



2013

## Interstate Water Compacts: A License to Hoard?

Linda Christie

Follow this and additional works at: <https://scholarship.law.tamu.edu/journal-of-property-law>



Part of the [Water Law Commons](#)

---

### Recommended Citation

Linda Christie, *Interstate Water Compacts: A License to Hoard?*, 1 Tex. A&M J. Real Prop. L. 15 (2013).  
Available at: <https://doi.org/10.37419/JPL.V1.I1.2>

This Symposia Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact [aretteen@law.tamu.edu](mailto:aretteen@law.tamu.edu).

# INTERSTATE WATER COMPACTS: A LICENSE TO HOARD?

By Linda Christie<sup>†</sup>

I.	INTRODUCTION.....	15
II.	RESOLVING INTERSTATE WATER DISPUTES.....	17
	A. <i>Frequent Disputes</i> .....	17
	B. <i>Dispute Resolution: Federal Intervention</i> .....	18
	C. <i>Dispute Resolution: Interstate Compacts</i> .....	20
III.	THE CURRENT DISPUTE.....	23
	A. <i>The Red River &amp; the Red River Compact</i> .....	23
	B. <i>TRWD’s Proposal to Appropriate Water from Oklahoma</i> .....	25
	C. <i>Oklahoma’s Water Embargo</i> .....	27
	D. <i>The Tenth Circuit’s Decision</i> .....	28
	1. Dormant Commerce Clause.....	28
	2. Preemption.....	29
	E. <i>The Parties’ Legal Arguments at the Certiorari Stage</i> .....	30
	1. TWRD.....	30
	2. OWRB.....	32
IV.	THE IMPORTANCE OF THE CASE.....	32
	A. <i>A License to Hoard</i> .....	33
	B. <i>Costly Uncertainty</i> .....	33
	C. <i>Federal Intervention</i> .....	34
V.	CONCLUSION.....	35

## I. INTRODUCTION

Ensuring sufficient water supply is a paramount concern of government throughout the arid West. The scarcity of water influences virtually every aspect of the vast region’s economy and environment,<sup>1</sup> and has been a simmering source of interstate and federal-state conflict for more than a century. To facilitate the equitable sharing of water, avoid strife, encourage economic development, and forestall federal intervention, states have proactively entered into more than thirty agreements among themselves to address the allocation and appropriation of water across state borders and water sources.<sup>2</sup> Such interstate compacts—the “oldest mechanism available to promote formal inter-

---

<sup>†</sup> The Author wishes to extend a special thanks to Michael B. Kimberly with Mayer Brown LLP for his assistance with the Article.

1. Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water across State Boundaries*, 46 NAT. RES. J. 601, 602 (2006).

2. See National Counsel for Interstate Compacts, *Compact Search Results*, APPS.CSG.ORG (Feb. 11, 2013), <http://tinyurl.com/bvvmqbc>

state cooperation”<sup>3</sup>—are authorized by § 10 of the Constitution.<sup>4</sup> They are, at bottom, contracts between and among states;<sup>5</sup> contracts that must be approved by Congress before taking effect, and once approved, assume the status of federal law.<sup>6</sup> Although not a panacea, these water compacts have become a vital tool in water management throughout the country.

There is a very important dispute over one such compact currently pending before the Supreme Court on a petition for certiorari. *Tarrant Regional Water District v. Herrmann*<sup>7</sup> is a lawsuit between North Texas’s Tarrant Regional Water District (“TRWD”) and the Oklahoma Water Resources Board (“OWRB”) concerning Texas’s right under the Red River Compact—which allocates water from the Red River system among Texas, Oklahoma, Arkansas, and Louisiana—to access water located in Oklahoma. At issue in the case are two significant questions of federal constitutional law: (1) Whether the Red River Compact—an agreement designed to enhance cooperation and resource sharing among its signatories, and using language present in virtually all water compacts between western states—expressly authorizes Oklahoma to hoard its water by enacting discriminatory state water laws that otherwise would be invalid under the Dormant Commerce Clause; and (2) whether compact language that *allocates* to the signatory states “equal” shares of water within a particular region preempts protectionist state laws that obstruct other states from *accessing* their allotted share of the water in another state. The Tenth Circuit answered the former in the affirmative and the latter in the negative. How the Supreme Court answers these questions will have far-ranging consequences for the future vitality of existing water compacts and the likelihood of future agreements.

The purpose of this essay is to familiarize readers with the facts and background of these issues in this important case, and to lay out the policy implications inherent in its resolution. This Article begins by providing some background and history regarding management of, and disputes over, water in the United States, with an emphasis on the value of interstate compacts in resolving and preventing disputes. The path of the current dispute between Texas and Oklahoma requires the Article to trace three things: (1) describing the creation of the Red River Compact as well as its terms; (2) detailing TRWD’s need for water and Oklahoma’s water export restrictions; and (3) laying out the

---

3. See generally CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS, A PRACTITIONER’S GUIDE* 3 (2006).

4. U.S. Const. art. I, § 10, cl. 3.

5. See generally CATHERINE BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS, A PRACTITIONER’S GUIDE* 64 (2006).

6. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

7. *Tarrant Reg’l Water Dist. v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011), *pet. for cert.* filed (U.S. No. 11-889).

reasoning of the Tenth Circuit below<sup>8</sup> and the parties' certiorari-stage legal arguments. Finally, the Author will explain what she believes are the consequences and policy implications at stake in the resolution of this dispute.

## II. RESOLVING INTERSTATE WATER DISPUTES

As the world has developed economically and its population has exploded, the need for fresh water has grown dramatically. As with most other vital natural resources, this growing need is sowing discord between resource rich and resource poor countries.<sup>9</sup> That water stubbornly refuses to respect political boundaries only increases the potential for conflict.

Such water-based conflicts, although a relatively recent phenomenon on the world stage, are well-known to the United States. Despite regular acknowledgement that a primary purpose of our union is to make "each State . . . the greater by a division of its resources, natural and created, with every other State, and those of every other State with it,"<sup>10</sup> states have often jealously guarded their resources (and water in particular), which has in turn led to conflicts with other states, and with the federal government. This Section will discuss the recurring conflicts over water and attempts to resolve them through Congressional action, legal proceedings, and interstate compacts, concluding with a discussion of the superiority of compacts as a resolution mechanism. Understanding this background will allow better appreciation of what is at stake in this case.

