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## War Over the Red River: Implications of the Tarrant Regional Water Dist. v. Herrmann Decision

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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

North Texas just to the south of the Red River receives unusually small amounts of rain annually. Patrick concluded this point stating that Oklahoma discharges 32.5 to 34 million acre-feet of unused stream water through the Red River annually.

Waring then presented her first counterpoint and explained that although southeastern Oklahoma is abundant in its annual precipitation, the southwestern portion of Oklahoma is very dry. Waring argued that area of Oklahoma should be the focal point as it contains the largest metropolitan area in the state, Oklahoma City.

Next, Patrick and Waring provided a visual of the Red River Compact, and pointed out sub-basin five as the area of the Compact at issue in this case. Patrick and Waring provided a Compact excerpt, Section 5.05(b)(1). Section 5.05(b)(1) declares that the signatory states shall have equal rights to the use of runoff originating in sub-basin five and designated water flowing into sub-basin five. Furthermore, anytime there are 3,000 cubic feet per second flowing at a particular point, each of the four states has a right to take twenty-five percent of the water in the river sub-basin. For reference, Patrick mentioned that ninety-six percent of the time, there is a flow of 3,000 cubic feet per second in sub-basin five, so the four states have the right to take twenty-five percent of that flow the majority of the time. Before moving into the procedural history leading up to the Supreme Court appearance, Waring posed the major question surrounding this case asking "why did Tarrant try to buy water rights from the state of Oklahoma if in fact it had the right to come and divert that water from the Red River in the first place?" Both Patrick and Waring agreed that because the case was appealed from a summary judgment in the district court, the parties could have developed a better factual record had the dispute made it to trial.

Moving into the procedural history, Patrick and Waring explained that the District initially filed the lawsuit in the United States District Court for the Western District of Oklahoma. The District sought declaratory and injunctive relief against the OWRB's enforcement of Oklahoma statutes. Those statutes apply stricter standards to applicants seeking to divert water within Oklahoma's borders for out-of-state use. The District sought to enjoin this enforcement on the grounds that the Compact pre-empted the statutes and that the statutes violated the Dormant Commerce Clause by discriminating against interstate commerce. The District Court denied OWRB's first motion for summary judgment motion on its claims of Eleventh Amendment Immunity. The court granted OWRB's second motion for summary judgment seeking to dismiss the District's Dormant Commerce Clause claim. After appeals, the United States Court of Appeals for the Tenth Circuit held that the Compact did not entitle a Texas water district to take a share of water from a tributary located in Oklahoma, and affirmed the District Court's decisions.

Patrick and Waring then discussed the District's first Petition for Certiorari, and Patrick discussed how the United States Solicitor General supported granting Cert and believed that the plain language of the Compact favored the District. The panelists discussed the fact that the Supreme Court looked to a number of other sections of the Compact, focusing more on states' rights instead of previous legislative history in regard to the Compact.

Before getting to the Supreme Court decision, Patrick and Waring broke

down the parties' arguments. First, Patrick listed the main points that the District would have made, including arguments on preemption and the Dormant Commerce Clause. For pre-emption, the District interpreted the provision regarding sub-basin five as allowing it to divert water from a tributary in Oklahoma. In other words, the District sought to prove that the plain language of the provision created a sub-basin defined by coordinates, not state boundaries, in which each state could access its equal share of the shared pool water from anywhere in the sub-basin. For the Dormant Commerce Clause, the District argued that the language of the Oklahoma anti-diversion statute for out-of-state entities was discriminatory. Additionally, it argued that there should be a rule to look at legislative history instead of the states' rights.

Next, Waring discussed OWRB's arguments. The OWRB's main argument was that the District did not have the authority to enter into Oklahoma physically to divert water for use in Texas. Furthermore, the OWRB argued that the twenty-five percent allocation of sub-basin five in the Compact meant twenty-five percent of the water within the state's own boundaries, not anywhere in the sub-basin. The OWRB argued that states don't relinquish sovereignty lightly and that whenever a state allows cross-border rights, they are always expressed with clear language. Finally, the OWRB argued that the dormant Commerce Clause does not apply to "allocated" water and that if anything, Texas's past efforts to buy that water cut against the District's argument that it was entitled to the water.

Next, Patrick and Waring dove into the Supreme Court case and Justice Sotomayor's 2013 decision. The Court affirmed the Tenth Circuit decision on different grounds. The key rulings, according to Waring, were that the Court agreed with the OWRB's argument that a state retains sovereignty over water resources within its boundaries, that the District's past conduct in attempting to purchase water from Oklahoma demonstrated no cross-border rights, and therefore the District could divert up to twenty-five percent of water in sub-basin five within Texas, but not from Oklahoma.

In their conclusion, Patrick and Waring reiterated that it would have been interesting to see the factual record developed had the case gone to trial. Additionally, they shortly discussed how the lack of language on state boundaries and border-crossings in the Compact played an important role throughout the case. Finally, the attorneys closed by outlining the key takeaways from the case and from their discussion before taking questions from the attendees.

*Joshua Oden*

## **WHAT'S AT STAKE IN THE NEGOTIATION AND LITIGATION OF INTERSTATE WATER COMPACTS?**

The final panel of the Symposium reflected on all the concepts discussed throughout the day, and provided great insight for the future of interstate water compacts.

Professor Jason Robinson of the University of Wyoming Law School, moderated the three-member panel through a series of pre-scripted questions and insightful answers from each of the panelists. The panel included: David Robbins of Hill and Robbins, P.C.; Chad Wallace of the Office of the Colorado