

CASE NOTE

**WATER LAW—Cooperation Abandoned to Allow Hoarding of Water: The Supreme Court Denies Right to Divert Waters Across State Borders Under the Red River Compact; *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013)**

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“Whiskey is for drinking—water is for fighting.’ The fighting will continue as long as water is allocated by politics instead of the market.”<sup>1</sup>

INTRODUCTION

Historically, water has caused disputes due to its variable nature and widespread necessity. The Red River between Texas and Oklahoma is no exception. The Red River water rights are distributed between Oklahoma, Texas, Arkansas, and Louisiana according to the Red River Compact (Compact).<sup>2</sup>

Hoping to find alternative supply channels for a growing population, the Tarrant Regional Water District (Tarrant), located in Texas, attempted to purchase water from water users in Oklahoma and Arkansas.<sup>3</sup> After these attempts failed, Tarrant applied to the Oklahoma Water Resources Board (OWRB) for a permit to divert water from the Red River basin in Oklahoma.<sup>4</sup>

Knowing the OWRB would deny the permit based on Oklahoma state water laws, Tarrant filed suit to enjoin the permit denial.<sup>5</sup> Tarrant argued the Compact allowed the diversion of water in Oklahoma, and certain Oklahoma state laws violated the dormant Commerce Clause.<sup>6</sup> The United States District Court for

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<sup>1</sup> Terry L. Anderson, *Water Needn't Be a Fighting Word*, THE WALL STREET JOURNAL, Sept. 30, 1983, at 30.

<sup>2</sup> Red River Compact Act of 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980) [hereinafter *Red River Compact*].

<sup>3</sup> See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2128 (2013). The Dallas-Fort Worth metropolitan area has grown from 5.1 million people to 6.4 million people between 2000 and 2010. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see OKLA. STAT. ANN. tit. 82, §§ 1086.1(A)(3), 105.12(A), 105.16(B) (2013); Okla. Att'y Gen. Op. No. 77-274 (1978).

the Western District of Oklahoma granted the OWRB's motion for summary judgment, and the United States Court of Appeals for the Tenth Circuit affirmed.<sup>7</sup> The United States Supreme Court rejected Tarrant's arguments concerning the compact language and the dormant Commerce Clause.<sup>8</sup> The Court affirmed the Tenth Circuit's decision.<sup>9</sup>

This Case Note begins with a discussion of interstate water compacts generally and interpretation methods, followed by a discussion of the modern dormant Commerce Clause doctrine.<sup>10</sup> Next, the Case Note outlines the facts and opinion of the *Tarrant* case.<sup>11</sup> This Case Note argues the Court erred in holding the Compact prohibited cross-border diversions in this situation.<sup>12</sup> It also argues the Oklahoma water law statutes violate the dormant Commerce Clause.<sup>13</sup> The Case Note concludes with how this decision affects Wyoming.<sup>14</sup>

## BACKGROUND

### *Compacts Generally*

Before states entered into water compacts, the United States Supreme Court adjudicated and apportioned use of interstate waters on a case-by-case basis.<sup>15</sup> This method was inefficient because of the time and cost of litigation.<sup>16</sup> The Court, as an expert in law and equity, was not the best option for deciding what parties with firsthand knowledge of the circumstances should determine.<sup>17</sup> The circumstances at the heart of a compact are unique, and the Court conceded such circumstances “necessitate expert administration, rather than judicial imposition of a hard and fast rule” because of the “possibility of future change of conditions.”<sup>18</sup> Further, the

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<sup>7</sup> *Tarrant*, 133 S. Ct. at 2137.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* notes 15–76 and accompanying text.

<sup>11</sup> See *infra* notes 77–138 and accompanying text.

<sup>12</sup> See *infra* notes 139–216 and accompanying text.

<sup>13</sup> See *infra* notes 217–69 and accompanying text.

<sup>14</sup> See *infra* notes 270–88 and accompanying text.

<sup>15</sup> See, e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907) (addressing dispute over diversions of the Arkansas River).

<sup>16</sup> John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 434 (2006).

<sup>17</sup> *Id.* at 104. (“The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary.”).

<sup>18</sup> *Colorado v. Kansas*, 320 U.S. 383, 392 (1943).

Court's application of a complex combination of differing state water laws creates uncertainty.<sup>19</sup> In response to such concerns, states began negotiating interstate water compacts before resorting to litigation.<sup>20</sup>

An interstate compact is a contract between states enacted into law upon congressional approval.<sup>21</sup> When applied to interstate waterways, like rivers crossing state boundaries, a compact expressly apportions water rights and duties between the signatory states.<sup>22</sup> Such apportionment is necessary to resolve possible conflicts, like an upstream state controlling the waters flowing to other, downstream states.<sup>23</sup> States negotiate to find more equitable solutions to these conflicts.<sup>24</sup> After the states have agreed to a compact, Congress has the option of approving the compact and transforming it into federal law.<sup>25</sup>

### *Compact Interpretation*

Compacts are contractual agreements between states that can cover a variety of issues.<sup>26</sup> Congress must approve compacts before they become binding as federal law.<sup>27</sup> No general rules exist to resolve compact disputes when they arise, but courts

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<sup>19</sup> See, e.g., *Montana's Exception and Brief, Montana v. Wyoming*, (2010) (No. 137), 2010 WL 4132841 (discussing an ongoing case where two conflicting state water laws are being applied to resolve a dispute between interstate waters).

<sup>20</sup> See generally Delph E. Carpenter, *Address on the Application of the Reserve Treaty Powers of the States to Interstate Water Controversies* (1921), <http://hdl.handle.net/10217/37424> (last visited Nov. 14, 2013). The first interstate water compact was the Colorado River Compact, developed by the states and approved by Congress in 1922. Colorado River Compact, 123 Colo. Sess. Laws 684, COLO. REV. STAT. §§ 37-61-101-104 (2013).

<sup>21</sup> BLACK'S LAW DICTIONARY 318 (9th ed. 2009); see generally Jerome C. Muys et al., *Utton Transboundary Resources Center Model Interstate Water Compact*, 47 NAT. RESOURCES J. 17, 26-37 (Winter 2007) (addressing issues and structure of interstate water compacts).

<sup>22</sup> Paul Elliott, *Texas' Interstate Water Compacts*, 17 ST. MARY'S L.J. 1241, 1241-45 (1986).

<sup>23</sup> *Id.* at 1243.

<sup>24</sup> *Id.*; see, e.g., Upper Colorado River Basin Compact, art. I, 63 Stat. 37 (1949) (stating the purpose of the compact is the equitable division of water use). Consumptive use of water for each state is apportioned under the compact. *Id.* art. III.

<sup>25</sup> U.S. CONST. art. I, § 10, cl. 3; see also BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 894 (5th ed. 2013) (providing an example of Congress refusing to approve a compact agreed to by the states).

<sup>26</sup> Charles T. DuMars & Stephen Curtice, *Interstate Compacts Establishing State Entitlements to Water: An Essential Part of the Water Planning Process*, 64 OKLA. L. REV. 515, 529 (Summer 2012).

<sup>27</sup> *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

have employed principles of contract and statutory interpretation.<sup>28</sup> Specifically, the Supreme Court has dealt with the importance of plain meaning, the structure of the document, and drafting history as they relate to compacts.<sup>29</sup> Because of the contractual nature of compacts, courts analyze the course of dealings.<sup>30</sup> Finally, once compacts become federal statutes, the canon of presumption against waiver of sovereign immunity applies.<sup>31</sup>

The first step in interpretation is determining if the plain meaning of the contract is clear.<sup>32</sup> If the plain meaning is clear, such meaning is applied.<sup>33</sup> The Supreme Court in *Montana v. Wyoming* considered the plain meaning of “beneficial use” within the Yellowstone River Compact to resolve a dispute.<sup>34</sup> The Court looked at the plain meaning of “beneficial use” to support holding there was no quantity of water guaranteed to flow from Wyoming to Montana.<sup>35</sup> The Court reasoned that if the states wanted to guarantee a net flow to downstream users, the states could have used explicit language in the compact.<sup>36</sup>

If the plain language is ambiguous, the Supreme Court can look to other tools of interpretation to determine the intent of the parties.<sup>37</sup> When determining the intent of the parties in *Alabama v. North Carolina*, the Court found that, although all contracts have an implied duty of good faith and fair dealing, compacts are more than contracts because Congress adopts compacts.<sup>38</sup> As such, courts should

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<sup>28</sup> Annotation, *Constitutionality, Construction, and Application of Compacts and Statutes Involving Co-operation Between States*, art. III, 134 A.L.R. FED. 1411 (1941); *Texas v. New Mexico*, 482 U.S. 124 (1987) (contract law interpretation); *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010) (statutory interpretation); see generally Ferdinand S. Tinio, Comment, *The Parol Evidence Rule and Admissibility of Extrinsic Evidence to Establish and Clarify Ambiguity in Written Contract*, 40 A.L.R. 3D 1384 (1971) (contract interpretation methods); 82 C.J.S. *Statutes* § 410 (statutory interpretation).

<sup>29</sup> See *infra* notes 143–80 and accompanying text.

<sup>30</sup> See, e.g., *Texas v. New Mexico*, 482 U.S. at 128 (contract principles).

<sup>31</sup> See, e.g., *Alabama v. North Carolina*, 130 S. Ct. 2295, 2307 (2010) (statutory canons).

<sup>32</sup> *Montana v. Wyoming*, 131 S. Ct. 1765, 1778 (2011).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1767.