### A. *Frequent Disputes*

Reflecting the importance of the resource, disputes between states over water are as old as the country itself—older, in fact. Maryland and Virginia, for example, have laid conflicting claims to the Potomac River since the Seventeenth Century.<sup>11</sup>

As the United States expanded westward into more arid regions of the continent, these conflicts became more frequent. Western disputes over water occurred throughout the Twentieth Century and in-

---

8. The Author will focus on the legal issues that are raised in the petition for certiorari.

9. Lee A. Laudicina, Note, *International Water Disputes: How to Prevent a War Over the Nile River*, 4 *LOY. U. CHI. INT'L L. REV.* 235 (2007) ("United Nations figures suggest there are nearly 300 potential water conflicts around the world."). See also Jeffrey Sachs, *Stemming the Water Wars*, *THE GUARDIAN* (Apr. 26, 2009), <http://www.guardian.co.uk/commentisfree/cif-green/2009/apr/26/water-shortage> (noting the link between water shortages and international conflicts in arid lands, warning that "future water stresses will be widespread, [spanning] both rich and poor countries.").

10. *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 255 (1911).

11. *Virginia v. Maryland*, 540 U.S. 56, 60 (2003).

volved nearly every state in the region.<sup>12</sup> Perhaps the most famous of these western water disputes involved Arizona, California, and the Federal Government. In 1934, the Bureau of Reclamation began constructing a dam on the Colorado River that would straddle the border of Arizona and California.<sup>13</sup> The Metropolitan Water District of Southern California was bankrolling the dam's construction, a major purpose of which was to supply the growing communities of Southern California with water.<sup>14</sup> Arizona objected, and not satisfied with the federal response, ultimately mounted an armed resistance, with the Arizona National Guard commandeering two ferry boats—dubbed the “Arizona Navy”—filling them with armed men, and sending them up the Colorado.<sup>15</sup> Thankfully, the dispute ended peacefully;<sup>16</sup> nevertheless, the episode serves as an important reminder of the passions water disputes can stir.

In recent years, water disputes have boomeranged back east. Maryland and Virginia renewed their dispute over access to the Potomac in the early 2000s.<sup>17</sup> Georgia, Alabama, and Florida have been embroiled in a twenty-plus year dispute over flow from the Apalachicola-Chattahoochee-Flint River basin as conflicting demands familiar in the west—population growth, environmental protection, and agriculture—come to a head in the southeast.<sup>18</sup> And the Great Lakes, the largest source of fresh surface water in the United States, is sure to be the battleground of the future.<sup>19</sup> Thus, it is unlikely that any region of the country will remain immune from these types of disputes, increasing the importance of finding effective modes of dispute resolution while encouraging interstate cooperation.

### B. *Dispute Resolution: Federal Intervention*

The three dominant modes of resolving interstate water disputes are (1) congressional action, (2) federal court decree, and (3) inter-

---

12. See, e.g., *Nebraska v. Wyoming*, 507 U.S. 584 (1993) (Platte River); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River); *Washington v. Oregon*, 297 U.S. 517 (1936) (Walla Walla River); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (Laramie River).

13. John B. Draper, et al., *Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, 55 PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW INST. § 18.01 (2009).

14. *Id.*

15. *Id.*

16. *Id.* After a case before the Supreme Court, Arizona acquiesced in the project in exchange for irrigation project approvals.

17. *Virginia*, 540 U.S. at 56.

18. See *In re Tri-State Water Rights Litig.*, 644 F.3d 1160, 1165 (11th Cir. 2011).

19. See, e.g., Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 429–30 (2006).

state compact.<sup>20</sup> The Author will begin with the first two, before turning to the most often utilized mode of resolution: compacts.

In *Arizona v. California*,<sup>21</sup> the Supreme Court first explicitly acknowledged Congress's power to unilaterally apportion water among states under the Commerce Clause. Congress has exercised this power in only three instances over the last 100-plus years.<sup>22</sup> Congress has also occasionally acted unilaterally to delegate to states more power over their water resources.<sup>23</sup> Congress has not eschewed action in this area for lack of interest in, or experience with, the nation's water resources, however: it regularly legislates in the area of water quality and environmental protection, and the federal government—through the Bureau of Reclamation—remains the largest wholesaler of water in the nation.<sup>24</sup> Rather, it is likely Congress has largely avoided the business of interstate water allocation and apportionment because of the intense local and regional interests and passions involved. But it is not hard to see this reticence dissipating in the future as interstate conflicts over water grow and intensify.

The federal courts find themselves attempting to resolve interstate water disputes more often than Congress, although such occasions are still relatively rare. The Supreme Court has reluctantly confronted a handful of interstate water disputes via its original jurisdiction,<sup>25</sup> while lower courts have entertained battles between state proxies.<sup>26</sup> The doctrine followed by courts in such cases is known as “equitable apportionment,” which, as the name suggests, calls for a consideration by the court of numerous factors in order to achieve the fairest distribution of disputed water.<sup>27</sup> The outcomes of such equitable analyses

20. There can be combinations, of course. Interstate compacts require congressional approval; federal courts may hear disputes arising from compacts, etc.

21. *Arizona*, 373 U.S. at 546.

22. The Truckee-Carson-Pyramid Lake Water Rights Settlement Act, H.R. 3941, 101st Cong. (1990); The Boulder Canyon Project Act, H.R. 5773, 70th Cong. (1928); Act of February 25, 1905, Pub. L. No. 58-108 ch. 798, 33 Stat. 814 (relating to the construction of a dam and reservoir on the Rio Grande, in New Mexico, for the impounding of flood waters of said river for purposes of irrigation).

23. *See, e.g.*, Water Resources Development Act, 100 Stat. 4082 (1986). The law provides, *inter alia*, that “[n]o water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake States.” 42 U.S.C. § 1962d–20(d) (2006).

24. Bureau of Reclamation, *Facts & Information*, USBR.GOV (Jan. 24, 2013), <http://www.usbr.gov/main/about/fact.html>.

25. *See supra* note 12.

26. *See, e.g.*, *In re Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011).

