INTERSTATE WATER COMPACTS
THE US SUPREME COURT’S TARRANT DECISION AND THE RISK OF SILENCE

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INTRODUCTION

On June 13, 2013, the Supreme Court of the United States announced its unanimous decision in Tarrant Regional Water District v. Herrmann et al., 133 S. Ct. 2120 (2013)(“Tarrant”). The Court held that the congressionally-sanctioned Red River Compact, which allocates water rights within the Red River Basin, does not allow Tarrant Regional Water District (Tarrant) to enter Oklahoma to divert water for its 1.7 million customers in the North Central Texas area.

A Supreme Court construction of an interstate water Compact under dispute is always of great interest to all professionals in the water field. Such cases usually occur in response to a petition to apportion interstate waters pursuant to the Court’s grant of original jurisdiction over interstate water conflicts (as included the US Constitution). These rulings are typically based on review of a report and recommendations from a special master appointed by the Court to initially hear the case.

Of particular interest in Tarrant is the fact that it arose from a petition for a writ of certiorari (request for hearing) to the Supreme Court. Where a writ of certiorari is the vehicle of appeal, the Court has much more under review, including here: the Tenth Circuit Court of Appeals decision; the original federal district court’s decision that was appealed; and the complete record from both those courts.

Absent an agreement among States via a Compact, disputes over the interstate allocation of water are subject to “equitable apportionment” by the Court. Arizona v. California, 460 U. S. 605, 609 (1983). In Tarrant, by contrast, there was a Compact agreed to by the States, but disagreement over the meaning of some of the Compact’s provisions.

BACKGROUND

The Red River’s watershed covers approximately 65,000 square miles. It is one of the southernmost major tributaries of the Mississippi River. The Red River’s drainage basin is mostly in the States of Texas and Oklahoma, but also covers parts of Arkansas and Louisiana. Most of the basin is relatively flat, fertile agricultural land with few major urban areas. The basin is arid and receives low levels of annual precipitation. As a result, the flow above the Texas-Oklahoma border is intermittent, and flow varies widely in lower reaches.

Congress authorized the Red River Compact (Compact) in 1955 — in part to avoid water disputes between the States of Arkansas, Louisiana, Oklahoma, and Texas. The four States signed the Compact in 1978; it was approved by the US Congress in 1980; and the parties have since relied on the Red River Compact Commission (Commission)
According to Article 1 of the Compact, its principal purposes are:

- To promote interstate comity and remove causes of controversy between each of the affected States by governing the use, control, and distribution of the interstate water of the Red River and its tributaries;
- To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;
- To promote an active program for the control and alleviation of natural deterioration and pollution of the water of the Red River Basin, and to provide for enforcement of the laws related thereto;
- To provide the means for an active program for the conservation of water, protection of lives and property from floods, improvement of water quality, development of navigation and regulation of flows in the Red River Basin; and
- To provide a basis for state or joint state planning and action by ascertaining and identifying each state’s share in the interstate water of the Red River Basin, and the apportionment thereof.

The Commission asserts “that while provisions of the Red River Compact specifically state how much water each signatory state is allowed to develop or store on an interstate stream, the Compact generally provides a means of working out problems between member states in an orderly manner, thus preventing the likelihood of litigation in most cases.” (See Red River Compact Commission’s home page at: www.owrb.ok.gov/rrccommission/rrccommission.html). Clearly, the dispute between Texas and Oklahoma in Tarrant was not worked out and litigation could not be avoided.

The Compact divided its geographic area into five separate subdivisions called “Reaches” (see Figure 1). Each of the five Reaches were further divided into smaller subbasins. The disputed water rights in Tarrant were rights under the Compact to water located in Oklahoma’s portion of Reach II, subbasin 5 (see Figure 2). The focus of the litigation was Section 5.05(b)(1) of the Compact — this section gives the four States “equal rights” to the use of subbasin 5’s waters when the flow is 3,000 cubic feet per second or more “provided no state is entitled to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second.”

