

Water Resources Committee Newsletter

Vol. 16, No. 1

March 2014

FROM THE CO-CHAIRS

Robin Craig and Jon Schutz

As we move into 2014, we hope that Water Resources Committee members are continuing to enjoy our new and improved Web site. Many thanks to Sorell Negro and her team of excellent vice chairs who have been busy editing case summaries and finding “Hot News.” If you would like to contribute to either, please contact Sorell directly.

On February 28, 2014, our team of Programs Vice Chairs, led by Craig Wilson and Susan Ryan, offered Committee members our first Committee teleconference on “State Water Resources Planning.” The program featured James Eklund, Director, Colorado Water Conservation Board; Michael Downey, Water Planning Section Supervisor, Montana DNRC; R. Timothy Weston, K&L Gates, Pennsylvania & Chair, Pennsylvania Statewide Water Resources Committee (Moderator), and Laura Goldfarb, Steptoe & Johnson, West Virginia. The comparison of water planning efforts East and West, and individual state variations on the process, made for fascinating listening. If you have ideas for future teleconferences please let us, Craig, or Susan know.

We hope that committee members will join us at the Section’s 43rd Spring Conference in Salt Lake City, Utah, on March 20–22, 2014. The conference will open with a keynote address and plenary panel on the Environmental Protection Agency’s priorities for 2014–2016, which should highlight several key water issues. Friday morning begins with the session

“Hot Topics in Water Quality,” while Friday afternoon begins with the ever-popular Supreme Court Review plenary, which will focus on the Court’s recent water, air, and jurisdiction cases. Water resources practitioners may also be interested in Friday afternoon’s session, “Climate-Ready Infrastructure,” and the “Hot Topics in Ethics” panel on Saturday morning. In addition, registration for this year’s conference includes a special bonus Thursday morning mini-conference put on by the University of Utah S.J. Quinney College of Law entitled “Communication and Mediation for the Environmental and Natural Resources Lawyer,” held on the easily accessible University of Utah campus.

In addition, planning is well under way for the Section’s 32nd Water Law Conference, which will be held June 4–6, 2014, at the Red Rock Resort in Las Vegas, Nevada. This year’s program is very exciting. Sessions will cover Tribal Water Law 101; tribal water settlements; the water implications of new energy regulations; the new green water infrastructure (and its financing); emerging interstate water issues; constitutional takings litigation over water rights; and a “nuts-and-bolts” hydrology session, among others. Be looking for the conference brochure and conference registration announcements!

We want to thank all of our vice chairs and committee members for their involvement so far,

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Newsletter
Vol. 16, No. 1, March 2014
Norman A. Dupont and Jeff Kray,
Editors**

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and we continue to be excited about the committee's activities this year. However, we still encourage committee members to become involved in the committee's ongoing evolution, especially with respect to programs suggestions and contributions to the committee newsletter. Contact us at robinkcraig@gmail.com, 801-585-5228, or jschutz@mwjlaw.com, 801-359-3663, with any ideas you have about how the Water Resources Committee or SEER can better serve you or your firm's professional development needs, or if you want to be more involved but aren't sure how best to contribute. We will find a place for you.

Robin Craig is the William H. Leary Professor of Law at the University of Utah S.J. Quinney College of Law in Salt Lake City, Utah, where she is also affiliated with the Wallace Stegner Center for Land, Resources, and the Environment.

Jon Schutz is an attorney with Mabey, Wright & James in Salt Lake City, Utah.

CALENDAR OF SECTION EVENTS

April 10-11, 2014

ABA Petroleum Marketing Attorneys' Meeting

The Ritz-Carlton Hotel
Washington, DC

May 2-4, 2014

Spring Council Meeting

The Hutton Hotel
Nashville, TN

June 4-6, 2014

32nd Annual Water Law Conference

The Red Rock Resort, Casino and Spa
Las Vegas, NV

**For full details, please visit
www.ambar.org/EnvironCalendar**

RECLAIMED WATER: HOPE FOR THE FUTURE OR DESECRATION OF HOPI HOMELAND?