27. *See Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (stating “Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—

are inevitably unpredictable, not helped by the fact that “equitable allocation tends to present questions that do not draw on judicial competence.”<sup>28</sup> Despite this lack of institutional competence, in the absence of cooperation between states, we can expect many more suits in our water-scarce future, because “[a]s the value of water rises, so does the value of a . . . judgment allocating it.”<sup>29</sup>

### C. *Dispute Resolution: Interstate Compacts*

By far the most successful method of resolving interstate disputes over water has been the interstate compact. The first water allocation compact, the Colorado River Compact of 1922, was precipitated by the Supreme Court’s decision in *Wyoming v. Colorado*—preceding its equitable apportionment line of cases—where it held that the default rule for determining the allocation of the nation’s water resources is the rule of “prior appropriation”: the first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose.<sup>30</sup> This doctrine, as the states involved realized, created a collective action problem by incentivizing users to put all available water sources into immediate use in order to avoid losing their rights to it.<sup>31</sup> The Colorado River Compact of 1922 was designed to forestall this problem by allocating water *ex ante* according to a negotiated agreement, rather than by the arbitrary development of senior priorities.<sup>32</sup> In the decades since the Colorado River Compact, many other states (primarily in the west) have negotiated tens of additional interstate water compacts, with more the thirty such agreements in place across the country. These compacts play a central role in regulating the allocation, appropriation, development, exportation, and management of western waterways.

The events leading to the creation of the Colorado River Compact demonstrate perhaps the most valuable result and the driving force behind most interstate water compacts: solving collective action problems while creating settled expectations that make the develop-

---

these are all relevant factors. They are merely an illustrative, not an exhaustive, catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.”).

28. Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J.L. & LIBERTY 95, 111 (2011).

29. *Id.* at 101.

30. *Wyoming*, 259 U.S. at 470.

31. See Leila C. Behnampour, Comment, *Reforming a Western Water Institution: How Expanding the Productivity of Water Rights Could Lessen Our Water Woes*, 41 ENVTL. L. 201, 209–10 (2011) (“[P]rior appropriation principles actually create incentives to use as much water as possible to ensure continuance of the amount of water in the right.”).

32. See *Arizona*, 373 U.S. at 553–59.

ment of reliable, long-term water supplies possible.<sup>33</sup> Important in allowing the settling of expectations is that compacts function as contracts, and should later disputes arise regarding the application of a compact, courts must interpret and enforce the compact “within the four corners of the agreement.”<sup>34</sup> Without these agreements, uncertainty would reign as allocations would be resolved only as disputes arose, and through unpredictable litigation or federal lobbying. Such uncertainty would surely retard economic development throughout water-scarce regions.<sup>35</sup> Thus, as compared to amorphous doctrines such as “equitable apportionment,” the *ex ante* ordering of rights by interstate compact is far preferable.

The benefits of interstate compacts do not end there. As noted by Justice Felix Frankfurter, compacts allow states to free themselves from strict legal rules and reach a “sensible compromise” in a nonadversarial environment.<sup>36</sup> In addition, and related, compacts encourage water allocations and apportionments based on input from stakeholders on the ground, considering myriad regional, state, and local interests, and force policy makers to sit and think about the future management of resources.<sup>37</sup>

Furthermore, and particularly important to the culture and politics of western states, states resolving water disputes on their own “effectively preempt federal interference into matters that are traditionally within the purview of the states but that have regional or national implications.”<sup>38</sup> Ongoing disputes between states always carry with them the specter of top-down solutions imposed by Congress. Importantly for our discussion, this specter fades only when a compact is effective in ending a dispute. Should a dispute reignite, the threat of congressional interference reemerges.<sup>39</sup> Crucially, any congressional

---

33. BROWN ET AL., *supra* note 5, at 26, 267; *accord* Texas v. New Mexico, 462 U.S. 554, 567 (1983).

34. BROWN ET AL., *supra* note 5, at 64.

35. *See* Horne, *supra* note 28, at 149 (stating “[B]ecause citizens of these states must plan economic activity that depends on particular rights to the waters, states must (sooner or later) negotiate with each other to secure protection for this activity.”).

36. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 706–07 (1925).

37. Justin Newell Hesser, Comment, *The Nature of Interstate Groundwater Resources and the Need for States to Effectively Manage the Resource Through Interstate Compacts*, 11 WYO. L. REV. 25, 42 (2011).

38. BROWN ET AL., *supra* note 5, at 27.

39. *See, e.g.*, Bob Ewgen, Editorial, *McCain Suggests Raiding Colorado’s Water*, Denver Post, DENVERPOST.COM (Aug. 16, 2008), [http://www.denverpost.com/opinion/ci\\_10218277](http://www.denverpost.com/opinion/ci_10218277) (“The problem, from Colorado’s perspective, is that in the 76 years since the [Colorado River] compact was signed, California, Nevada and Arizona have grown much more rapidly in population—and political power—than the upper basin states. So when the lower basin states talk about ‘renegotiating’ the compact, that’s their code for a process of give and take—in which Colorado, Utah, New Mexico and Wyoming give and California, Arizona and Nevada take.”).



action subsequent to a congressionally-approved interstate compact can supersede provisions of that compact. Despite the need for congressional approval, almost all compacts are agreements solely between states, which do not bind Congress.<sup>40</sup> Accordingly, “Congress may use its substantial legislative power . . . to significantly erode the purpose or regulatory authority of a compact.”<sup>41</sup> It is imperative, then, if states wish to maintain control over their water, that they continue to cooperate, and work towards mutually beneficial solutions, even after the compacts enter force.

Finally, the cooperation and coordination required by interstate compacts has the benefit of strengthening our union and preventing strife. As states sit down at the negotiating table, then transform from rivals into partners. In contrast, without agreement, states will continue to jealously guard resources located within their borders and fight each other in court and in Congress, undermining the very theory upon which the U.S. Constitution was framed, *i.e.*, “that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division.”<sup>42</sup> Moreover, and more ominously, “[t]he intentional, self-serving nature of [such] protectionist measure[s] is likely to invoke anxiety in other states and invite hostile retaliatory measures.”<sup>43</sup> A scenario we would surely all wish to avoid.

Given these benefits, and the shortcomings of the alternatives, it is no surprise that both Congress and the courts strongly encourage states to resolve water disputes via compact. The Supreme Court rarely misses an opportunity to encourage state parties before it to sit down at the bargaining table:

[S]o awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.<sup>44</sup>

Likewise, Congress puts such value on interstate agreements concerning the allocation and apportionment of water, that approval for fed-

40. BROWN ET AL., *supra* note 5, at 43–44; John D. Leshy, *Interstate Groundwater Resources: The Federal Role*, 14 HASTINGS W.-NW. J. ENV'T'L L. & POL'Y 1475, 1483 (2008).

