

1-1-2016

Addressing Competing Obligations Under Compacts and the Endangered Species Act

Connor Pace

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Connor Pace, Conference Report, Addressing Competing Obligations Under Compacts and the Endangered Species Act, 19 U. Denv. Water L. Rev. 341 (2016).

This Conference Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Addressing Competing Obligations Under Compacts and the Endangered Species Act

going to “get shit done” as the mentality parties must adopt as society enters tough drought cycles. For the Western water community to continue to be successful, Mulroy emphasized that conversations need to shift from a discussion about water rights, to one about responsibilities. In the face of a changing environmental and political climate, it will only become more difficult to have rational conversations about tough problems. The willingness to find solutions, in the face of daunting challenges, must serve to unite the West. While every community has its own culture, infrastructure, and laws to administer, Mulroy argued that future generations must cooperate to confront common problems and avoid litigation.

Mulroy concluded her remarks by stating that her generation is handing down a legacy of partnership to the next generation. With that legacy comes the responsibility to continue the partnership as we confront the new, more extreme stresses that will strain the compact over the next few decades. She reminded the next generation of lawyers that the guiding principle, which has permeated conversations about water in the West, is that failure is not an option. We need to find a way to cooperate to find a solution that works for all interested parties. She strongly urged the next generation to venture outside its immediate communities and go see what it is like in other areas of the world, to tell a story about our journey back to being full partners, and to start thinking about the laws in their flexible fashion rather than a rigid manner. Failure is not an option.

Jennifer Najjar

ADDRESSING COMPETING OBLIGATIONS UNDER COMPACTS AND THE ENDANGERED SPECIES ACT

In this panel, Karen Kwon and James “Jay” Tutchton presented differing sides of ongoing conflicts between the federal law and state water compacts concerning the Endangered Species Act (“ESA”). Kwon, from the Office of the Colorado Attorney General, works in water compact litigation and negotiations. She has contributed to two amicus briefs submitted to the Supreme Court of the United States regarding state compact issues. Tutchton has been a public interest environmental attorney for over twenty years, and he is currently a Senior Staff Attorney with the Defenders of Wildlife. Federico Cheever, an environmental law professor at the University of Denver Sturm College of Law who has written about the ESA, moderated the panel.

First, Kwon offered her approach to this conflict. She began with a brief recitation of the implications the ESA has among interstate relations. For instance, the ESA affects water and wildlife management between states because endangered species recovery in one state can affect water supplies in other areas. Additionally, the ESA implicates the allocation and use of compact water. Recovery of underwater species under the ESA often requires reserving a steady water supply for recuperation efforts.

Then, Kwon focused on the state perspective of this competition and described several values that Coloradans hold. First, Coloradans value their environment. Conserving and promoting species promotes that way of life. Second, that quality of life requires a certain availability in water supply. Attaining

a reliable supply of water helps to preserve species and further Coloradans' way of life. Finally, Coloradans seek to maintain their ability to manage the resources within their borders.

Kwon next analyzed the ESA and discussed its advantages and disadvantages. One of its advantages is that lawyers can use it as a tool to effectuate change. Through litigation, lawyers can try to modify or stop projects that jeopardize endangered species. Another point in the law's favor, the ESA protections have proven successful in preventing extinction. On the other hand, the ESA's disadvantages include the fact that very few species have recovered to the point that they can leave the endangered species list. Also, some view the ESA as a threat instead of a tool because the ESA threatens liability for those who do not adhere to its guidelines. Finally, the ESA contains no long-term incentives looking to the future. Instead, it focuses on present happenings and immediate incentives.

Before posing her solution, Kwon presented two examples in Colorado of conflicts between the ESA and compacts: the Delta Smelt in the Bay Delta and the Silvery Minnow in the Rio Grande. The Delta Smelt conflict could dramatically cut the amount of water flowing to Southern California and directly affect the Colorado River. The Silvery Minnow conflict involves a dwindling fish population in the Rio Grande River, which divides several states' waters.

Kwon's proposed solution to this problem: fit species conservation within the existing structure of water allocation in and between states. Through this framework, states can create long-term goals and accomplish them while working within the ESA's parameters. Additionally, states may find flexibilities under the ESA to allow compliance with water compacts while recovering species. Kwon then offered several examples from Colorado that embody this solution. First, a Colorado policy, the Colorado Parks and Wildlife and the Colorado Water Conservation Board ("CWCB") work to "keep species common" and to recover and de-list already-endangered species. To do this, the two entities collaborate with public and private groups to collect, exchange, and analyze data and resources on endangered species. Overall, they use this data to collaborate and try to intervene before listing species as endangered.

Another example illustrating Kwon's proposed solution concerns the Upper Colorado Recovery Program. In this program, several public and private entities collaborate to recover four endangered species of fish in the Upper Colorado River without interfering with water rights or compacts. The program avoids this interference by implementing flow augmentation, monitoring non-native fish, screening large diversions, and constructing fish ladders to help habitat access. Through these actions, the program maintains compliance with the ESA while promoting the recovery of several endangered fish. Kwon also mentioned a third example: a water lease in the 15-Mile Reach in Colorado. Through this action, the CWCB leases approximately twelve thousand acre-feet to preserve the natural environment flows in that area and maintain the goals of the parties involved, such as water use and development.

Kwon summarized by re-emphasizing that the challenges facing species are growing, such as a lack of both long-term solutions and scientific consensus. To combat these challenges, she stressed that water advocates must collaborate and utilize scientific methods.