<sup>35</sup> *Id.* at 1778.

<sup>36</sup> *Id.* at 1767–69 (using the Colorado River Compact, 42 Stat. 171 (1922), as an example of establishing minimum flows to downstream users); see Joe Norris, *Montana v. Wyoming: Is Water Conservation Drowning the Yellowstone River Compact?* 15 U. DENV. WATER L. REV. 189, 197 (Fall 2011); Shiran Zohar, *A Deal is a Deal in the West, or is it?* *Montana v. Wyoming and the Yellowstone River Compact*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 160, 166–67 (Mar. 8, 2011).

<sup>37</sup> *Alabama v. North Carolina*, 130 S. Ct. 2295, 2309 (2010); see also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

<sup>38</sup> *Alabama*, 130 S. Ct. at 2312. The compact was an agreement between states concerning radioactive waste management procedures. *Id.*

not add terms, or else they risk overstepping their judicial role.<sup>39</sup> This is the basis of the omitted-case canon.<sup>40</sup> When language appears in a provision of the statute, but is omitted elsewhere, the omission is considered intentional.<sup>41</sup>

The Supreme Court has also looked at the drafting history of compacts when determining the intent of the parties.<sup>42</sup> In *Oklahoma v. New Mexico*, the Court focused on the congressional adoption of compacts, rather than their contractual nature, when interpreting the Canadian River Compact as it related to water storage.<sup>43</sup> When interpreting interstate compacts under the rules of statutory interpretation, it is appropriate for courts to use extrinsic evidence, including negotiating history and legislative history, to determine the meaning of the compact language.<sup>44</sup> When considering prior drafts of statutes, language considered and rejected in prior drafts demonstrates intent to omit.<sup>45</sup> Further, intention to leave a term out can be found when a prior draft contains the language, while the final version omits it.<sup>46</sup>

Course of dealings analysis could also be an appropriate way to interpret a compact. In *Texas v. New Mexico*, the Court interpreted the Pecos River Compact to resolve a dispute between the states.<sup>47</sup> The Court commented that the compact, despite congressional adoption, is a contract and “must be construed and applied in accordance with its terms.”<sup>48</sup> When interpreting contracts, courts may look at the course of dealings as a factor in determining the intent of the parties.<sup>49</sup> When interpreting a contract, “prior negotiations and surrounding circumstances may be considered.”<sup>50</sup> Therefore, the same analysis may be extended to the interpretation of a compact.

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<sup>39</sup> *Id.* at 2312–13.

<sup>40</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 93 (2012).

<sup>41</sup> *Russello v. United States*, 464 U.S. 16, 23 (1983).

<sup>42</sup> *Oklahoma v. New Mexico*, 501 U.S. 221, 234–37 (1991).

<sup>43</sup> *Id.*; see also OKLAHOMA HISTORICAL SOCIETY’S *ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE*, <http://digital.library.okstate.edu/encyclopedia/entries/c/ca039.html> (last visited Sept. 22, 2013) (detailing the Canadian River flows from Colorado through New Mexico, Texas, and Oklahoma).

<sup>44</sup> *Oklahoma*, 501 U.S. at 235 n.5.

<sup>45</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000).

<sup>46</sup> *Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 374 (2008).

<sup>47</sup> 482 U.S. 124, 135 (1987).

<sup>48</sup> *Id.* at 128.

<sup>49</sup> *Pac. Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 552 (9th Cir. 1949).

<sup>50</sup> *Id.*; see also RESTATEMENT (FIRST) OF CONTRACTS: RULES AIDING APPLICATION OF STANDARDS OF INTERPRETATION § 235(d) (1932).

The issue of federalism also becomes a factor because compacts are both contracts and statutes, and states execute compacts.<sup>51</sup> In *Virginia v. Maryland*, the Supreme Court held, “[i]f any inference at all is to be drawn from . . . 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>52</sup> Further, in *Alaska v. United States*, the Court declared when deciding whether waters are navigable, the analysis must “begin with a strong presumption against defeat of a State’s title.”<sup>53</sup> The Court imposes a strong presumption in favor of state sovereignty when there is a conflict between federal and state law, and it will factor the reluctance of states to abandon their sovereign rights into any interpretation analysis.<sup>54</sup> In *Tarrant Regional Water District v. Herrmann*, the Court applied this interpretive tool to an interstate compact.<sup>55</sup>

### *Dormant Commerce Clause*

Under the Federal Constitution, the Commerce Clause grants Congress the power of regulation of commerce between the states.<sup>56</sup> States maintain the right to regulate interstate commerce in the interest of public health and safety as long as there is no clear congressional action to the contrary.<sup>57</sup> States are given the power to regulate interstate commerce, but this is not unlimited authority to protect state interests at the expense of other states.<sup>58</sup>

The Supreme Court has developed principles to determine whether a state law violates the Commerce Clause.<sup>59</sup> First, the object of the law must be considered interstate commerce.<sup>60</sup> The Court must also look to whether Congress granted power to the state to regulate such commerce.<sup>61</sup> The Court must then determine if the state laws are discriminatory on their face, in their purposes, or in their effects.<sup>62</sup> If discriminatory, the law is invalid unless the state can prove the law

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<sup>51</sup> *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131–33 (2013).

<sup>52</sup> 540 U.S. 56, 67 (2003).

<sup>53</sup> 521 U.S. 1, 34 (1997).

<sup>54</sup> *Tarrant*, 133 S. Ct. at 2131–33.

<sup>55</sup> *Id.* at 2120.

<sup>56</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>57</sup> *S. Pac. Co. v. Arizona*, 325 U.S. 761, 766 (1945).

<sup>58</sup> *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, (1978).

<sup>59</sup> *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 401 (1994) (O’Connor, J., concurring).

<sup>60</sup> *Gibbons v. Ogden*, 22 U.S. 1, 9–10 (1824).

<sup>61</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

<sup>62</sup> *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

“serves a legitimate local purpose” and “this purpose could not be served as well by available nondiscriminatory means.”<sup>63</sup> The Court will apply strict scrutiny to this analysis if the law is found to be discriminatory.<sup>64</sup>

Specifically, the United States District Court for the Western District of Texas has dealt with cross-border water issues under the dormant Commerce Clause. In *City of Altus v. Carr*, the district court dealt with a similar issue to the *Tarrant* case.<sup>65</sup> Altus, Oklahoma was an expanding urban center in need of water.<sup>66</sup> The city bought rights to groundwater from Texas water users.<sup>67</sup> In response, Texas passed a statute forbidding the transfer of groundwater rights to out-of-state users.<sup>68</sup> The district court overruled the statute because it violated the Commerce Clause; thus, the water was able to cross state lines to where it was needed.<sup>69</sup> Specifically, the groundwater—once pumped—became private property, and any attempt to deny the sale of such property across state lines violated the Commerce Clause.<sup>70</sup>

In another case, *Sporhase v. Nebraska ex rel. Douglas*, the state of Nebraska filed suit to enjoin water users in Colorado from using Nebraska groundwater without a permit.<sup>71</sup> The Supreme Court first held groundwater was an instrument of commerce.<sup>72</sup> The Court noted eighty percent of the water supply was used for agriculture, which is an interstate enterprise, and the boundaries of groundwater aquifers, like the Ogallala, cover multiple states.<sup>73</sup> After concluding that “water is an article of commerce,” the Court looked at whether the requirement of reciprocity for transfers of water across state lines violated the dormant Commerce

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<sup>63</sup> *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

<sup>64</sup> *Id.*

<sup>65</sup> 255 F. Supp. 828 (W.D. Tex.), *summarily aff'd*, 385 U.S. 35 (1966).

<sup>66</sup> *Id.* at 831.

<sup>67</sup> *Id.* at 832.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 837–40.

<sup>70</sup> *Id.* at 840.

<sup>71</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *see also* Douglas L. Grant, COMMERCE CLAUSE LIMITS ON STATE REGULATION OF INTERSTATE WATER EXPORT, <http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1310&context=jcwre> (last visited Oct. 19, 2013) (discussing *Sporhase*).

<sup>72</sup> *Sporhase*, 458 U.S. at 954–55.

<sup>73</sup> *Id.* at 952–53.

Clause.<sup>74</sup> The state satisfied the purpose prong by showing that conservation of groundwater in an area with inadequate present supply to meet its demand was a legitimate purpose.<sup>75</sup> However, the Court found such conservation could be achieved through restrictions on in-state users, and the restrictions would not be discriminatory to out-of-state parties.<sup>76</sup> Because there was a nondiscriminatory alternative to achieve the public policy, the statute was in violation of the dormant Commerce Clause.<sup>77</sup>

#### PRINCIPAL CASE

##### *Red River Compact*

Oklahoma, Texas, Arkansas, and Louisiana drafted the Red River Compact following more than twenty years of negotiations.<sup>78</sup> Congress approved the Compact in 1980.<sup>79</sup> The Compact allocates water resources between the states located in the Red River basin.<sup>80</sup> The Compact divides the basin into five reaches and multiple subbasins within the reaches.<sup>81</sup> In Reach II, the Compact created five subbasins.<sup>82</sup> Reach II, subbasin 5 encompasses parts of Texas, Oklahoma,

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<sup>74</sup> *Id.* at 958–60.

<sup>75</sup> *Id.* at 954–55.

<sup>76</sup> *Id.* at 955–56.

<sup>77</sup> *Id.* at 958.

<sup>78</sup> OKLAHOMA WATER RESOURCE BOARD, RED RIVER COMPACT COMMISSION, <http://www.owrb.ok.gov/rcccommission/rcccommission.html> (last visited Nov. 11, 2013).