41. BROWN ET AL., *supra* note 5, at 44.

42. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

43. Catherine Gauge O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 580 (1997).

44. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951) (quotation marks omitted).

eral water projects is often conditioned upon the execution of such compacts.<sup>45</sup>

### III. THE CURRENT DISPUTE

In this Section, the Author lays out the facts and legal arguments at issue in *Tarrant*. This Section first discusses the Red River system and the interstate compact governing it. The Author then describes TRWD's water predicament and its plan to acquire water from Oklahoma. The Author next details Oklahoma's legislative and regulatory regime, which effectively prevents the exportation of water out of the state. The Section ends by summarizing the reasoning of the Tenth Circuit in its ruling for Oklahoma and each side's arguments before the Supreme Court.

#### A. *The Red River & the Red River Compact*

The Red River is a major tributary of the Mississippi River. It rises in two primary forks from the Texas Panhandle and flows east, adjacent to the border between Texas and Oklahoma. It thereafter marks a portion of the border between Texas and Arkansas before flowing through Arkansas and Louisiana and discharging into the Gulf of Mexico.

Arkansas, Louisiana, Oklahoma, and Texas, having been "moved by considerations of interstate comity," and with the consent of Congress, executed the Red River Compact ("the Compact"). The compact was executed in order to, inter alia, "promote interstate comity and remove causes of controversy between each of the affected states" by "provid[ing] an equitable apportionment among the Signatory States of the water of the Red River and its tributaries," thereby enabling "state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin."<sup>46</sup>

The Compact divides the Red River Basin into five "Reaches," and those Reaches into respective subbasins. Reach 2, subbasin 5—the primary subject of dispute between TRWD and OWRB—is defined geographically without reference to state borders. This subbasin covers an area that includes territory within Arkansas, Oklahoma, and Texas.<sup>47</sup> Although just 22% of the subbasin falls geographically within Oklahoma,<sup>48</sup> a majority of the subbasin's water is located there.<sup>49</sup> The main stem of the river itself falls within Oklahoma along Oklahoma's border with Texas; the vegetation line of the river's south bank marks the boundary between the two states, resulting in the main channel of

---

45. BROUN ET AL., *supra* note 5, at 267.

46. Red River Compact § 1.01; TEX. WATER CODE ANN. § 46.013 (West 2011).

47. *Id.* at § 5.05(a); *Herrmann*, 656 F.3d at 1250 (map).

48. Red River Compact § 5.05(a); 656 F.3d at 1250 (chart).

49. *Herrmann*, 656 F.3d at 1251 (chart).

the Red River lying wholly within Oklahoma. Just 17.4% of the yield of the subbasin's water is located within Texas, and only a small fraction of that is useful as a source for municipal water supply. The main stem of the Red River is high in saline and thus not useful as a source of potable water.<sup>50</sup> Instead, the primary potable water sources within Reach 2, subbasin 5 include the fresh-water tributaries to the Red River, immediately before they discharge into the main stem and become polluted by the river's salinity.

In section 5.05, the Compact allocates water within Reach 2 subbasin 5 by reference to these fresh water sources and such allocations are dependent on the rate of flow downstream into Louisiana. As relevant here, the Compact provides that "so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more," each signatory state "shall have equal rights to the use of runoff originating in . . . and undesignated water flowing into" Reach 2, subbasin 5. With an eye towards maintaining the 3,000 cubic feet per second flow into Louisiana, the Compact limits these "equal rights" by constraining each state to no "more than 25 percent of the water in excess of 3,000 cubic feet per second" at the Arkansas-Louisiana state boundary.<sup>51</sup> In other words, once the flow of the Red River into Louisiana hits 3,000 cubic feet per second, the "equal rights" provision kicks in, but in order to keep the flow into Louisiana at or above 3,000 cubic feet per second, none of the four signatory states may take more than one-quarter of that excess flow. The meanings of "equal rights" and "25 percent" share are at the heart of the preemption issue in this case. Other provisions of the Compact important to this case, both to the preemption and Dormant Commerce Clause analyses are as follows. Section 2.01 provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state."<sup>52</sup> It provides further that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state," but that "such use shall be subject to the availability of water in accordance with the apportionments made by this Compact."<sup>53</sup> Section 2.10, using language that appears in similar form in almost every interstate water compact, provides that

---

50. U.S. Geological Survey, *Stream Monitoring and Educational Program in the Red River Basin, Texas*, Fact Sheet 170-97 (1997), available at [http://pubs.usgs.gov/fs/fs-170-97/FS\\_170-97.htm](http://pubs.usgs.gov/fs/fs-170-97/FS_170-97.htm) (citations omitted) (stating "Salinity is the greatest limitation on water use in the Red River Basin and is largely the result of naturally occurring salt springs in parts of the upper reaches of the basin. The salt sources contribute water with large concentrations of dissolved solids, principally chloride. At certain times and locations, the salinity of streams in the basin exceeds that of seawater.").

51. Red River Compact § 5.05(b)(1) (explaining the signatories are allocated different shares of subbasin 5 water when the Red River's flow is below 3,000, 1,000, or 526 cubic feet per second at various locations.). *Id.* at § 5.05(b)(2)-(3), (c). The flow of the river substantially exceeds 3000 cfs the great majority of the time.

52. *Id.* at § 2.01.

53. *Id.*

“nothing in this compact shall be deemed” to “interfere with or impair the right” of “any Signatory State to regulate within its boundaries the appropriation, use, and control of water,” provided that its exercise of that right is “not inconsistent with its obligations under this Compact.”<sup>54</sup> In addition, although seemingly unrelated to the water in dispute in this case, section 4.02(b) ends up playing an important role in the Tenth Circuit’s analysis. Section 4.02 governs water allocation from Reach 1, subbasin 2. Subsection 4.02(b) grants to Oklahoma “free and unrestricted use of the water of this subbasin.”<sup>55</sup> Finally, and essential to TRWD’s challenge, there is no provision in Compact that declares expressly that any signatory state’s use or regulation of water within its boundaries is free from the limitations imposed by the dormant Commerce Clause, or from obligations under the Compact.

### B. *TRWD’s Proposal to Appropriate Water from Oklahoma*

From four reservoirs and through more than 150 miles of pipeline, TRWD provides water to over two million residents of North Central Texas through its wholesale customers. In cooperation with other North Texas water suppliers, TRWD is charged with developing additional water resources to meet the current and future demands of the region. TRWD is “an entity created under Texas law . . . to obtain water” for Texas residents; it therefore is authorized to invoke, and obtain water pursuant to, “Texas’s water rights under the Red River Compact.”<sup>56</sup>

TRWD is in dire need of new sources of water.<sup>57</sup> It currently supplies 448,800 acre feet<sup>58</sup> of water per year<sup>59</sup> to more than 100 wholesale customers, who in turn serve the Dallas Fort-Worth metroplex, the nation’s fourth largest metropolitan area. TRWD’s long term plan shows that by 2060, the population of Dallas-Fort Worth will have more than doubled, and its customers’ demand for water will exceed supply by more than 477,000 acre feet, or 155 billion gallons, per year.<sup>60</sup>

In addition to these long-range needs, TRWD also faces an imminent water shortage as a result of extreme drought. Media coverage

---

54. *Id.* at § 2.10.