Emily Bergeron

On December 24, 2011, the Arizona Snow Bowl became the first ski resort in the world to make artificial snow completely from sewage effluent; however, when the first powder blasted onto the mountain, it was yellow. The resort's manager attributed the problem to a rusty residue in the snowmaking equipment, but this explanation could not quell demands for additional tests of the water's quality and revitalized opposition from local Native American tribes and environmental groups claiming that the snow poses substantial risks to public health and ecology of the San Francisco Peaks, a volcanic mountain range located north of Flagstaff, Arizona.

Although the Peaks received their current name thanks to Spanish missionaries honoring St. Francis, the area has long been sacred to Native American tribes, including the Hopi and Navajo. To the Hopi, the Peaks are home to the Kachinas, spiritual beings who are in part responsible for rain and snowstorms. To the Navajo, they are the physical embodiment of a Navajo god, prayed to as a living, sacred being. The most recent struggle to protect the site has led to an ongoing action about whether using reclaimed water for snowmaking here constitutes a public nuisance. Its outcome raises questions about the viability of using reclaimed wastewater as an alternative when potable water is not required.

1. The Litigation over Reclaimed Water and Its Use

Litigation over the Snow Bowl began in 1981–82, with a series of three lawsuits brought by Hopi and Navajo representatives, seeking to challenge a Forest Service permit that allowed expanded operations by the Arizona Snow Bowl. Situated on federal land in the Coconino National Forest, the resort opened as a modest facility in the 1930s and expanded to cover 777 acres of the peaks. Hopi and Navajo plaintiffs argued that if the U.S. Forest Service (Forest Service) authorized expansion of

the ski area, it would infringe upon their religious freedom. But the tribes failed to convince the district court, which granted summary judgment in favor of the Forest Service and the Department of Agriculture. On appeal, the Hopi and Navajo failed to convince the D.C. Circuit Court that the Peaks were “indispensable” to their religious practice. This led to dismissal of the suit, and expansion of the resort began. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 496 U.S. 956 (1983). The court of appeals held that while the “free exercise” of religion clause of the U.S. Constitution is well recognized, plaintiffs could not establish a significant burden on their religion or its practice. The court of appeals did recognize that expanded construction by the private interests in the national park area would be inconsistent with tribal religious beliefs and cause the tribes “spiritual discomfort,” but that was insufficient to constitute a claim that the secretary’s actions “burdened” the free exercise of religion under the First Amendment. *Wilson*, 708 F.2d at 742.

2. The Second Litigation: Snowmaking from Reclaimed Water

Making snow became necessary for a profitable ski season and a more consistent income to neighboring Flagstaff. The Snow Bowl requested the initial permit, which included clear-cutting 74 acres of forest to accommodate additional lifts, roads, and parking in 2001. In March 2002 the Snow Bowl executed a reclaimed wastewater agreement to purchase reclaimed water from the city of Flagstaff. The agreement was contingent upon obtaining necessary federal and state approvals. That year, the Snow Bowl submitted a proposal to the Forest Service, launching an extensive study of the project and issuing a final impact statement pursuant to the National Environmental Policy Act. The tribe continued its opposition, requesting a hearing on the matter from the city’s water commission.

The Forest Service reached a final administrative decision in June 2005, determining among other things, that the treated water met standards just below those of drinking water. In a second lawsuit

the plaintiffs challenged the Forest Service decision on the grounds that the agency failed to comply with the requirements of the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, the Grand Canyon National Park Enlargement Act, the National Forest Management Act, the Religious Freedom Restoration Act, and the Forest Service's trust responsibility to the tribes. While the Snow Bowl did play a role in this second lawsuit, the city was not a party to the suit. In January 2006 the district court granted summary judgment in favor of the Forest Service on all claims but those under the Religious Freedom Restoration Act. A bench trial resulted in the dismissal of the remaining claims under that statute. The plaintiffs appealed to the Ninth Circuit Court of Appeals, who initially reversed in part and affirmed in part, but ultimately when sitting en banc affirmed the district court's decision on all counts. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc). The Supreme Court denied certiorari in 2009. Opposition to the use of reclaimed water persisted throughout the litigation.