Figure 1: The Five Reaches of the Red River Compact
As the Court noted, the Red River has been the subject of many historical conflicts between Texas and Oklahoma. At one time, things got so heated that the States mobilized their militias. Later — in the “Red River Bridge War” — Oklahoma Governor “Alfalfa Bill” Murray declared “martial law” along a stretch of the River. The Court described such disputes over the river and its waters as “a natural result of the river’s distribution of water flows.” Given the meander of the River’s course, the Court noted that “upstream States like Oklahoma and Texas may appropriate substantial amounts of water from both the River and its tributaries to the disadvantage of downstream States like Arkansas and especially Louisiana, which lacks sufficiently large reservoirs to store water.” *Tarrant* at 2126.

In the years since the Compact was ratified by Congress, competition for the River’s water has increased dramatically as the region’s population increased. While growth has strained regional water supplies, years of a long and costly drought have hit north Texas hard and exacerbated its need for water and new water supplies. Tarrant is the Texas state agency responsible for providing water to North Central Texas (including the cities of Fort Worth, Arlington, and Mansfield). Tarrant has made numerous attempts to secure new sources of water for its service area. Beginning in 2000, Tarrant, along with several other Texas water districts, offered to purchase water from Oklahoma and the Choctaw and Chickasaw Nations. When the negotiations failed, however, Tarrant abandoned the effort. With its water needs unmet and growing, Tarrant “settled on a new course of action.” *Id.* at 2129. In 2007, Tarrant filed an application for a water resource permit from the Oklahoma Water Resources Board (OWRB) to take 310,000 acre-feet per year of surface water from the Kiamichi River, a tributary of the Red River located in Oklahoma. Tarrant proposed to divert from the Kiamichi River, at a point located in subbasin 5 of Reach II, before it discharges into the Red River and, according to Tarrant, becomes too saline for potable use.
The Water Report

From the outset, Tarrant understood that OWRB would likely deny its permits because several provisions of the Oklahoma water statutes effectively prevent out-of-state applicants from taking or diverting water from within Oklahoma’s borders.

Among other things, Oklahoma law requires that:

- OWRB consider, when evaluating an application to take water out of state, whether that water “could feasibly be transported to alleviate water shortages in the State of Oklahoma.” Okla. Stat. tit. 82, §105.12(A)(5).
- No permit issued by the OWRB to use water outside of the State shall “[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact.” §105.12A(B)(1).
- A permitting review process applies only to out-of-state water users. §105.12(F).
- Legislative approval for out-of-state water-use permits be obtained, §105.12A(D), and further provides that “[w]ater use within Oklahoma...be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state,” §1086.1(A)(3).

Assessing Oklahoma’s water law, as applied to this dispute, the Oklahoma attorney general concluded that “we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the [OWRB]” because “[w]e can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.” Id. at 2130; Court citing to 1 App. 118.

After unsuccessfully attempting to purchase water from Oklahoma and other sources — and knowing that OWRB would likely deny its permit application because of Oklahoma’s water laws that effectively prevent out-of-state applicants from taking or diverting water from within Oklahoma’s borders — Tarrant filed suit in federal court simultaneously with its permit application. The lawsuit sought to enjoin OWRB’s enforcement of the state statutes on grounds that they were pre-empted by federal law in the form of the Compact and violated the dormant Commerce Clause by discriminating against interstate commerce in water. The federal district court granted summary judgment for OWRB, and the Tenth Circuit affirmed.

Tarrant Regional Water District v. Herrmann et al., 656 F.3d 1222 (10th Cir. 2011).