55. *Id.* § 4.02(b).

56. Brief of Amicus Curiae the State of Texas in support of Appellant, *Herrmann*, 656 F.3d 1222, No. Civ-07-45-HE, 2010 WL 416578, at \*1–2.

57. See Freese and Nichols, Inc. et al., *Recommended Water Management Strategies for Whole Water Providers*, 2011 REGION C WATER PLAN 4E.1 at 4E.14 (Oct. 2010), available at [http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204E\\_final.pdf](http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204E_final.pdf) [hereinafter WATER PLAN].

58. An acre foot is the volume of one acre of surface area to a depth of one foot and is equal to 325,853 gallons; 448,800 acre feet equals approximately 146 billion gallons.

59. WATER PLAN, *supra* note 57, at 4E.14.

60. WATER PLAN, *supra* note 57, at 4E.18.

has characterized Texas's drought condition as "catastrophic," costing Texas more than \$5 billion in recent agricultural losses.<sup>61</sup> As a result of the drought, TRWD estimates that it will face a 50,000 acre foot per year shortfall in less than eight years' time.<sup>62</sup>

Oklahoma, by contrast, sits within the heart of the Mississippi River watershed and, in the words of the OWRB, is "blessed with an abundance of water."<sup>63</sup> OWRB estimates that the entire state of Oklahoma currently uses less than two million acre feet per year of stream water.<sup>64</sup> Another 34 million acre feet of unused water flows out of Oklahoma annually, bound for the Gulf of Mexico. From the southeast part of Oklahoma alone, more than twelve times the volume of TRWD's entire projected 2060 shortfall is discharged to the Gulf of Mexico each year. And OWRB has acknowledged that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre feet," which is enough to supply the entire state of Oklahoma three times over.<sup>65</sup>

Consistent with the Texas State and Region C Water Plans, TRWD has identified water it claims is apportioned to Texas—but located within Oklahoma, just a few miles north of its border with Texas—as among the most practical sources of water for addressing both its immediate and long-term needs.<sup>66</sup> In the permit application underlying this lawsuit, TRWD proposed taking 310,000 acre feet of its share of Reach 2, subbasin 5 water from the Kiamichi River, not far above where it discharges into the Red River. The proposal involves placing pumps into the tributary and running underground pipelines to existing reservoirs serving TRWD and other regional water suppliers. The project would require both a federal environmental impact assessment and a permit from the Army Corps of Engineers. Because the plan uses existing reservoir infrastructure and does not involve pumping water vast distances to a higher elevation, it has a lesser environmental impact than TRWD's other options.<sup>67</sup> And time is of the essence: TRWD estimates that, with lead times for alignment plan-

---

61. Kate Galbraith, *Catastrophic Drought in Texas Causes Global Economic Ripples*, N.Y. TIMES (Oct. 31, 2011), available at <http://tinyurl.com/tarrant6>.

62. WATER PLAN, *supra* note 57, at 4E.14.

63. 2012 OKLAHOMA COMPREHENSIVE WATER PLAN EXECUTIVE REPORT, 3 (Feb. 2012), [http://www.owrb.ok.gov/supply/ocwp/pdf\\_ocwp/WaterPlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf](http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf).

64. *Id.*

65. OKLA. WATER RES. BD., STATUS REPORT TO THE OFFICE OF GOVERNOR: JOINT STATE/TRIBAL WATERS COMPACT & WATER MARKETING PROPOSAL, 27 (2002), [http://www.owrb.ok.gov/studies/legislative/southeast/southeast\\_pdf/Status%20Report\\_Part%201.pdf](http://www.owrb.ok.gov/studies/legislative/southeast/southeast_pdf/Status%20Report_Part%201.pdf).

66. WATER PLAN, *supra* note 57, at 4E.15–16.

67. Alternatives to drawing water from within Oklahoma involve obtaining water from sources to the south and east of the Metroplex and pumping the water to a higher elevation over hundreds of miles. These alternatives (including taking water from Wright Patman Lake and constructing a new Tehuacana Reservoir) are substantially more expensive than the Oklahoma project and involve far greater environmen-

ning, environmental review, permitting, design engineering, and construction, it will be fifteen to twenty years before water can be delivered.

### C. *Oklahoma's Water Embargo*

Notwithstanding Oklahoma's enormous water reserves, Oklahoma has enacted a panoply of laws that, taken together, prohibit OWRB from issuing permits for out-of-state water use. OWRB's executive director has openly acknowledged that Oklahoma's restrictive water laws were intended to "protect Oklahoma's water supply" against "out-of-state" water users and "actually strengthen" its protectionist scheme as compared with the state's prior express moratorium on the removal of water from the state.<sup>68</sup> As a consequence, these laws prevent TRWD from obtaining water that originates in Oklahoma.

Oklahoma law requires any entity (including any "state or federal governmental agency" like TRWD) that "intend[s] to acquire the right to the beneficial use of any water" within Oklahoma to apply to the OWRB for "a permit to appropriate" before "commencing any construction" or "taking [any water] from any constructed works."<sup>69</sup> Several aspects of the Oklahoma permitting scheme make it impossible for an out-of-state water user to obtain a permit to appropriate. First is an opinion from the Oklahoma Attorney General issued in 1978, and still binding on the OWRB,<sup>70</sup> stating that no "out-of-state user is a proper permit applicant before [OWRB]."<sup>71</sup> Second is Oklahoma's express public policy, which OWRB is statutorily required to "effectuat[e],"<sup>72</sup> 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."<sup>73</sup> Third is the time restriction placed on out-of-state users that that, as a

---

tal impacts, both in terms of new infrastructure and massive electricity usage. See WATER PLAN, *supra* note 57, at 4D.9–10, 4D.20, 4E.21, Table 4D.6.

68. *New Bill Protects Oklahoma Water Rights*, OKLA. WATER NEWS 4, (2009), available at <http://tinyurl.com/tarrant5> (Oklahoma earlier had in force an outright statutory prohibition on exports of water for out-of-state use). See OKLA. STAT. ANN. tit. 82, § 1B (West Supp. 2012); OKLA. STAT. ANN. tit. 74, § 1221.A (West Supp. 2012) (the express moratorium expired in 2009, during the pendency of this action and was replaced with the collection of discriminatory statutes discussed in text).