<sup>79</sup> *Red River Compact*, *supra* note 2, § 1.

<sup>80</sup> *Id.* § 1.01. The Red River basin covers a large portion of Texas, Oklahoma, Arkansas, and Louisiana. The river starts near the border of Texas and New Mexico, defines part of the border between Texas and Oklahoma, and eventually flows into the Mississippi River, to be released into the Gulf of Mexico. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2136 (2013) (showing a map of the entire basin).

<sup>81</sup> *Red River Compact*, *supra* note 2, §§ 2.12, 4.01–4.04, 5.01–5.05, 6.01–6.04, 7.01–7.02. Natural boundaries like river basins are efficient ways to implement water resources. *See Know Your Basin?*, Wyoming State Engineer's Office, <https://sites.google.com/a/wyo.gov/seo/interstate-streams/know-your-basin> (last visited Nov. 2, 2013) (providing a list and map of the major basins in Wyoming). A reach is "a continuous extent of land or water." NEW OXFORD AMERICAN DICTIONARY, 1450 (3d ed. 2010). A basin is a "tract of country that is drained by a river and lakes." *Id.* at 137. Reach, basin, and subbasin are used in the Compact to delineate subdivisions of the watershed.

<sup>82</sup> *Red River Compact*, *supra* note 2, §§ 5.01–5.05.



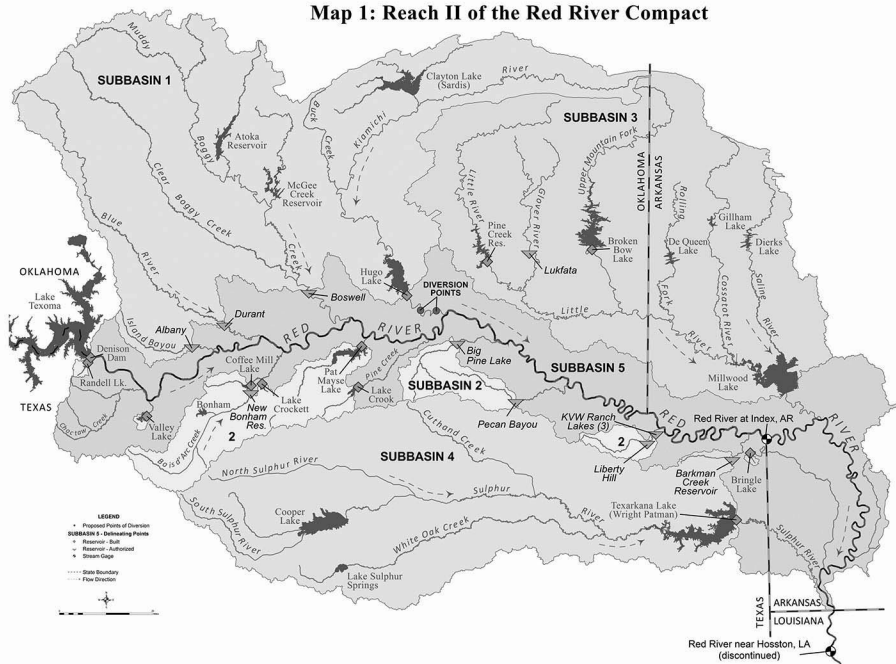
and Arkansas, and preserves a minimum flow to Louisiana.<sup>83</sup> Regarding Reach II, subbasin 5, the Compact assigns “equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5” if at least 3,000 cubic feet per second (cfs) are flowing down the Red River at the Louisiana-Arkansas border.<sup>84</sup> This language requires the other three states to guarantee that a minimum flow of water reaches Louisiana.<sup>85</sup>

The Compact also provides for enforcement in the form of accounting.<sup>86</sup> Although the Compact did not specify a method of accounting, a general accounting typically includes a determination of supply and diversion in each state.<sup>87</sup> The drafters saw a routine requirement of accounting for all the water in the basin financially burdensome, but wanted to provide a method of seeking equity within the Compact.<sup>88</sup> Accounting over such a large area can be expensive,

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<sup>83</sup> *Id.*; see also The Oklahoma Water Resources Board, available at <http://www.owrb.ok.gov/util/legal.php> (map of Reach II, reprinted with permission below).

**Map 1: Reach II of the Red River Compact**



<sup>84</sup> *Red River Compact*, *supra* note 2, § 5.05.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* § 2.11; see Grant Harse, *Nebraska's Costs of Compliance with the Republican River Compact: An Equitable Solution*, 19-FALL KAN. J.L. 7 PUB. POL'Y 124, 131 (Fall 2009) (discussing issues concerning accounting in compacts and defines accounting procedures to “determine supply, allocations, use and compliance with the [c]ompact . . .”).

<sup>87</sup> *Red River Compact*, *supra* note 2, § 2.11; *Harse*, *supra* note 86, at 124.

<sup>88</sup> *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2127 (2013).

time-consuming, and uncertain in outcome.<sup>89</sup> Although a state may request an accounting at any time, no state has ever made such a request in the history of the Compact.<sup>90</sup>

Other important portions of the Compact explicitly address possible conflicts between the Compact and state water law. The relevant language provides:

Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.<sup>91</sup>

Elsewhere, language discusses the limitations of the Compact:

Nothing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact.<sup>92</sup>

While Tarrant focused on the qualifiers of the language above, the OWRB focused on the language dealing with regulation within state boundaries.<sup>93</sup> The dispute at issue arose from these sections of the Compact.

### *Factual Background*

The Tarrant Regional Water District provides water to north-central Texas.<sup>94</sup> In looking to meet the short-term and long-term demands of its expanding population, Tarrant attempted to secure water through purchase from other states.<sup>95</sup> After these attempts failed, it applied for a permit from the OWRB to divert water to Texas from a point in Oklahoma within Reach II, subbasin 5

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<sup>89</sup> *Harse*, *supra* note 86, at 138, 144.

<sup>90</sup> *Red River Compact*, *supra* note 2, § 2.11; *Tarrant*, 133 S. Ct. at 2127.

<sup>91</sup> *Red River Compact*, *supra* note 2, § 2.01.

<sup>92</sup> *Id.* § 2.10.

<sup>93</sup> *See infra* notes 102–14 and accompanying text.

<sup>94</sup> *Tarrant*, 133 S. Ct. at 2128. The Tarrant Regional Water District lies outside the Red River basin, but this was not addressed in the litigation that focused on the rights of the states. *Id.* at App. B. Although the Compact is silent on whether out-of-basin use is permitted, other compacts expressly limit water rights within the basin. *See, e.g.*, Yellowstone River Compact, § 2, 65 Stat. 663 (1951).

<sup>95</sup> *Tarrant*, 133 S. Ct. at 2128.

of the Compact.<sup>96</sup> Anticipating that OWRB would deny the permit based on Oklahoma law, Tarrant filed suit to enjoin the OWRB's likely denial of Tarrant's application.<sup>97</sup> Tarrant claimed the Compact allowed for cross-border diversions within Reach II, subbasin 5, and the Oklahoma statutes violated the dormant Commerce Clause by discriminating against out-of-state applicants.<sup>98</sup> The United States District Court for the District of Western Oklahoma granted summary judgment in favor of the OWRB, and the United States Court of Appeals for the Tenth Circuit affirmed.<sup>99</sup>

### *Court's Opinion*

The Supreme Court held the Compact did not allow cross-border diversions of water within Reach II, subbasin 5, and the dormant Commerce Clause was not violated because all the water in Reach II, subbasin 5 was appropriated.<sup>100</sup> The Court first acknowledged that compacts should be interpreted through principles of contract law.<sup>101</sup> Looking at the plain language of section 5.05 of the Compact, the Court disagreed with Tarrant and viewed the absence of a qualifier like "equal rights within their state" as an indication of ambiguity, requiring further interpretive tools to determine the intended meaning.<sup>102</sup> Tarrant argued the plain meaning and four corners of the Compact allowed Texas to cross state lines to obtain its share of excess water.<sup>103</sup> Using interpretive tools, the Court rejected these arguments regarding the plain meaning of the Compact and four corners analysis.<sup>104</sup> Based on its determination that, at a minimum, silence can only be considered ambiguous, the Court relied heavily on a state's general reluctance to abandon sovereign powers.<sup>105</sup> The Court also utilized the standards of other compacts and course of performance under the Compact between the states to reach its holding.<sup>106</sup>

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<sup>96</sup> *Id.* Tarrant applied for a permit to divert a total of 310,000 acre-feet per year from the Kiamichi. *Id.* Average annual flow of the Kiamichi between 1950 and 2007 was about 2.87 million acre-feet per year. OWRB, OKLAHOMA COMPREHENSIVE WATER PLAN PHYSICAL WATER SUPPLY AVAILABILITY REPORT, Table 4-3 (2011), [http://www.owrb.ok.gov/supply/ocwp/pdf\\_ocwp/WaterPlanUpdate/OCWP\\_PhysicalWaterSupplyAvailabilityReport.pdf](http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/OCWP_PhysicalWaterSupplyAvailabilityReport.pdf) (last visited Nov. 23, 2013).

<sup>97</sup> *Tarrant*, 133 S. Ct. at 2129.

<sup>98</sup> *Id.* at 2128–29.

<sup>99</sup> *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011).

<sup>100</sup> *Tarrant*, 133 S. Ct. at 2137.

<sup>101</sup> *Id.* at 2130.