The Snow Bowl received final authorization for the improvements from the Forest Service in July 2010. Hopi opposition continued as the tribe continued its protest with the city water commission through a series of communications and public hearings. After considering alternatives through September 2010, the city of Flagstaff ultimately decided to proceed with the reclaimed water plan.

3. The Third Lawsuit: Is the Use of Reclaimed Water a Public Nuisance?

On August 19, 2011, the Hopi filed a complaint asserting that the agreement violated Arizona law and public policy, there had been an infringement upon the tribe's water rights, and the expansion created a public nuisance. The superior court dismissed the complaint against the city. The tribe appealed the dismissal to the Arizona Court of Appeals asserting that the lower court had erred both in the dismissal of the public nuisance claim and in the awarding of attorney's fees. On April 25,

2013, the appeals court reversed the lower court's ruling allowing the tribe to take its claim back to the Coconino County Superior Court. *Hopi Tribe v. City of Flagstaff*, No. 1 CA-CV 12-0370 (Ariz. Ct. App. Apr. 25, 2013) (unpublished), available at <http://azcourts.gov/Portals/0/OpinionFiles/Div1/2013/CV12-0370.pdf>. Clearly the effects of reclaimed water on the environment or public health have yet to be determined. Navajo Nation addressed agency compliance with the Administrative Procedure Act, rather than environmental costs or economic benefits of reclaimed water. If the potential for negative health impacts is a public nuisance, the parameters are admittedly imprecise.

The *Second Restatement of Torts* defines public nuisance as something "that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons." It requires a demonstration that there has been a substantial interference with a collective right and that the substantial interference is unreasonable under the circumstances (*Armory Park Neighborhood Association v. Episcopal Cemetery Services*, 712 P.2d 914 (Ariz. 1985) (nuisance found by operation of charitable institution feeding indigents one meal a day in private neighborhood). Potentially impacting the determination of reasonableness are the significance of the interference, the legality of the conduct, and the duration of the interference of effect.

4. Reclaimed Water and Its Current Regulation

High-quality water sources are limited, particularly in the western states, and this limited supply faces increasing urbanization demand coupled with increased domestic and industrial uses of water. This limited supply versus demand problem requires a strategy to meet the ever-expanding demand, reclamation, or recycling of used water could potentially provide alternatives for tasks that do not require high-quality, potable water. State regulations have resulted in wastewater treatment plants that produce a higher quality of "reclaimed"

water that is gradually meeting a portion of the ever-increasing demand. The use of reclaimed wastewater for non-potable needs has the potential to satisfy current demand and to decrease the volume of effluent discharged to receiving waters. Some combined program of water conservation and reuse may extend the water supply to meet projected needs and may lead to decreasing demand and costs for raw water treatment.

While reclaimed water use has been on the rise, it has existed in the United States for over a century, starting in 1912 with the irrigation of Golden Gate Park in San Francisco. California continues to lead: for example, the North Bay Water Reuse Program, a coordinated effort of Sonoma, Napa, and Marin Counties, uses “recycled water” to offset the limited amounts of potable water while meeting the region’s diverse needs. Similar programs exist on the east coast. For example, the Southwest Florida Management District uses reclaimed water for agricultural irrigation, groundwater recharge, industrial processes, and the irrigation of lawns, landscapes, cemeteries, and golf courses.

At the federal level, the use of reclaimed water, unlike drinking water, is not specifically regulated. One exception, the Farm Bill, defines growing turfgrass as agriculture, making federal regulations applicable to lawn irrigation. The Environmental Protection Agency has not regulated the subject; however, it published GUIDELINES FOR WATER REUSE in 1980, updating them in 1992 and 2004. The September 2004 version of EPA’s GUIDELINES FOR WATER REUSE is available at <http://water.epa.gov/aboutowm/upload/Water-Reuse-Guidelines-625r04108.pdf>.

States have created their own regulations to ensure safe use, disposal and reuse of wastewater. Some regulation occurs at the source, requiring high-quality and low pathogen levels. Others address the point of use, restricting application to certain sites. Most states adhere to stricter water quality levels for produce that is eaten raw than is processed or cooked. Others regulate time and duration of use, allowing pathogens to break down in the soil over

time rather than accumulate to dangerous levels. Although many state regulations exceed federal guidelines, fear over the use of reclaimed water persists.