Tutchton took the podium next, and he started by explaining that the ESA's process, like a play, consists of "acts." In the first "act," the ESA prescribes the requirements for listing a species as endangered. Researchers utilize the best available science to determine whether extinction poses a danger to a species or a distinct population segment of vertebrate. The second "act" includes the consultation process, during which the government re-thinks its activities in light of the listing. This portion prohibits the federal government from making the species' situation worse. Finally, the third "act" prohibits anyone from "taking" the endangered species. In this context, both killing a member of the species and destroying its habitat constitutes a "taking."

According to Tutchton, the ESA is a "paper tiger." That is, it looks tough, but lawyers may easily disarm it. In practice, the ESA only removes or modifies the worst-of-the-worst projects. In the water world, however, Tutchton concedes that the ESA commonly helps water species gain protection and escape extinction. He attributes this characteristic to the fact-heavy situations and objective, scientific determination. An apparent advantage for water wildlife is that researchers can collect data to calculate with scientific precision the results of a particular action, and thus protect endangered water species from peril. For example, Tutchton mentioned one case where the predicted extinction of a three-inch fish overruled the construction of a dam. In that case, researchers produced enough data to conclude the species would become extinct if developers built the dam and blocked its construction. (*See Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).)

Next, Tutchton briefly mentioned that one can comply with both of the laws of the river, and then quickly turned to the success of the ESA. For instance, while the government has de-listed relatively few species, the ESA's regulations have seen success in perpetuating the survival of listed species. Going against those that criticize the ESA for a lack of de-listing, Tutchton admitted the ability of the species to recover depends on the means one wants to use. Certainly more drastic measures can get faster results, but those drastic measures may venture beyond one's comfort zone. In practice, the small measures produce small effects, often resulting in maintenance or slow growth of a species.

Additionally, while Tutchton understands the desire for local control, he argued several counterpoints. First, all species, as national resources, are of national interest. All people, no matter where they live, have an equal right to enjoy the nation's wildlife. Furthermore, the need to list a species represents a local failure of conservation. The federal government does not manage wildlife until *after* listing occurs. Then, the federal government steps in to intervene for the endangered species. Tutchton also admitted that handing control back to the state, which often caused the endangered status, disappoints him.

Tutchton then touched on the issue of drought. He declared that Westerners routinely live in a drought. In fact, he hopes people in Colorado and the West more generally remove the word "drought" from their vocabularies, as these areas normally experience little or no precipitation. Furthermore, Westerners should consider rain or snow an abnormality, especially in states located in a former dust bowl. Thus, organizations should expect drought-like weather and act in accordance with the expected conditions.

Finally, Tutchton spoke about the future of the ESA. First, he pointed out

the ESA underrepresents real life. The ESA currently protects fifteen-hundred species, but scientists speculate that number should be around six or eight thousand. Next, he mentioned that species originally evolved before humans changed the earth's landscape. Wildlife originally developed when rivers regularly flooded and followed their natural course. Now, humans use rivers for transportation and for development. Creating and managing the workarounds needed to protect the species will only present more difficulty as human development continues. Tutchton summarized by emphasizing that he favors ESA litigation, as it helps to represent underrepresented points of view in critical ventures.

Connor Pace

WAR OVER THE RED RIVER: IMPLICATIONS OF THE *TARRANT REGIONAL WATER DIST. V. HERRMANN* DECISION

Professor Tom Romero, a faculty member at Sturm College of Law and faculty advisor for the Water Law Review, introduced the sixth panel of the Symposium, which featured two attorneys arguing for each side of the Supreme Court case *Tarrant Regional Water Dist. v. Herrmann*.

Professor Romero began by outlining the case, which the United States Supreme Court ("Court") decided in 2013, and how it affected litigation over interstate water compacts. The water compact at issue, the Red River Compact ("the Compact"), includes Texas, Oklahoma, Louisiana, and Arkansas. This case originated in the Compact area shared by Texas and Oklahoma. Before introducing the attorneys, Professor Romero summarized the issues in the case, including the Dormant Commerce Clause and water marketing issues that the Supreme Court had not reviewed in many years.

The first attorney Professor Romero introduced was Kevin L. Patrick, a shareholder at Patrick, Miller and Noto, P.C. Patrick was counsel for petitioner Tarrant Regional Water District ("District") in the case. The District provides water to north-central Texas. The second attorney on the panel was Star Waring, a shareholder-partner and member of the Natural Resources and Water Law Practice Group of Dietze and Davis, PC. Waring is the Practitioner in Residence for the Natural Resources and Environmental Law program at Sturm College of Law. Waring spoke on behalf of Susan M. Ryan of Ryley, Carlock, and Applewhite, who was counsel for two amicus parties for respondents in the case, the Oklahoma Water Resources Board ("OWRB"), who presented in a point-counterpoint style.

Patrick began first by explaining key historical points that led to this dispute. The first negotiations surrounding the Red River occurred when the United States signed the *Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty on behalf of the Republic of Mexico*. Under this treaty, Mexico relinquished access, use, and ownership rights to the Red River. Patrick next jumped to 1978, when Arkansas, Louisiana, Oklahoma, and Texas divided the waters of the Red River, creating the Compact. Congress passed the Compact into federal law in 1980. Patrick made his first argument in favor of the District by detailing that Southeastern Oklahoma to the north of the Red River receives large amounts of rain annually, while