<sup>102</sup> *Id.* at 2130–32.

<sup>103</sup> Brief for Petitioner at 26, *Tarrant Reg'l Water Dist. v. Herrmann* 133 S. Ct. 2120 (2013) (No. 11-889), 2013 WL 648740 [hereinafter *Brief for Petitioner*].

<sup>104</sup> *Tarrant*, 133 S. Ct. at 2130–32.

<sup>105</sup> *Id.* at 2132–33. The Court's determination that silence is ambiguous conflicts with the omitted-case canon. See, e.g., *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312–13 (2010).

<sup>106</sup> *Tarrant*, 133 S. Ct. at 2133–36.

In interpreting the Compact, the Court held that a state's reluctance to give up sovereign power should be one of the most important factors to consider.<sup>107</sup> The Court found there is a strong presumption in favor of state ownership of the waters of the basin by relying on prior cases that states held vested rights to their "navigable waters."<sup>108</sup> From these cases, the Court further conveyed, "[i]f any inference at all 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>109</sup> Therefore, the Court held it was unlikely the states intended to hand over their sovereign rights through silence.<sup>110</sup>

After making a strong presumption against surrendering sovereign powers, the Court looked at customary practices in other compacts.<sup>111</sup> Relying on compacts like the Snake River Compact and the Upper Colorado River Basin Compact, the Court determined standard practice for permitting diversions across state lines is to expressly declare such cross-border diversion rights in the agreements.<sup>112</sup> The Court also considered other compacts that provided specifically how such cross-border agreements would be managed.<sup>113</sup> With this support, the Court held that explicit language regarding the cross-border rights and specific language on the implementation are standard in other compacts, and silence here was insufficient evidence of intent in this case to create a cross-border diversion right.<sup>114</sup>

Next, the Court looked at the course of performance of the parties.<sup>115</sup> It noted this was the first instance of an entity attempting to assert cross-border diversion rights under section 5.05 since Congress officially adopted the Compact in 1980.<sup>116</sup> Tarrant's behavior when attempting to purchase water rights prior to

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<sup>107</sup> *Id.* at 2132.

<sup>108</sup> *Id.*; see also *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842) (navigable waters); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (power to control waters); *Alaska*, 521 U.S. at 34 (1997) (presumption). The Court does not address whether or not the Red River is navigable, but only cites cases involving navigable waters in its sovereignty analysis. *Tarrant*, 133 S. Ct. at 2132; see generally *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227–28 (2012) (defining "navigable").

<sup>109</sup> *Tarrant*, 133 S. Ct. at 2132 (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)).

<sup>110</sup> *Id.* at 2133.

<sup>111</sup> *Id.* at 2133–35.

<sup>112</sup> *Id.*; see Brief for Respondents at 30 n.10, *Tarrant Reg'l Water Dist. v. Herrmann* 133 S. Ct. 2120 (2013) (No. 11-889), 2013 WL 1618026 [hereinafter *Brief for Respondents*] (listing compacts with explicit language granting cross-border access).

<sup>113</sup> *Tarrant*, 133 S. Ct. at 2134; see also *Kansas-Nebraska Big Blue River Compact*, art. VII(1), 86 Stat. 198 (defining which parties can assert rights); *Belle Fourche River Compact*, art. VI, 58 Stat. 96–97 (determining who bears the costs of diversions); *Arkansas River Basin Compact*, *Kansas-Oklahoma*, art. VII(A), 80 Stat. 1411 (implementing administration of diversions).

<sup>114</sup> *Tarrant*, 133 S. Ct. at 2134.

<sup>115</sup> *Id.* at 2135.

<sup>116</sup> *Id.*

the attempt to assert its right under the Compact was also significant in holding the OWRB's interpretation to be more consistent with the drafters' intent.<sup>117</sup>

The Court also rejected Tarrant's argument that the Compact itself allowed Tarrant to divert water from Oklahoma.<sup>118</sup> Tarrant argued the location of boundaries between subbasins within Reach II indicated that subbasin 5 contained surplus water that no state intended to use.<sup>119</sup> Subbasins 1 through 4 could be dammed to provide unlimited water to each of the states, therefore, anything flowing into subbasin 5 was excess.<sup>120</sup> Access to the surplus was only limited by capping each state's share at twenty-five percent of the excess water in subbasin 5.<sup>121</sup> Further, because the subbasin contained waters the states did not intend to use, there would be no detriment to cross-border diversions.<sup>122</sup> The Court was not persuaded by this argument, and looked at section 5.05 of the Compact where the language is not only "equal rights" to "water flowing into subbasin 5," but also "runoff originating in subbasin 5."<sup>123</sup> Therefore, the Court concluded subbasin 5 did not exclusively consist of excess water.<sup>124</sup>

Tarrant also argued "equal rights" meant each state was guaranteed twenty-five percent of the excess water in subbasin 5.<sup>125</sup> The OWRB argued the language of section 5.05 assigns a cap of twenty-five percent on the right to access water in the subbasin, but the states are not guaranteed the full twenty-five percent.<sup>126</sup> Further, Tarrant argued the amount of excess water within each state was not equal to twenty-five percent of the total excess water within Reach II, subbasin 5.<sup>127</sup> Specifically, Tarrant claimed more than twenty-five percent of the water was in Oklahoma.<sup>128</sup> Tarrant argued more than twenty-five percent of the freshwater was in Oklahoma and only sixteen percent was located in Texas.<sup>129</sup> This was inconsistent with the OWRB calculations placing at least twenty-nine

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 2135–36.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2135–36.

<sup>121</sup> *Id.* This assumes flow at the Arkansas-Louisiana border is at least 3,000 cfs. See *Red River Compact*, *supra* note 2, § 5.05.

<sup>122</sup> *Tarrant*, 133 S. Ct. at 2135–36.

<sup>123</sup> *Id.* at 2136.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Brief for Respondents*, *supra* note 112, at 28–29.

<sup>127</sup> *Tarrant*, 133 S. Ct. at 2136.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; see also *Brief for Petitioner*, *supra* note 103, at 9 n.5 (discussing relevant details of the 1970 report).

percent of the water in the subbasin within Texas.<sup>130</sup> Ultimately, the Court did not have to decide which calculations were accurate, and held the “equal rights” referred only to a limit of twenty-five percent instead of a guarantee.<sup>131</sup> The Court maintained if Texas believed Oklahoma was using more than twenty-five percent, it could request an accounting pursuant to section 2.11 of the Compact.<sup>132</sup>

The Court also disagreed with Tarrant’s alternative argument that the Oklahoma water laws violated the dormant Commerce Clause. The Court found all the waters within Reach II, subbasin 5 were allocated; therefore, Oklahoma statutes did not apply to interstate waters.<sup>133</sup> For the dormant Commerce Clause to apply, there has to be interstate commerce.<sup>134</sup> In this case, the Court found the Compact appropriated all water within the Red River basin.<sup>135</sup> Because all the water within the basin was appropriated, the Court found there was no interstate commerce.<sup>136</sup> The Compact assumes each state only uses its allocated twenty-five percent of the excess unless accounting demonstrates otherwise.<sup>137</sup> The Court found the Compact governs all interstate waters in the basin, and the Oklahoma statutes cannot discriminate against any interstate commerce because there is no interstate commerce to regulate.<sup>138</sup> Ultimately, the Court held Oklahoma water statutes did not violate the dormant Commerce Clause doctrine.<sup>139</sup>

#### ANALYSIS

The United States Supreme Court erred in its decision. First, Tarrant’s interpretation of the Compact was correct; the Court should have placed more weight on the structure of the Compact, course of dealings, and prior draft history.<sup>140</sup> Proper interpretation of the Compact would not have resulted in involuntary abandonment of state sovereign powers.<sup>141</sup> Second, contrary to the Court’s conclusion, there was unappropriated water under the Compact, and Oklahoma’s discriminatory state laws violated the dormant Commerce Clause.<sup>142</sup>

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<sup>130</sup> *Tarrant*, 133 S. Ct. at 2136; *see also Brief for Respondents, supra* note 112, at 26, 47–48, & n.17 (discussing the twenty-nine percent calculation and pitfalls of the Tarrant report).

<sup>131</sup> *Tarrant*, 133 S. Ct. at 2136.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2137.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See infra* notes 144–92 and accompanying text.

<sup>141</sup> *See infra* notes 193–200 and accompanying text.

<sup>142</sup> *See infra* notes 218–70 and accompanying text.

Finally, this decision will have far reaching effects on Wyoming's interstate water compacts.<sup>143</sup>

### *Compact Interpretation*

Contrary to the Supreme Court's conclusion, the Compact's plain meaning permits Tarrant to divert water in Oklahoma.<sup>144</sup> If a court finds the plain meaning ambiguous, it can use interpretive rules.<sup>145</sup> When interpreting the Compact, more weight should be given to the structure of the Compact as a whole, the drafting history, and the course of dealings of the parties.<sup>146</sup> Because the Compact is a statute, state sovereignty should be a factor.<sup>147</sup> But the Court erred in deciding the states did not abrogate their sovereignty.<sup>148</sup> Finally, the policy behind water law strongly favors permitting Tarrant's proposed cross-border diversion.<sup>149</sup>

The Supreme Court views compacts between states as contracts Congress approves and requires interpretation through principles of contract law and statutory canons.<sup>150</sup> Both interpretation methods first focus on the unambiguous, plain meaning of the language in dispute.<sup>151</sup> If the plain meaning of the compact is clear, that is the interpretation that should be used.<sup>152</sup> The first distinction that must be made is whether the "equal rights" language in section 2.01 of the Compact refers to a right to water up to a maximum of twenty-five percent or a guaranteed entitlement to twenty-five percent of the excess in Reach II, subbasin 5.<sup>153</sup> The plain meaning of a "right" is a "legally enforceable claim" or "legal guarantee" of an "interest."<sup>154</sup> The use of the term "right" within the Compact is not a mere opportunity to divert excess water.<sup>155</sup> Rather, "right" in

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<sup>143</sup> See *infra* notes 271–89 and accompanying text.