69. OKLA. STAT. ANN. tit. 82, § 105.9 (West 1990).

70. *Hendrick v. Walters*, 865 P.2d 1232, 1243 (Okla. 1993). ("Public officers have the duty to follow [the] opinions [of the Oklahoma Attorney General] until they are judicially relieved of compliance."). No court has overruled the aforementioned opinion.

71. Okla. Op. Att'y Gen. No. 77–274 (1978).

72. *Id.* at § 1086.2 (West Supp. 2012).

73. *Id.* at § 1086.1(A)(3) (because out-of-state use of water necessarily precludes in-state use of that water for any purpose (including recreation and "conservation"), arguably any permit to appropriate water for out-of-state use is "to the detriment" of Oklahomans).

practical matter, is a categorical bar to major municipal proposals like TRWD's.<sup>74</sup> Finally, there is Oklahoma's express preference for in-state uses over "[u]se[s] of water outside the state."<sup>75</sup> The practical upshot of this statutory scheme is a categorical prohibition against permits to appropriate Oklahoma surface water for use in another state.

#### D. *The Tenth Circuit's Decision*

At the same time that TRWD filed its permit applications with OWRB, it filed suit against the members of OWRB in federal district court in Oklahoma, alleging, inter alia, (1) that Oklahoma's water embargo laws violate the Dormant Commerce Clause by unduly restricting interstate commerce in water, and (2) that the Red River Compact—specifically the "equal rights" provision of section 5.05(b)(1)—preempts the Oklahoma statutes that prevent TRWD's appropriation of water from Reach 2, subbasin 5. TRWD sought a declaratory judgment to that effect and an injunction prohibiting OWRB from enforcing the statutes. The parties agreed by joint stipulation, approved by the court, that no action will be taken on TRWD's application until the lawsuit has concluded. The district court granted summary judgment to OWRB on both claims,<sup>76</sup> and the Tenth Circuit affirmed.

##### 1. Dormant Commerce Clause

In addressing the Dormant Commerce Clause issue, the court of appeals focused its inquiry on whether Congress, in giving its consent to the Compact had consented to Oklahoma's restrictions on water export. By way of background, courts have held that the Commerce Clause restricts states "from engaging in purposeful economic protectionism."<sup>77</sup> Export restrictions on natural resources are one form of such disfavored protectionism,<sup>78</sup> and in *Sporhase v. Nebraska ex rel. Douglas*,<sup>79</sup> the Supreme Court held that water is an article of com-

---

74. A permit to appropriate surface water for out-of-state use must provide "that the whole of the amount of the water authorized by the permit [will] be put to beneficial use within a period of less than seven years." *Id.* § 105.16(A). Given the enormous lead time necessary for planning and construction—greater than 15 years—this limit functions as an absolute bar to TRWD's proposal.

75. *Id.* § 105.12(A)(5). In passing on an application for out-of-state use, OWRB must, for example, "evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma" instead.

76. *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009).

77. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986).

78. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) ("[A] State may not preserve solely for its own inhabitants natural resources located within its borders.")

79. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

merce and thus state laws burdening its trade are subject to Dormant Commerce Clause constraints. Congress, however, may “permit the states to regulate the commerce in a manner which would otherwise not be permissible”<sup>80</sup> by making a “clear expression of approval.”<sup>81</sup> The court held that the Compact itself—despite its avowed purpose to “promote interstate comity and remove causes of controversy” among the signatories—actually contains this clear expression of approval from Congress for Oklahoma to prohibit water export. In doing so, the court of appeals did not point to a provision of the Compact that contained this approval, rather it held, “the broad language of key Compact provisions” provided “the clear statement of congressional authorization of state regulation that Sporhase and Wunnicke require.”<sup>82</sup>

In reaching this conclusion, the court of appeals found that “the Compact provisions using words and phrases such as ‘unrestricted use,’ ‘control,’ ‘in any manner,’ ‘freely administer,’ and ‘nothing shall be deemed to interfere’ give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state’s apportioned water.”<sup>83</sup> Those phrases come from three Compact provisions described above: “unrestricted use” is from section 4.02(b), which governs allocations from Reach 1, subbasin 2; “in any manner” and “freely administer” come from section 2.01, while “control” and “nothing shall be deemed to interfere” come from section 2.10(a), both general provisions of the Compact. The court of appeals also relied in part on the Compact’s “Interpretive Comments”<sup>84</sup>—which “the Compact’s Negotiating Committee wrote . . . so that future readers might be apprised of the intent” of the drafting committee,<sup>85</sup> and which state “each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.”<sup>86</sup>—to confirm its reading of the Compact.

## 2. Preemption

The court of appeals also rejected TRWD’s Supremacy Clause claim that the Compact’s “equal rights” provision preempts Oklahoma laws that prevent TRWD from appropriating water allocated to it from parts of Reach 2, subbasin 5. Invoking the presumption against preemption, the court deemed the presumption “particularly strong in this case” because of a general history of “deference to state water law by Congress.”<sup>87</sup> The court then focused in

---

80. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984).

81. *Id.* at 92.

82. *Herrmann*, 656 F.3d at 1222, 1237.

83. *Id.* at 1239.

84. *Id.* at 1238.

85. *Id.* at 1228.

86. *Id.*

87. *Id.* at 1242 (quotation marks omitted).



on and the language in section 2.10 of the Compact—“Nothing in this Compact shall be deemed to: (a) Interfere 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”—concluding that it was an “interpretive rule of non-interference” whereby Congress, in consenting to the Compact, deferred to state regulation.<sup>88</sup> Further, the court bootstrapped from its previous Dormant Commerce Clause analysis, reasoning that “a compact that authorizes state regulatory water laws so as to insulate them from dormant Commerce Clause challenge, as this one does, is unlikely to preempt those very same laws.”<sup>89</sup>

The court acknowledged that state powers cannot be exercised in a manner inconsistent with the terms of the Compact, as stated in section 2.10(a). But, employing the presumption against preemption, it interpreted the “equal rights to the use” guaranteed by section 5.05(b)(1) of the Compact, when read in the context of the minimum flow provisions in the rest of section 5.05, to merely ensure that “an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas.”<sup>90</sup> Once minimum downstream flow requirements are met, according to the court, section 5.05 gives equal rights to use of the excess, but does not entitle a “Texas user” to “take Texas’s share of that water from a tributary located in Oklahoma,” even though Texas’s share is not available to it from Texas sources.<sup>91</sup> Having read the Compact in this way, the court held that it does not conflict with Oklahoma law.