THE DECISION

Writing for the Supreme Court (Court), Justice Sonia Sotomayor’s opinion focuses on the meaning of a provision of the Compact that gives each of the signatory States (i.e., Arkansas and Louisiana, as well as Oklahoma and Texas) “equal rights” to certain excess water in one subbasin of the river (subbasin 5), provided no state was entitled to more than 25%. Tarrant argued that the Compact’s “equal rights” provisions entitled it to access and divert the water even outside of Texas. Further, Tarrant argued that the “silence” of the Compact about crossing borders indicates that the Compact’s drafters did not intend to allocate water according to state borders. OWRB, on the other hand, argued that “equal rights” afford each State an equal opportunity to use subbasin 5’s excess water within each State’s own borders, but that the Compact’s silence on cross-border rights indicates that the Compact’s drafters had no intention to create cross-border rights for the signatory States. The Court held that the Compact does not pre-empt the Oklahoma water statutes and Tarrant could not enter Oklahoma without Oklahoma’s consent to divert water in Oklahoma.

The Court explained that since interstate compacts are construed under contract law principles, it viewed the Compact’s express terms as the best indication of the parties’ intent. The Court, though, found that the “silence” in the critical Compact section regarding cross-border rights was ambiguous (see Compact §5.05(b)(1)). Due to this ambiguity, the Court turned to other interpretive tools to shed light on the drafters’ intent. In the end, the Court concluded that the Compact did not grant cross-border rights because, among other things, it found: States do not easily cede their sovereign powers; other interstate water compacts have treated cross-border rights explicitly; and the parties’ course of dealing indicated otherwise.

Sovereign Powers, Compacts and Course of Dealing

Tarrant made a complex set of arguments about sovereign powers. First, it argued that §5.05(b)(1)’s silence on State boundaries in the allocation of water under the Compact suggested that borders were irrelevant for that allocation. But Tarrant also contended that its “interpretation would not intrude on any sovereign prerogative of Oklahoma, which would retain its authority to regulate the water within its borders.” Id. at 2124. The Court disagreed. With regard to the silence argument, the Court found, “But since States rarely relinquish their sovereign powers, the better understanding is that there would be a clear indication of such devolution, not inscrutable silence.” Id. The Court rejected Tarrant’s argument to have it both ways on sovereignty, holding that adopting Tarrant’s argument “would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over their waters when they agreed to the Compact.” Id.

Rejecting Tarrant’s reading of the Compact’s silence, the Court examined the “customary practices employed in other interstate compacts” to help determine “the parties’ intent.” Id. at 2134. In sharp
contrast to the Red River Compact, the Court found that “[m]any compacts feature unambiguous language permitting signatory States to cross each other’s borders to fulfill obligations under the compacts.” *Id.*

The Court pointed out that many compacts provide for the terms and mechanics of how such cross-border relationships will operate, including who can assert such cross-border rights. It cited the Kansas-Nebraska Big Blue River Compact, the Belle Fourche River Compact, and the Arkansas River Basin Compact between Kansas and Oklahoma as examples that do so. Noting that the “absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the agreement,” the Court noted that while Tarrant claimed that not all interstate compacts contain explicit language, it cited “only one such compact, and even it sets out a detailed scheme that would apply to any contemplated diversions.” *Id.* at 2124-2125.

In its last reference to resolve the ambiguity of the Compact’s silence, the Court looked at the “parties’ conduct under the Compact” and found that it undermined Tarrant’s legal arguments. For example, the Court noted that “no signatory State pressed for a cross-border diversion until Tarrant filed suit in 2007.” *Id.* at 2125. Moreover, the Court found that Tarrant’s offer to purchase water from Oklahoma was a “strange decision if Tarrant believed the Compact entitled it to demand water without payment.” *Id.* Indeed, if Tarrant really believed its arguments that it had a right to water located in Oklahoma, there would have been “compelling business reasons” to discuss the right “given that billions of dollars were at stake.” *Id.* at 2136.

**Dormant Commerce Clause**

Finally, the Court quickly disposed of Tarrant’s constitutional challenge to Oklahoma water statutes under a dormant Commerce Clause theory. Tarrant claimed that the Oklahoma statutes discriminate against interstate commerce by preventing water left unallocated under the Compact from being distributed out of state. The Court found, however, that: “Tarrant’s assumption that the Compact leaves some water ‘unallocated’ is incorrect.” *Id.* at 2137. The Court found that the Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters, because the Compact itself left no waters unallocated.