<sup>144</sup> See *infra* notes 150–56 and accompanying text.

<sup>145</sup> See *infra* note 157 and accompanying text.

<sup>146</sup> See *infra* notes 157–92 and accompanying text.

<sup>147</sup> See *infra* notes 193–200 and accompanying text.

<sup>148</sup> *Id.*

<sup>149</sup> See *infra* notes 201–17 and accompanying text.

<sup>150</sup> *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (contract principles); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010) (statutory canons).

<sup>151</sup> *Montana v. Wyoming*, 131 S. Ct. 1765, 1778 (2011) (discussing contract principles); *Alabama*, 130 S. Ct. at 2306 (exemplifying statutory use of plain meaning of "sanctions" in the compact).

<sup>152</sup> See *Montana*, 131 S. Ct. at 1778 (addressing the plain meaning of "beneficial uses" in the Yellowstone River Compact).

<sup>153</sup> See *Red River Compact*, *supra* note 91, § 2.01.

<sup>154</sup> BLACK'S LAW DICTIONARY 1436 (9th ed. 2009).

<sup>155</sup> See *Red River Compact*, *supra* note 83, § 5.05.

the Compact is a guaranteed entitlement for the states in the Compact to use twenty-five percent of the excess in subbasin 5 of Reach II when the Red River's flow at the Arkansas-Louisiana border is at least 3,000 cfs.<sup>156</sup> The plain meaning of "equal rights" guarantees all the states twenty-five percent of the surplus of Reach II, subbasin 5. The next issue is how the states satisfy this guarantee, and if they can do so by cross-border diversions.

Tarrant has a right to divert water in Oklahoma to fulfill their guaranteed rights under the Compact because the structure of the Compact allows it. The Supreme Court looks at the structure of statutes to resolve interpretation ambiguities.<sup>157</sup> In the Compact, specific qualifiers were used in other sections of the Compact but left out of the language regarding Reach II, subbasin 5.<sup>158</sup> For example, the Compact describes states as having "free and unrestricted use of the water of this subbasin *within their respective states*," with respect to Reach II, subbasin 3.<sup>159</sup> Also, in section 6.03, which governs Reach III, "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin."<sup>160</sup> When a term is used in another provision, the court assumes omissions elsewhere are intentional.<sup>161</sup> Because the Court is reluctant to write language into compacts, and the Compact drafters specified elsewhere that unrestricted uses within subbasins were restricted within state boundaries, it is clear the drafters intended Reach II, subbasin 5 to be a borderless basin with equal access for all states.<sup>162</sup>

The Compact contemplated in some sections that states are limited to use waters within their boundaries.<sup>163</sup> In the section concerning Reach II, subbasin 5, that language is absent, demonstrating the parties did not contemplate the waters of Reach II, subbasin 5 to be limited within the state boundaries.<sup>164</sup> This distinction demonstrates the intent of the parties because the Court is reluctant to add terms to contracts.<sup>165</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> *Russello v. United States*, 464 U.S. 16, 22–23 (1983).

<sup>158</sup> Compare *Red River Compact*, *supra* note 2, at §§ 5.03(b) & 6.03 (qualitative language present), with *Red River Compact*, *supra* note 2, at § 5.05; see generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it.").

<sup>159</sup> *Red River Compact*, *supra* note 2, § 5.03(b) (emphasis added).

<sup>160</sup> *Id.* § 6.03(b) (emphasis added).

<sup>161</sup> *Russello*, 464 U.S. at 23 (1983).

<sup>162</sup> See *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312–13 (2010) ("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.").

<sup>163</sup> See *supra* notes 159–60 and accompanying text.

<sup>164</sup> See *Red River Compact*, *supra* note 2, § 5.05.

<sup>165</sup> See *supra* note 162 and accompanying text.



The drafting history of the Compact also supports the argument Reach II, subbasin 5 was intended to be a borderless pool for all states. When courts interpret compacts, they carefully consider the parties' intent.<sup>166</sup> Further, the negotiation history must be looked at when interpreting ambiguous language, and previous drafts and the circumstances surrounding the current language are aids to find the drafters' intent.<sup>167</sup> In *Tarrant*, both parties used the previous drafts as support for their positions, but the drafting history supports the conclusion the drafters specifically intended to create a basin without restricting access for each state within their respective boundaries.<sup>168</sup>

An early draft of the Compact in 1966 contained specific language referring to state power within their boundaries.<sup>169</sup> This language referred to explicit boundaries within Reach II, as applied to "unassigned" waters, which would become "excess" water (subbasin 5) in future drafts.<sup>170</sup> The 1972 draft required that the states would have "free and unrestricted use of the waters of this subbasin [5]."<sup>171</sup> The language of that draft still contained limits to the state boundaries as found in the 1966 draft.<sup>172</sup> However, in 1976, the drafters deleted the language "within their boundaries," and "in their respective states" with regards to Reach II, subbasin 5.<sup>173</sup> But the drafters kept that language elsewhere in the Compact.<sup>174</sup> States had free use of the waters of subbasin 5 with the restrictions of minimum flow requirements at the Arkansas-Louisiana border, and the twenty-five percent guarantee.<sup>175</sup>

The OWRB argued the language "free and unrestricted use" implies a limitation to state boundaries.<sup>176</sup> It claimed the use among the multiple states could not be so broad without restricting the states to their respective areas.<sup>177</sup> But, the twenty-five percent guarantee acts as a limit to the states' use within the subbasin, just like a restriction to use within each state's respective boundary

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<sup>166</sup> *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011).

<sup>167</sup> *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (negotiation history); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) (previous drafts).

<sup>168</sup> See *Brief for Petitioner*, *supra* note 103, at 41–43; *Brief for Respondents*, *supra* note 112, at 45–47.

<sup>169</sup> See *Brief for Petitioner*, *supra* note 103, at 42 (discussing the precise language and location of such language in the 1966 draft).

<sup>170</sup> *Id.*

<sup>171</sup> *Brief for Respondents*, *supra* note 112, at 46.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 46–47.

<sup>176</sup> *Id.* at 13.

<sup>177</sup> *Id.*

would.<sup>178</sup> Thus, there was no need for the “implied” state boundary limitations under the Compact to protect against abuse.

Significantly, prior drafts had language specifically limiting the right to access water under the Compact to state boundaries, and the drafters abandoned that language in the final version.<sup>179</sup> If compact drafters consider and reject language, such actions demonstrate intent not to include such language in the final version.<sup>180</sup> State boundary limitations remained elsewhere in the Compact, but were omitted in the section describing Reach II, subbasin 5.<sup>181</sup> By changing the language, the parties to the Compact contemplated states could make interstate diversions from Reach II, subbasin 5.

The course of dealings under the Compact also demonstrate the Compact allows cross-border diversions. The Supreme Court found it important that no state sought cross-border diversions within Reach II, subbasin 5 until the current case.<sup>182</sup> The Court failed to recognize that a need for such cross-border diversions did not previously arise.<sup>183</sup> More importantly, the Court should have relied on the parties’ course of dealings during the negotiations.<sup>184</sup> While the Red River Compact negotiations were proceeding in the 1950s and 1960s, Oklahoma sought federal funding for dam projects along the Kiamichi River, which is in Reach II, subbasin 1.<sup>185</sup> There was not enough demand in Oklahoma for the projects to be approved, so the Oklahoma Legislature subsequently included demand from north Texas in their analysis, including from the Tarrant Water District; this resulted in a feasible project that Congress approved.<sup>186</sup> Under the Compact, the water storage created by the projects would be available for unlimited, exclusive use within subbasin 1, which is entirely within Oklahoma.<sup>187</sup>

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<sup>178</sup> See *Red River Compact*, *supra* note 2, § 5.05 (stating the twenty-five percent guarantee language).

<sup>179</sup> See *supra* notes 169–75 and accompanying text.

<sup>180</sup> *Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 374 (2008) (upholding specific intent to leave out the term “economic” found in earlier drafts, but omitted in the final version); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000) (finding that Congress, in drafting legislation considered and rejected specific language was indicative of intent to purposely leave out in the final version).

<sup>181</sup> See *Red River Compact*, *supra* note 2, §§ 5.03(b) & 6.03(b).

<sup>182</sup> *Tarrant*, 133 S. Ct. at 2135.

<sup>183</sup> See, e.g., BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY, SR-34 (2012) (describing climate change trends of decreased supply and increased demand).

<sup>184</sup> *Pac. Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 552 (9th Cir. 1949) (noting that “prior negotiations and surrounding circumstances may be considered” when trying to determine the meaning of words used in a contract).

<sup>185</sup> *Brief for Petitioner*, *supra* note 103, at 45 (citing S. Doc. No. 145, *Report of the District Engineer*, 87th Cong. (Sept. 24, 1962)).

<sup>186</sup> *Id.*; Flood Control Act of 1962, Pub. L. No. 87-874, tit. II, 76 Stat. 1173 (1962).

<sup>187</sup> *Red River Compact*, *supra* note 2, § 5.01.

