

June 25, 2013

## Decision Made Concerning Red River Compact

This month, in *Tarrant Regional Water District v. Herrmann*, the United States Supreme Court unanimously sided with the State of Oklahoma in the state's long battle with the State of Texas concerning the Red River Compact, 94 Stat. 3305 ("the Compact"). The case represents a significant win for the State of Oklahoma and the preservation of its water management authority. The decision is also significant for other states that may face similar interstate transfer issues because it demonstrates the Court's unwillingness to allow interstate water transfers over a state's objection where the applicable compact language is less than clear.

By way of background, the Compact is a multi-state agreement that allocates water rights within the Red River Basin among Texas, Oklahoma, Arkansas and Louisiana. Under the Compact, the river is divided into five separate subdivisions called reaches and each reach is further divided into smaller subbasins. The Compact governs the allocation of water within each reach and subbasin.

In *Herrmann*, the Petitioner, Tarrant Regional Water District ("Tarrant") (a Texas agency), filed an application for a water resource permit from the Oklahoma Water Resources Board (OWRB) to take 310,000 acre-feet of surface water per year from the Kiamichi River, a tributary of the Red River located in Oklahoma. Tarrant proposed to divert water at a point located in subbasin 5 of Reach II, before it discharges into the Red River. In anticipation of its application being denied, Tarrant filed this lawsuit in federal district court seeking to enjoin OWRB's enforcement of the relevant Oklahoma state water statutes on the grounds that they are (1) preempted by federal law in the form of the Compact and (2) violate the Commerce Clause by discriminating against interstate commerce in water.

The Court rejected Tarrant's arguments and affirmed the decisions of the trial court and the Tenth Circuit, holding that: (1) the Compact does not preempt the challenged Oklahoma water statutes and (2) the statutes do not run afoul of the Commerce Clause. The Court rejected Tarrant's claim that the "equal rights" language in Section 5.05(b)(1) of the Compact permitted it to cross state lines into Oklahoma and divert water. Section 5.05(b)(1) of the Compact provides:

"[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second . . . or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 (CFS)."

The Court noted that the meaning of the Compact's silence with respect to cross-border diversions is the key to determining the preemption issue, and concluded that the Compact did not grant cross-border rights. The Court's conclusion was based on the following: (1) the well-established principle that States do not easily cede their sovereign powers, including control over waters within their own territories; (2) the fact that other interstate water compacts have treated cross-border rights explicitly; and (3) the

June 25, 2013

parties' course of dealing (no party has sought a cross-border diversion since the Compact was approved by Congress in 1980 and Tarrant has actually sought to purchase water from Oklahoma in the past).

The Court also rejected Tarrant's claim that the Oklahoma state water statutes violated the Commerce Clause by preventing "unallocated water" in subbasin 5 of Reach II from being distributed outside of Oklahoma. The Court reasoned that under the terms of the Compact, no water is "unallocated." The Court explained: "[i]f 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 Compact] and Oklahoma is asked to refrain from utilizing more than its entitled share."

Ultimately, since North Texas continues to grow, its need to secure additional water resources will not end with this case. Indeed, it will likely be forced to develop or acquire new water sources in order to sustain its growing population, including the potential purchase of water from the State of Oklahoma. Such efforts undoubtedly will be challenging.

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June 25, 2013

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