### E. *The Parties’ Legal Arguments at the Certiorari Stage*

#### 1. TRWD

TRWD argues in its petition for certiorari that, in reaching its conclusions on each issue, the Tenth Circuit misread and rewrote provisions of the Compact, misused the presumption against preemption, and misapplied clear Supreme Court precedent. TRWD insists that nothing in the Compact indicates Congress’s acquiescence to Oklahoma’s discriminatory water export regime and that the plain language of the Compact “allocates an equal portion of the disputed water to Texas and thereby preempts inconsistent Oklahoma law.”<sup>92</sup>

In challenging the Tenth Circuit’s Dormant Commerce Clause holding, TRWD zeroes in on the rule that that “Congress must manifest its unambiguous intent before a federal statute will be read to permit or

---

88. *Id.* at 1236, 1238, 1246.

89. *Id.* at 1245.

90. *Id.* at 1243.

91. *Id.* at 1245.

92. *Herrmann*, No. Civ-07-0045-HE, 2009 WL 3922803, at \*3.

to approve” of protectionist state laws that would otherwise violate the Commerce Clause.<sup>93</sup> TRWD argues that Tenth Circuit’s cobbling together of phrases from various provisions of the Compact and its interpretative comments is insufficient to create such an “unmistakably clear”<sup>94</sup> impression as to Congress’s intent.<sup>95</sup> In fact, TRWD argues, the provisions relied on by the Tenth Circuit, when read in their entirety, do not give *any* indication of an intention to use the Compact as a vehicle to grant Oklahoma permission to enact protectionist laws.<sup>96</sup> TRWD goes on to point out that other reasoning employed by the Tenth Circuit—that the deference to state law embodied in the general provisions of the Compact demonstrates Congress’s approval of discriminatory laws—has been expressly rejected in prior Supreme Court cases.<sup>97</sup> Finally, TRWD argues that the Tenth Circuit’s resort to the Compact’s interpretative comments, which TRWD labels “legislative history,” is, itself, evidence that there was no “clear” congressional consent to Oklahoma’s discriminatory regulations.<sup>98</sup>

As to the Tenth Circuit’s preemption analysis, TRWD argues that language of § 5.05(b) is clear and susceptible to only one interpretation: that Texas is entitled to 25% of the of the excess flow from Reach 2, subbasin 5 above 3000 cubic feet, and that it may collect its portion from outside of Texas. TRWD insists that the Tenth Circuit’s reading of § 5.05, with its selective reference to other, more general, provisions in the Compact, is an impermissible rewriting of the obligations assigned by the Compact.<sup>99</sup> The Tenth Circuit got off on the wrong foot in its interpretation, TRWD claims, by applying the presumption against preemption, which in turn led it to give unnatural meaning to various provisions. TRWD concedes that the Compact is technically a federal law, and that it does not contain an express preemption provision,<sup>100</sup> nonetheless, TRWD argues, the presumption has no place in the interpretation of an interstate compact—a contract between states—because “[a]n interstate compact is not imposed upon the States by Congress; it is, instead, the product of two or more States exercising their sovereign prerogative to negotiate a collaborative solution to a common problem.”<sup>101</sup>

---

93. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

94. *South-Central*, 467 U.S. at 91.

95. *Herrmann*, No. Civ-07-0045-HE, 2009 WL 3922803, at \*20.

96. *See id.* at \*9.

97. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959–60 (1982) (holding that general “deference to state water law” does not “indicate that Congress wished to remove federal constitutional constraints on such state laws”; rather, such language must be understood, instead, as deferring only to “*valid* state law,” an ordinary “ingredient[ ]” of which is conformity with “[t]he negative implications of the Commerce Clause”).

98. *Herrmann*, No. Civ-07-0045-HE, 2009 WL 3922803, at \*22.

99. *Id.* at \*28.

100. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

101. *Herrmann*, No. Civ-07-0045-HE, 2009 WL 3922803, at \*33.

## 2. OWRB

Unsurprisingly, given that this case is at the certiorari stage, OWRB's legal arguments largely track the reasoning of the Tenth Circuit. OWRB spends most of its brief in opposition attempting to convince the Court that its dispute with TRWD is minor, emphasizing that it is a dispute over just a few words in the Compact, and does not even involve any of the actual signatories.<sup>102</sup>

As to the Dormant Commerce Clause issue, OWRB argues that in consenting to a compact that allocated water among small group of states—in other words, “legislat[ing] on the specific subject at issue”—Congress blessed those states' enactment of protectionist regimes regarding that water.<sup>103</sup> OWRB insists, as the Tenth Circuit did, that Sporhase and Wunnicke are distinguishable because they did not involve interstate compacts governing the articles of commerce at issue in each respective case, and thus lacked this form of Congressional acquiescence.<sup>104</sup>

As to the preemption issue, OWRB begins by challenging TRWD's interpretation of the Compact language, claiming that overarching goal of the Compact “is to allow one state to divert its water within its state and the other to do so within the other state,” and that TRWD's interpretation flies in the face of that goal.<sup>105</sup> OWRB further endorses the “Tenth Circuit[’s] meticulous interpretation and preemption analysis of section 5.05(b)(1)'s ‘equal rights’ provision in the context of the policy and purpose expressed throughout the Compact,”<sup>106</sup> insisting that “[h]ad it been the intent of the Compact drafters to allocate the water located within Oklahoma to Texas, after twenty years of negotiations, surely they would have [clearly] said so.”<sup>107</sup>

## IV. THE IMPORTANCE OF THE CASE

Whichever side you agree with in this case, the importance of the issues presented cannot be overstated. Beyond the immediate impacts that will be felt in the water-starved regions of north Texas, if the Tenth Circuit is correct in its conclusions, many (even most) water compacts between western states could be significantly weakened, and the ability of a compact state to hoard its natural resources from the rest of the country could be greatly enhanced. These effects will only be magnified as the need for water increases and disputes of water become more common.

---

102. See *Tarrant Reg'l Water Dist. v. Herrmann*, No. 11-889, 2012 WL 590128, at \*10–12 (Feb. 21, 2012).

103. *Id.* at \*25.

104. *Id.* at \*25–26.

105. *Id.* at \*28–29.

106. *Id.* at \*30–31.

107. *Id.* at \*31.