It is unreasonable that Congress would approve such a project on the premise that waters would be available to Texas and then approve a compact preventing Texas from accessing those waters.<sup>188</sup> The only fair interpretation is that, within Reach II, subbasin 1, waters were for Oklahoma's unlimited use, but any unused, excessive water would flow into subbasin 5, where Texas would have access to such waters under the Compact with the flow restrictions and percentage allocation provided in section 5.05.<sup>189</sup> Any other interpretation would allow Oklahoma to hoard water because the projects created a surplus supply in Oklahoma.<sup>190</sup> If Oklahoma or any other state would be allowed to hoard water, the only remedy would be an accounting.<sup>191</sup> To date, no state has sought an accounting due to the time, cost, and uncertainty in implementation.<sup>192</sup>

The Supreme Court also erred in its analysis of the relinquishment of state sovereignty because the states voluntarily surrendered their sovereignty in the Compact. The Court held allowing states to divert water across state boundaries would violate the strong presumption of states retaining their sovereignty.<sup>193</sup> Although state sovereignty is an important factor, the Court put the most weight on this factor and failed to see how the states voluntarily ceded their sovereign power when they agreed to the Compact.<sup>194</sup> The Compact language provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state," which demonstrates intent to retain state sovereign power.<sup>195</sup> Section 2.01 continues and states "such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact."<sup>196</sup> Further, section 2.10 discusses the inability of the Compact to interfere with state rights regarding use and control of their waters.<sup>197</sup> But this is only as long as such actions are consistent with the states' obligations under the Compact.<sup>198</sup> The states freely negotiated and approved the Compact, which contains explicit language limiting their powers.<sup>199</sup> The states specifically allowed the Compact to preempt their own

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<sup>188</sup> Although Congress does not have to contemplate all circumstances before approving a compact, Congress has rejected proposed compacts before because of the circumstances. *See supra* note 31 and accompanying text.

<sup>189</sup> *See Red River Compact, supra* note 2, § 5.05.

<sup>190</sup> *Brief for Petitioner, supra* note 103, at 45.

<sup>191</sup> *Red River Compact, supra* note 2, § 2.11; Thorson, *supra* note 16, at 434 (discussing the difficulties associated with an accounting).

<sup>192</sup> *See supra* notes 86–90 and accompanying text.

<sup>193</sup> *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131–33 (2013).

<sup>194</sup> *Id.* at 2132–33.

<sup>195</sup> *Red River Compact, supra* note 2, § 2.01.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* § 2.10.

<sup>198</sup> *Id.*

<sup>199</sup> *See supra* notes 195–98 and accompanying text.

water laws.<sup>200</sup> Therefore, their sovereign power was not involuntarily limited, and the Court should not have weighed this factor as heavily.

Finally, policy demands Tarrant be able to divert water in Oklahoma for its immediate use.<sup>201</sup> Temperature and precipitation trends make cooperation between states important to make sure water gets to where it is needed.<sup>202</sup> In a Bureau of Reclamation study for the nearby Colorado River basin, a recent analysis suggests a deficit of 3.2 million acre-feet (maf) between supply and demand for basin water by 2060.<sup>203</sup> This is equal to roughly ten trillion gallons.<sup>204</sup> With demand increasing in metropolitan areas like Dallas-Fort Worth, and supply becoming less stable, states need to cooperate to make sure water goes to where it is most needed.<sup>205</sup> Both Oklahoma and Arkansas rejected Tarrant's attempts to purchase water, and now Oklahoma is attempting to hoard excess water while an expanding population to the south is looking for more water to meet its needs.<sup>206</sup> This is especially important because water is a unique resource that represents the "basis of life on Earth and the foundation of all civilizations."<sup>207</sup>

Further, Oklahoma is a hybrid state, meaning it acknowledges both prior appropriation and riparian doctrines in regard to surface water rights.<sup>208</sup> Although it still recognizes riparian rights, the state has sought to limit such rights in favor of the trend of western states towards prior appropriation.<sup>209</sup> With foundations in mining law, prior appropriation was developed to put water to use to populate and produce economic prosperity in the West.<sup>210</sup> With this policy, the two

<sup>200</sup> "[V]ia the supremacy clause, a state's compact obligations can be enforced under federal authority, taking precedence over inconsistent state law." THOMPSON, *supra* note 25, at 902.

<sup>201</sup> See *infra* notes 202–12 and accompanying text.

<sup>202</sup> BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY, STUDY REPORT, SR-34 (2012), [http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Study%20Report/CRBS\\_Study\\_Report\\_FINAL.pdf](http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Study%20Report/CRBS_Study_Report_FINAL.pdf) (last visited Nov. 15, 2013).

<sup>203</sup> *Id.*

<sup>204</sup> One acre-foot is equivalent to 325,851 gallons. THOMAS V. CECH, PRINCIPLES OF WATER RESOURCES, Appendix (3d ed. 2010).

<sup>205</sup> See *supra* note 3 and accompanying text (stating that Dallas is growing); *supra* notes 202–204 and accompanying text (describing that supply is variable).

<sup>206</sup> See Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2128 (2013) (describing how Tarrant's customer base is expanding).

<sup>207</sup> THOMAS V. CECH, PRINCIPLES OF WATER RESOURCES 1 (3d ed. 2010).

<sup>208</sup> Franco-American Charolaise, Ltd. v. Oklahoma Water Res. Bd., 855 P.2d 568, 571 (Okla. 1990). For basic doctrine elements compare A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769 (Fall 2001) (prior appropriation), with 65 C.J.S. *Navigable Waters* § 93 (2013) (riparian rights).

<sup>209</sup> See THOMPSON, *supra* note 25, at 211–12 (legislature attempting to limit unused riparian rights and dispute between two types of users is resolved by seniority of right).

<sup>210</sup> See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 231–35 (1992).

major components are “first in time, first in right” and “beneficial use.”<sup>211</sup> Prior appropriation stresses the idea of putting the water to use instead of hoarding it because a right may be forfeited upon non-use.<sup>212</sup> The OWRB’s actions of attempting to hoard water are in direct conflict with the policy basis for the water laws of the state, and Tarrant should be able to appropriate water from Oklahoma.

Ultimately, the Court erred in preventing Tarrant from asserting its claim under the Compact within Oklahoma and Reach II, subbasin 5. The plain meaning guarantees each state an entitlement to twenty-five percent of the excess in that subbasin.<sup>213</sup> The drafters intentionally omitted limitations on water use within state boundaries in the provision describing Reach II, subbasin 5.<sup>214</sup> Prior drafts of the Compact and the course of dealings between the parties demonstrate the intent to create a common pool of water in subbasin 5 for the benefit of all states.<sup>215</sup> In the Compact the states voluntarily abrogated their sovereign powers.<sup>216</sup> Finally, policy requires that waters should be diverted to where they are needed in the spirit of cooperation between states.<sup>217</sup>

### *Dormant Commerce Clause*

Oklahoma water statutes and procedures governing the interstate water not covered in the Red River Compact violate the dormant Commerce Clause. The Supreme Court refused to engage in the dormant Commerce Clause analysis because it held, under the Compact, Oklahoma is entitled to all waters within their boundaries as well as within Reach II, subbasin 5, pending a call for accounting.<sup>218</sup> The Court was wrong in its holding because there were unappropriated waters not covered by the Compact which fall under the definition of interstate commerce.<sup>219</sup> These waters are the amount above twenty-five percent of the excess that exist within Oklahoma and Reach II, subbasin 5. Congress did not consent to the protectionist state laws of Oklahoma.<sup>220</sup> The Oklahoma laws are discriminatory on their face and in their effects.<sup>221</sup> The legitimate public purpose is not enough to overcome the subsequent strict scrutiny test.<sup>222</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> See OKLA. ADMIN. CODE § 785:20-9-3 (2013).

<sup>213</sup> See *supra* notes 150–56 and accompanying text.

<sup>214</sup> See *supra* notes 157–65 and accompanying text.

<sup>215</sup> See *supra* notes 166–92 and accompanying text.

<sup>216</sup> See *supra* notes 193–200 and accompanying text.

<sup>217</sup> See *supra* notes 201–17 and accompanying text.

<sup>218</sup> Tarrant Reg’l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2137 (2013).

<sup>219</sup> See *infra* notes 223–34 and accompanying text.

<sup>220</sup> See *infra* notes 235–42 and accompanying text.

<sup>221</sup> See *infra* notes 243–50 and accompanying text.

<sup>222</sup> See *infra* notes 251–70 and accompanying text.

The water involved in the case is defined as an interstate commercial medium. Water, being “essential for human survival,” deserves “significant federal interest.”<sup>223</sup> As such, water passing between states is interstate commercial activity susceptible to regulation under the Commerce Clause. Further, the majority of developed water in the country is used for irrigation, especially in the western, arid states.<sup>224</sup> The waters of the Red River basin are considered interstate commerce.<sup>225</sup>

There are unappropriated interstate waters that the Compact does not govern.<sup>226</sup> It is unclear whether Oklahoma has a surplus beyond the twenty-five percent guarantee under the Compact, but according to at least one report, it could be as high as fifty-nine percent of the excess water in subbasin 5.<sup>227</sup> If Oklahoma has more than its share within its borders, Oklahoma can only access twenty-five percent of the excess in subbasin 5.<sup>228</sup> Any surplus above the twenty-five percent should flow downstream; if Oklahoma uses that surplus it violates the Compact.<sup>229</sup> The main stream of the Red River is within the borders of Oklahoma, so the excess flows go through Arkansas and Louisiana, where the twenty-five percent guarantee of the excess also limits those states.<sup>230</sup> The unappropriated remainder eventually flows out of the basin and into the Mississippi River.<sup>231</sup> Therefore, there are unappropriated waters under the Compact to which the dormant Commerce Clause would apply.<sup>232</sup> Other studies show that thirty-four percent of the basin lies within Texas, so there is uncertainty about the amount of water in subbasin 5

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<sup>223</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982).

