictions.

Despite these seemingly positive results, however, *Tarrant* also may make resolution of future interstate water disputes more difficult. Certainly the court continues to prefer negotiated compacts to equitable apportionment litigation. This is perhaps in no small part due to the fact that disputes between states (whether on water or other issues) fall within the original jurisdiction of the Supreme Court; an institution that is not generally adept at directly overseeing fact-intensive and time-consuming litigation. However, the *Tarrant* decision may, at least in theory, make future compact negotiations more difficult.

For example, if one state involved in a future compact negotiation believes it is critical to have the ability to appropriate water within a neighboring state, it now knows that it must bargain for an explicit right to do so – silence in the future compact will not be sufficient. At the same time, however, the state whose water resources are coveted by its neighbor may be motivated to resist such a provision. Indeed, the targeted state and its negotiators are likely to feel enormous internal political pressure to not cede any portion of the state’s sovereign control over water.

If the end result in this scenario is a standoff, the likely alternative will be equitable apportionment litigation before the Supreme Court—the very outcome the court disfavors. This outcome, however, is not necessarily preordained. States should still have powerful motivations to negotiate compacts rather than litigate. After all, not only the court, but the states themselves will face the enormous costs, the lengthy delays, and the uncertainty associated with equitable apportionment litigation. Those negative consequences may provide sufficient incentives for neighboring states to stay at the table, even through lengthy and difficult negotiations, because—if nothing else—at least each state retains control of its destiny in a negotiated resolution to a dispute. The same obviously cannot be said for equitable apportionment litigation.

Importantly, one option that still appears to be off the table is unilateral protectionism by an individual state. Although it relegated the case to a footnote, the Supreme Court in *Tarrant* acknowledged its prior dor-

<sup>20</sup> *Id.* at 20.

<sup>21</sup> Interestingly, although the court did not mention it in the Opinion, the other two parties to the Red River Compact, Arkansas and Louisiana, filed an amicus brief with the court in support of Oklahoma’s position. This provides further evidence that the parties to the compact did not intend to provide cross-border rights to access water in other compacting states.

<sup>22</sup> *Tarrant*, Slip Op. at 22.

<sup>23</sup> See, e.g., *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008) (cited by Tarrant in its brief on the merits).

<sup>24</sup> *Tarrant*, Slip Op. at 23-24.

mant commerce clause case, *Sporhase v. Nebraska*,<sup>25</sup> which invalidated a protectionist state statute that limited the right to export water from Nebraska. In *Sporhase*, the court concluded that water is an article in interstate commerce, and the laws of one state may not impose an impermissible burden on exportation of water to another state. The Supreme Court's reference in the *Tarrant* opinion to *Sporhase* as a dormant commerce clause precedent should continue to prevent states from enacting overtly protectionist water legislation that impermissibly burdens interstate commerce. As a result, states are likely to be better off negotiating specific limits on interstate access to their water supplies in a compact than to try to keep those supplies off limits through unilateral legislative action.

### The Future of Interstate Disputes

Interstate water disputes are likely to become all the more difficult to resolve as our nation faces increasingly widespread and long-lasting droughts, and as population growth and other sources of demand for water con-

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<sup>25</sup> 458 U.S. 941 (1982), cited in *Tarrant*, Slip Op. at 15, n. 11.

tinue to tax available resources in many states. Across the spectrum of possible ways to address such disputes, negotiation of interstate compacts should remain the first and best choice for nearly every state. The Supreme Court's opinion in *Tarrant* clearly reinforces that point.

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#### About the author:

*L. William Staudenmaier is a partner with Snell & Wilmer LLP in Phoenix. His practice is concentrated in water and environmental law. His water law practice involves representation of clients in general stream adjudications, participation in negotiations for settlement of Indian water right claims, negotiation of contracts and leases for transfer of water rights, obtaining permits and approvals from state and federal regulatory agencies, and drafting, negotiating and lobbying on state and federal water resources legislation. He filed an amicus brief on behalf of the Oklahoma Independent Petroleum Association in *Tarrant Regional Water District v. Herrmann* in opposition to *Tarrant*.*

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