### A. *A License to Hoard*

As discussed earlier, the primary purpose of Dormant Commerce Clause restrictions is to prevent state-level economic protectionism.<sup>108</sup> And the reason for the primacy of this purpose is that such protectionism “tends to undermine the political union established by the Constitution” and is “likely to provoke retaliation by other states.”<sup>109</sup> It follows then, that anything that makes it easier for states to engage in economic protectionism—particularly with regard to a vital resource—should catch our eye, and should be examined closely.

What the Tenth Circuit did in this case that has the potential to result in widespread water-protectionism was to take general provisions providing that the Compact is limited to its subject matter; and that anything outside the compact remains status quo, and which are present in similar forms in almost all western water compacts; and elevate them to the status of a clear statement of congressional acquiescence in discriminatory water export laws. In other words, if the Tenth Circuit is correct that a statement in a compact that generically provides that “[n]othing in this Compact shall be deemed to . . . [i]nterfere with [water regulations] not inconsistent with its obligations under this Compact,” grants a state free reign to prevent export of water, then most states in the western part of this country have a license to hoard their water at the expense of other states.<sup>110</sup> Regardless of whether the court’s interpretation is sound, it is unlikely that this outcome of the compact process was anticipated; it will require a reexamination of the interstate compact’s place in the resolution of water disputes, particularly as water-starved states increasingly look to their more blessed neighbors with a jealous eye.

Further, by encouraging hoarding, the Tenth Circuit’s decision makes it more likely that disputes between and among states will emerge and more likely that existing disputes will intensify. Although it is doubtful that we will see a return of the “Arizona Navy,” there is a very real risk that these disputes over water, a resource that we all need to survive and thrive, will create cycles of retaliation that leave us all worse off.

### B. *Costly Uncertainty*

As already noted, the primary value of water compacts is their ability to settle expectations and allow for the type of advanced planning that is necessary for future economic development. It is vital for this settling of expectations that the terms and provisions of a compact

---

108. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1977) (adopting a “virtually *per se* rule of invalidity” for discriminatory state statutes that raise the specter of economic protectionism).

109. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 485 (2008).

110. *Herrmann*, 656 F.3d at 1222.

have a clear and unchanging meaning. If the Tenth Circuit is correct, however, that the presumption against preemption guides the interpretation of an interstate compact's terms, the predictability gains from existing compacts will be greatly reduced. This is because employing the presumption against preemption to compacts encourages their rewriting by courts. Instead of searching for the plainest or most obvious reading of a provision when such a provision conflicts with a state law, courts instead will actively seek out an interpretation that saves state laws, adopting that interpretation so long as it is not "unreasonable."<sup>111</sup> This greatly increases the range of possible interpretations of any given provision, and consequently diminishes the certainty that these provisions would otherwise provide.

An additional, and related, increase in uncertainty following from the application of the presumption against preemption to interstate compacts is the incentive it provides for states to get creative in their lawmaking in order to shirk their responsibilities under a compact. Knowing that a compact provision that conflicts with a state law will be given not necessarily the best interpretation, but a "reasonable" interpretation that saves the conflicting state law, a state has an incentive to pass a law that directly conflicts with the best interpretation of an unfavorable provision. Such a perverse incentive makes it that much more difficult to achieve the important goal of settling expectations.

### C. *Federal Intervention*

This increase in uncertainty with respect to the meaning of compact provisions and the likelihood of interstate disputes reduces the value of existing compacts and could make future compacts more difficult to execute. The ultimate outcome of this unraveling of the carefully-balanced network of interstate compacts that govern allocation of the nation's water is likely to be increased litigation and, eventually, solutions imposed by Congress.

One large advantage compacts have over litigation is that their outcomes are much more predictable.<sup>112</sup> As the uncertainty of compact outcomes increase, their value relative to litigation decreases. If states come to believe that any "sensible compromise" can be undone by signatories later in the game, they are likely to prefer trying their luck in the courtroom upfront, where they have a chance to score a water windfall, rather than engaging in what are often protracted negotiations.<sup>113</sup> This is a possibility that should give us pause, because, to put

---

111. *Id.* at 1245.

112. See Horne, *supra* note 28.

113. Red River Compact, Pub. L. No. 84-346, 69 Stat. 654 (1955) (showing that negotiations on the Red River Compact were authorized by Congress in 1955). Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (showing that the Compact was not ratified by Congress until 1980.).

it bluntly, courts are “very bad at resolving interstate water disputes.”<sup>114</sup>

In addition, as noted above, Congress has the power to undo previously executed compacts; if it sees that current compacts are becoming ineffective and increasing, rather than decreasing interstate strife, it may put that power to use. The odds of intervention increase as states seek to alleviate water shortages in environmentally-risky ways<sup>115</sup> and as state disputes encroach on federal water interests.<sup>116</sup> In considering this possibility, it is important to remember that a state like Texas, with its thirty-six representatives in the House, will have far more clout in such disputes than a state like Oklahoma, with only five.

## V. CONCLUSION

The need for cooperation in resolving interstate water disputes has never been greater. The most effective mode of encouraging this necessary cooperation over the past 100 years has been the interstate compact. The Tenth Circuit’s decision in *Tarrant*, however, raises questions about the continuing viability of these compacts. These questions are of vital importance, not just to the future of the American West, but to the entire country.

---

114. Horne, *supra* note 28, at 104.

115. In this case, for example, TRWD’s alternatives to acquiring its water from Oklahoma pose a much greater environmental impact. See *WATER PLAN*, *supra* note 57, at 4E.15–16.

116. Again, using this case as an example, the Hugo, Sardis (formerly Clayton), and Tuskahoma federal reservoirs—all located in southeastern Oklahoma within Reach 2, subbasin 5—were expressly authorized as water sources for both Oklahoma and North Texas. At the time the reservoirs were under consideration, Oklahoma’s anticipated future water demands did not justify the cost of their construction. Thus, Oklahoma legislators represented that the demands of North Texas (and specifically Tarrant) should be taken into account to justify Congress’s authorization and subsequent funding of the projects. See, e.g., HEARING BEFORE SUBCOMM. OF THE COMM. OF PUBLIC WORKS, UNITED STATES SENATE, 84TH CONG. (1956) (statement of Okla. Sen. Monroney) (“[T]he water for sale to municipalities, such great municipalities as Dallas and Fort Worth . . . [a]nd others that are desperate for . . . water supply . . . will not only reimburse the cost of the upstream dams, but it will carry the cost of the auxiliary dam, the dry dam located at Millwood.”).