<sup>224</sup> THOMPSON, *supra* note 25, at 3 (quoting John D. Leshy, *Notes on a Progressive National Water Policy*, 3 HARV. J.L. & POL'Y 132, 134–37 (2009)). The amount of groundwater used for agriculture, which is a global commercial enterprise, was important in determining interstate commerce. *Sporhase*, 458 U.S. at 953. Within Texas, irrigation is a major use of Red River basin water. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, BASIN 02: RED RIVER, [http://www.tceq.state.tx.us/assets/public/comm\\_exec/pubs/sfr/050\\_00/vol2\\_basin02.pdf](http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/050_00/vol2_basin02.pdf) (last visited Nov. 2, 2013).

<sup>225</sup> *Gibbons v. Ogden*, 22 U.S. 1, 21 (1824) (“It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States . . . their use, for those purposes, seemed to be entrusted to the exclusive power of Congress.”).

<sup>226</sup> See *infra* notes 227–334 and accompanying text.

<sup>227</sup> *Brief for Petitioner*, *supra* note 103, at 9 n.5 (summarizing relevant points of the *Report of the Engineering Advisory Committee to the Red River Compact Commission*, which covered average flows taken between the 1930s and 1960s and reported that Oklahoma has fifty-nine percent of the water in subbasin 5, while Texas retained only eleven percent).

<sup>228</sup> See *Red River Compact*, *supra* note 2, § 5.05.

<sup>229</sup> *Id.* See also *Brief for Petitioner*, *supra* note 103, at 5–6 (stating the mainstream of the Red River is too high in salt and chloride contamination for suitable domestic and industrial uses).

<sup>230</sup> *Red River Compact*, *supra* note 2, § 5.05.

<sup>231</sup> *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2136 App. B (2013).

<sup>232</sup> It is possible that if Tarrant wins under this argument that they would be required to pay just compensation for the water. See *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355–56 (1908).

within each state.<sup>233</sup> Although accounting is allowed under the Compact, it can be expensive and time-consuming, and the variability of water leads to uncertainty in the results.<sup>234</sup>

Congress did not consent to the state laws governing the interstate waters of the Red River. In subsequent years, the Supreme Court laid down the standard for Congressional assent to state control of interstate commerce.<sup>235</sup> The consent must be “unmistakably clear,” and “manifest unambiguous consent.”<sup>236</sup> The Court demonstrated in *Sporhase* how much deference it will give to Congress when determining if Congress has granted the right to govern specific instances of interstate commerce.<sup>237</sup> In that case, the Court focused on whether Congress granted Nebraska the right to govern groundwater, which the Court found to be interstate commerce.<sup>238</sup> The Reclamation Act of 1902 asserted, “nothing in this Act shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation.”<sup>239</sup> Such language did not constitute congressional consent.<sup>240</sup> In the Tarrant dispute, the Compact has similar language, but is even weaker than *Sporhase* because the Compact expressly limits the state control to the obligations listed therein.<sup>241</sup> Further, Congress assented to the weaker language when it approved the Compact, making it statutorily binding, like the Reclamation Act.<sup>242</sup> The Compact does not contain language that is “unmistakably clear,” so Congress did not intend to convey regulatory powers of interstate commerce to Oklahoma.<sup>243</sup>

Under the next step of the dormant Commerce Clause analysis, the Oklahoma statutes were discriminatory on their face.<sup>244</sup> There is a strong presumption against a state’s economic protectionism that blatantly discriminates against another state.<sup>245</sup> Specifically, Oklahoma statutes title 82, sections 1086.1(A)(3) and 105.12(A) declare that water must be put to use in Oklahoma “so out-of-state downstream users will not acquire vested rights therein,” and explicitly express a

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<sup>233</sup> *Brief for Respondents*, *supra* note 112, at 15.

<sup>234</sup> *Red River Compact*, *supra* note 2, § 2.11; *see supra* notes 90–94 and accompanying text.

<sup>235</sup> *See Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>236</sup> *Wyoming*, 502 U.S. at 458 (“manifest”); *Gregory*, 501 U.S. at 460–61 (“unmistakably clear”).

<sup>237</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959–60 (1982).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 959.

<sup>240</sup> *Id.*

<sup>241</sup> *See supra* notes 193–200 and accompanying text.

<sup>242</sup> *See Red River Compact*, *supra* note 2.

<sup>243</sup> *See supra* notes 235–36 and accompanying text.

<sup>244</sup> *See Brief for Petitioner*, *supra* note 103, at 17–19 (discussing the Oklahoma water laws discriminating against out-of-state users).

<sup>245</sup> *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

preference to in-state uses.<sup>246</sup> Facial discrimination occurs when a statute “overtly blocks the flow of interstate commerce at the State’s borders.”<sup>247</sup> By excluding out-of-state users of interstate waters unappropriated under the Compact, Oklahoma has facially discriminated against out-of-state applicants in blocking interstate commerce from crossing its border.

Even if the Oklahoma statutes are not discriminatory on their face, they are discriminatory in their effects. The Oklahoma Attorney General, in an official directive said, “it is unrealistic that an out-of-state user is a proper permit applicant.”<sup>248</sup> The opinion tells the agency responsible for administering water rights that out-of-state users do not meet the criteria for a permit. Although not written into statutes, such a policy statement is evidence of a purpose to discriminate against out-of-state applicants because they are prevented from obtaining permits as a result of the directive.<sup>249</sup> Further, the time frame for out-of-state users to put a project to beneficial use is only seven years, while the project intended by Tarrant would require fifteen years to complete.<sup>250</sup> According to the statutes, if Tarrant were an in-state user, the time restriction would not apply.<sup>251</sup> The effects of such a scheme would result in potential out-of-state applicants looking for alternatives elsewhere rather than risk a large investment if there was uncertainty in meeting the completion requirement.

The statutory scheme is discriminatory, either facially or in its effects, so it must pass a strict scrutiny test to be valid.<sup>252</sup> The only way the state can overcome the invalidity is to prove the statutes support local benefits and no nondiscriminatory alternatives exist.<sup>253</sup> In this case, the OWRB argued the dormant Commerce Clause did not apply and never asserted a public policy argument.<sup>254</sup> However, one of the statutes asserts water should be used for the “benefit” of Oklahoma, “so that out-of-state downstream users will not acquire vested rights therein to

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<sup>246</sup> OKLA. STAT. ANN. tit. 82, §§ 1086.1(A)(3), 105.12(A) (2013).

<sup>247</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 336–37 (1979) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

<sup>248</sup> Okla. Att’y Gen. Op. No. 77-274 (1978).

<sup>249</sup> See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 677 (1981) (finding a declaration by the governor evidenced a statutory scheme intending to limit out of state truck traffic instead of the declared public purpose of safety).

<sup>250</sup> OKLA. STAT. ANN. tit. 82, § 105.16(A) (2013); *Brief for Petitioner*, *supra* note 103, at 18 (discussing Oklahoma water laws discriminating against out-of-state users).

<sup>251</sup> OKLA. STAT. ANN. tit. 82, § 105.16(B) (2013).

<sup>252</sup> *Kassel*, 450 U.S. at 624 (facially discriminatory); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994) (discriminatory in its effects); *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (requires a high scrutiny).

<sup>253</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

<sup>254</sup> *Brief for Respondents*, *supra* note 112, at 27.



the detriment of the citizens of this state.”<sup>255</sup> Further, the Oklahoma Attorney General discusses that the prevention of water, a “valuable resource,” from being bound by out-of-state users.<sup>256</sup> The support for this opinion stems from a vague claim regarding “public health and general welfare.”<sup>257</sup>

If the argument is to conserve water for the benefit of its people, then any state can make the same claim for any natural resource it may have within its boundaries and hoard it.<sup>258</sup> Oklahoma has lost this argument before when it attempted to conserve natural gas by preventing interstate pipelines.<sup>259</sup> Water is even more important a resource because it is the basis of life on Earth.<sup>260</sup> The Court was unimpressed with the conservation argument and found the statutes violated the dormant Commerce Clause.<sup>261</sup>

Further, a nondiscriminatory alternative exists. Under the Compact, Oklahoma can store as much water as it requires in Reach II, subbasin 1 for the exclusive use within the state.<sup>262</sup> Water is a resource that should be distributed nationally to where it is currently needed.<sup>263</sup> Individual states should not be allowed to hoard it for possible future use. The benefit of protecting the interests of Oklahoma citizens would not carry enough weight to overcome the virtually per se invalidity assigned by the discriminatory nature of the statutory scheme.<sup>264</sup>

A better policy argument is that Oklahoma is restricting out-of-state water uses to maintain minimum flows for environmental protection because environmental concern has been the only legitimate public policy to overcome the strict scrutiny test.<sup>265</sup> However, western states have only started to recognize in-stream flow rights for environmental purposes.<sup>266</sup> Further, this is not the best

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<sup>255</sup> OKLA. STAT. ANN. tit. 82, §§ 1086.1(A)(3) (2013).