In support of its conclusion, the Court noted that Tarrant’s argument “is premised on the position that if we ‘adopt the Tenth Circuit’s or respondent’s interpretation [of the Compact]...a substantial amount of Reach II, Subbasin 5 water located in Oklahoma is not apportioned to any State and therefore is available to permit applicants like Tarrant.’” *Id.* (emphasis added). Rejecting Tarrant’s argument, the Court provided its view of the “allocation” question. “If more than 25 percent of subbasin 5’s water is located in Oklahoma, that water is not ‘unallocated’; rather, it is allocated to Oklahoma unless and until another State calls for an accounting [under the Red River Compact] and Oklahoma is asked to refrain from utilizing more than its entitled share.” *Id.* at 2138.

For additional information on the Court’s dormant Commerce Clause discussion, see Moon, *TWR* #113 (July 15, 2013).

**TARRANT DECISION IMPLICATIONS**

Despite its subject matter and interest to the natural resources and water bars, some critics have questioned whether the decision affirning the judgments reached below by the federal district court and the Tenth Circuit — on a matter that concerns only one clause of an interstate compact allocating water in the river dividing Texas and Oklahoma — was worthy of the Supreme Court’s time and attention. For example, despite broad agreement that Justice Sotomayor’s opinion is better organized and more persuasive than that of the Tenth Circuit, the opinion contains only a few minor points about interpretation, making no change in the law as it existed when the Court agreed to grant review. However, a strong argument can be made that the dispute was worthy of being one of the 79 cases before the Court in it’s October 2012 term. Water disputes are on the rise, as are settlements and compacts to allocate water. This unanimous opinion helps to instruct those efforts.

To many in the arid West, including readers of *The Water Report*, the case may offer broader meaning. For example, many State and local officials would be alarmed that any State could argue that it was entitled to enter another State to take water without that State’s consent. Similarly, arguments concerning the Commerce Clause and constitutionality of State water laws bear attention. Justice Sotomayor was not distracted by the “silence” about whether cross-border diversions were permitted by the Compact. Moreover, her able sorting of arguments as to the correct interpretation of that silence makes sense and adds to the view and standing of existing compacts. For example, it is helpful to remember the Court’s admonition that such agreements will be construed under contract law principles. In all, the opinion is an important message to those parties considering or negotiating new agreements or managing existing compacts.

One object lesson for future negotiations is to assess Tarrant’s reliance on a standard rule of statutory construction: the expressio unius canon — i.e., when one or more things of a class are expressly mentioned others of the same class are excluded. Under this legal canon, Tarrant suggested because one section of the Compact provided that “Texas and Louisiana within their respective boundaries shall each have
SUMMARY

Water disputes between States and users groups have long been common in the arid West. The landmark 1922 Colorado River Compact divided the water of our most disputed river among seven States in the most arid region of the country. The wrangling continues between basins even as Arizona v. California, 373 U.S. 546 (1963) continues to be updated and governs the “law” of that river. As in the Texas and Oklahoma dispute, increased population and more competition for scarce water resources have fueled conflicts and contests between Eastern States, including: Maryland and Virginia, fighting over access to the Potomac under a treaty between the States that was ratified under the Articles of Confederation; South Carolina fighting with North Carolina over the Pee Dee River, and with Georgia over the Savannah River; and the intense clash between Alabama, Florida, and Georgia over the waters of the Apalachicola-Chattahoochee-Flint river basin.

As the climate changes, water disputes and calls for changes to or solutions from water law may become even more frequent. In Tarrant, the Supreme Court found that a Texas water district was free to take up to 25% of the excess water in a Compact subbasin from inside Texas — if it could find that much — and it could demand an accounting if it thought Oklahoma was diverting more than 25%. But Texas could not enter Oklahoma without Oklahoma’s consent to divert water in Oklahoma. Hopefully the practical lessons of this dispute will prepare us more fully to meet those challenges.

For Additional Information:
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Tarrant decision available at: www.supremecourt.gov/opinions/slipopinions.aspx