<sup>256</sup> Okla. Att’y Gen. Op. No. 77-274 (1978).

<sup>257</sup> *Id.*

<sup>258</sup> See *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911) (“If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals.”).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 254–55.

<sup>261</sup> *Id.*

<sup>262</sup> *Red River Compact*, *supra* note 2, § 5.01.

<sup>263</sup> See, e.g., *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 279 (Wyo. 1992) (“Water is the lifeblood of Wyoming. It is a scarce resource which must be effectively managed and efficiently used to meet the various demands of society.”).

<sup>264</sup> See *Maine v. Taylor*, 477 U.S. 131, 140–44 (1986) (exemplifying when legitimate public interest can overcome a discriminatory law).

<sup>265</sup> *Id.* (discussing skewed balancing test where environmental protection prevailed for the state).

<sup>266</sup> See generally THOMPSON, *supra* note 25, at 215–21 (discussing the current evolution of in-stream flow rights in the western states).

alternative for accomplishing such a policy without discrimination.<sup>267</sup> Oklahoma could set minimum flows for rivers that govern any appropriative right, or issue conditional permits reserving the right to reduce diversions when environmental circumstances require.<sup>268</sup> None of these alternatives would be discriminatory, unlike the present scheme, because they only affect in-state users.<sup>269</sup> Further, the need of water for an expanding population in North Texas for domestic use is a legitimate public policy, instead of leaving water in reservoirs, where it evaporates into the atmosphere instead of being put to use.<sup>270</sup> This is especially important in western states, where prior appropriation is based on putting water to beneficial use or forfeiting the right to it.<sup>271</sup>

### *Effects on Wyoming*

Wyoming has been involved in interstate water compacts since their inception in 1922.<sup>272</sup> To date, Wyoming has seven compacts concerning interstate waterways that are some of the largest and most important waterways in the nation.<sup>273</sup> Wyoming is “situated astride the Continental Divide, and as a result provides the headwaters for four major river basins in the western United States, including the Missouri-Mississippi, Green-Colorado, and Snake-Columbia Rivers.”<sup>274</sup> The Great Salt Lake Basin also carves out a portion of the state.<sup>275</sup> Because of this, Wyoming has had disputes over the use of interstate waters that have led to multiple compacts and apportionments.<sup>276</sup>

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<sup>267</sup> *Maine*, 477 U.S. at 146.

<sup>268</sup> See THOMPSON, *supra* note 25, at 219 (discussing different ways prior appropriation states can manage aqueous environmental issues).

<sup>269</sup> See *supra* notes 77–84 and accompanying text.

<sup>270</sup> Domestic uses are typically considered more important than any other use. See, e.g., WYO. STAT. ANN. § 41-3-102 (2013) (stating municipal use is the penultimate preferred use, behind drinking water).

<sup>271</sup> OKLA. ADMIN. CODE § 785:20-9-3 (2013).

<sup>272</sup> See Colorado River Compact, 42 Stat. 171 (1922).

<sup>273</sup> See *id.*; Belle Fourche River Compact, 58 Stat. 94 (1944); Upper Colorado River Basin Compact, 63 Stat. 37 (1949); Snake River Compact, 64 Stat. 32 (1950); Yellowstone River Compact, 65 Stat. 663 (1951); Amended Bear River Compact, 72 Stat. 38 (1958); Upper Niobrara River Compact, 83 Stat. 86 (1969).

<sup>274</sup> James J. Jacobs & Donald J. Brosz, WYOMING’S WATER RESOURCES, <http://library.wrds.uwyo.edu/wrp/93-12/93-12.html> (last visited Nov. 17, 2013) [hereinafter *Jacobs & Brosz*]; see also James J. Jacobs et al., WYOMING WATER LAW: A SUMMARY (1995), available at <http://library.wrds.uwyo.edu/wrp/90-17/90-17.html> (last visited Nov. 17, 2013) (describing the history and basic tenets of Wyoming water law).

<sup>275</sup> See *Jacobs & Brosz, supra* note 274.

<sup>276</sup> See Colorado River Compact, 42 Stat. 171 (1922); Belle Fourche River Compact, 58 Stat. 94 (1944); Upper Colorado River Basin Compact, 63 Stat. 31 (1949); Snake River Compact, 64 Stat. 29 (1950); Yellowstone River Compact, 65 Stat. 663 (1951); Amended Bear River Compact, 72 Stat. 38 (1958); Upper Niobrara River Compact, 83 Stat. 86 (1969).

The Supreme Court's decision on how to interpret ambiguities in interstate water compacts could impact any compact to which Wyoming is a signatory. Specifically, the Court's decision in *Tarrant* could impact the Upper Niobrara Compact.<sup>277</sup> Despite a tiny portion of the river being within the boundaries of Wyoming, the compact grants "no restrictions on the use of the surface waters of the Upper Niobrara River by Wyoming."<sup>278</sup> The language did not expressly grant Wyoming the right to divert waters in Nebraska, where the majority of the river flows, but only limits the use to Wyoming laws and certain limitations within Nebraska.<sup>279</sup>

With this decision, Nebraska may be able to set further limitations on Wyoming since there is no expressed granting of diversion rights for Wyoming within Nebraska. Nebraska could enact statutes similar to Oklahoma's, where out-of-state applicants were virtually denied the right to divert water.<sup>280</sup> Wyoming water users would be unable to access their share of water from the Upper Niobrara River under the compact.

Further, the Supreme Court has already held that certain interstate water practices in Nebraska violated the dormant Commerce Clause.<sup>281</sup> But if a case concerning this compact were presented preventing out-of-state permittees in Nebraska, *Tarrant* may be the basis for allowing such laws.<sup>282</sup> Despite previous contrary precedent, this could occur, as preventing surface waters from leaving the state would be an obvious violation of the dormant Commerce Clause.<sup>283</sup>

Wyoming will be at the heart of litigation over interstate waters and the compacts governing them.<sup>284</sup> In fact, Wyoming is currently part of litigation concerning the Yellowstone River Compact.<sup>285</sup> Many of the compacts could run into cross-border diversion issues similar to *Tarrant* and the OWRB. There are

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<sup>277</sup> Upper Niobrara River Compact, art. V, 83 Stat. 86 (1969).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Cf.* *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2136–37 (2013); *see supra* note 6 and accompanying text.

<sup>281</sup> *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959–60 (1982).

<sup>282</sup> *Id.* at 960 (discussing reciprocity requirement for exporting groundwater outside the state violated dormant Commerce Clause); *see Tarrant*, 133 S. Ct. at 2136–37.

<sup>283</sup> *See Sporhase*, 458 U.S. at 945–954.

<sup>284</sup> *See* BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY, STUDY REPORT, SR-34 (2012); Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The Case of Wyoming*, 6 WYO. L. REV. 291 (2006) (discussing, in general, the issues affecting Wyoming).

<sup>285</sup> *See Montana v. Wyoming*, 131 S. Ct. 1765, 1769 (2011) (parties are still presently in litigation over other issues with the compact).

four compacts where Wyoming is a signatory with express language granting cross-border diversions of water: the Upper Colorado River Basin Compact, Snake River Compact, Yellowstone River Compact, and Amended Bear River Compact.<sup>286</sup> The Snake River Compact is more specific and has implementation instructions on how a state can obtain cross-boundary water rights.<sup>287</sup> The Yellowstone River Compact also has a detailed explanation concerning which state laws apply in conceivable situations involving cross-border water rights.<sup>288</sup> The Upper Niobrara River Compact does not expressly grant cross-border rights, and compacts that expressly allow cross-border diversion still have incomplete procedures for implementing such rights.<sup>289</sup> With possible ambiguities in the compacts, the Court's emphasis on state sovereignty, industry standard, and course of performance has set a new precedent for compact interpretation that may affect Wyoming in the future.<sup>290</sup> Specifically, being an upstream party to all of its compacts, Wyoming should look favorably on the overall result of *Tarrant*.<sup>291</sup> It sets a precedent that the Court will favor an upstream state storing water at the detriment of other states in the compact.

### CONCLUSION

The Supreme Court erred in *Tarrant* because it improperly interpreted the Compact and did not properly apply the dormant Commerce Clause test. Using interpretive tools, the language of the Compact grants the states a guarantee to the waters within a borderless pool—Reach II, subbasin 5.<sup>292</sup> Oklahoma's prohibition against out-of-state permittees concerning interstate waters that the Compact does not govern violated the dormant Commerce Clause.<sup>293</sup> Wyoming, being a signatory to multiple compacts, is sure to be involved in litigation in the future, and this holding is important for any future case dealing with compact interpretation.<sup>294</sup> Ultimately, Wyoming cannot rely on the language of its compacts to protect its interests in interstate waters.

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<sup>286</sup> See Upper Colorado River Basin Compact, 63 Stat. 31 (1949); Snake River Compact, 64 Stat. 29 (1950); Yellowstone River Compact, 65 Stat. 663 (1951); Amended Bear River Compact, 72 Stat. 38 (1958).

<sup>287</sup> *Snake River Compact*, art. III.

<sup>288</sup> *Yellowstone River Compact*, art. VII.

<sup>289</sup> *Upper Niobrara River Compact*, art. V.

<sup>290</sup> See *supra* notes 100–39 and accompanying text.

<sup>291</sup> See *supra* notes 273–76 and accompanying text.

<sup>292</sup> See *supra* notes 157–217 and accompanying text.

<sup>293</sup> See *supra* notes 218–71 and accompanying text.

<sup>294</sup> See *supra* notes 272–89 and accompanying text.