Studies have provided results supporting both sides of the argument. Institutions such as the Florida Department of Environmental Protection, the National Academies of Science National Research Council, and the Monterey County Water Resources Agency indicate that there is no measurable increase in illness or disease resulting from irrigation using reclaimed water. However, uncontrolled amounts of nutrients present in wastewater can be problematic as excessive nutrient levels may cause uncontrolled plant growth, inferior plant quality, and leaching into groundwater reserves.

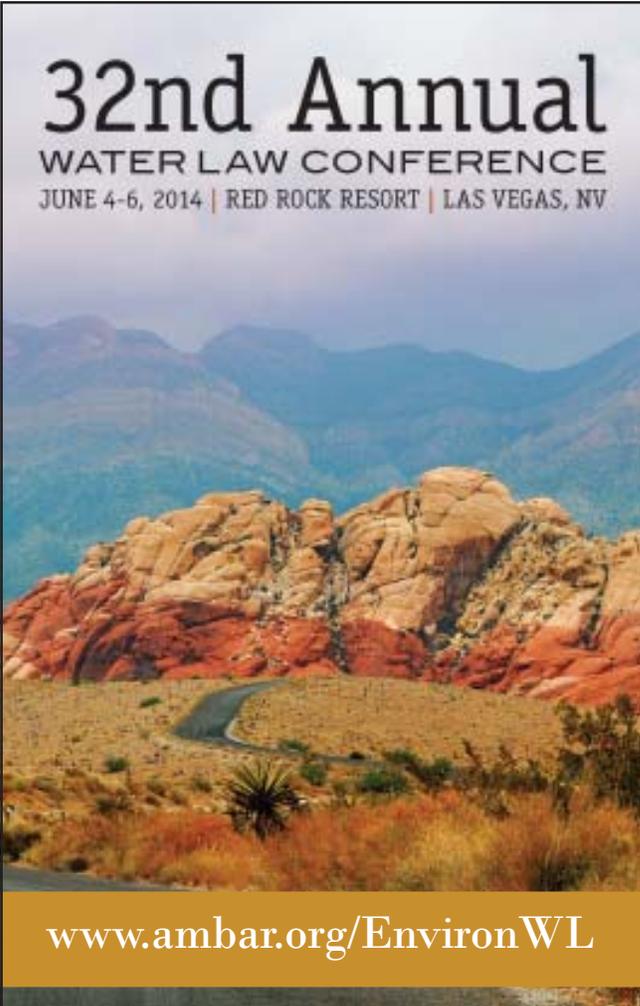
The impact of heavy metals, chemical toxins, and organic pathogens on the environment as a result of reclaimed water use has also been documented. In the case of the Snow Bowl, Northern Arizona University researchers have indicated that reclaimed water contains endocrine-disrupting chemicals—substances not accounted for by the Forest Service’s impact assessment as they are outside the agency guidelines, but discovered in a U.S. Geological Services study on reclaimed water (USDA, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS, vol.1, at 3–191 (2005)). See D. Quanrud & C. Propper, *Wastewater Effluent: Biological Impacts of Exposure and Treatment Processes to Reduce Risk; A Literature Review* (2010) THE NATURE CONSERVANCY, available at http://azconservation.org/dl/TNCAZ_Wastewater_Effluent.pdf). A study conducted by Virginia Polytechnic Institute and State University has also indicated that pipes carrying wastewater effluent to their final destinations also contain antibacterial resistant genes in levels higher than fresh water. See A. Pruden et al., ANTIBIOTIC RESISTANCE GENE TESTING OF RECYCLED WATER SAMPLES IN FLAGSTAFF, AZ (2002), a report available at <http://list.web.net/pipermail/sludgewatch-l/attachments/20120902/be59ef00/attachment-0001.pdf>). Antibiotic resistant genes carried through the wastewater system’s pipes may become more

concentrated at points of use such as sprinkler heads. These chemicals may hamper the body's ability to fight disease. Antibiotic resistant pathogens could lead to infections in cuts and scrapes incurred while skiing, be tracked into eating areas, or ingested by children playing in snow. Further, melting snow could degrade the area's aquifers, freeze-thaw could impact the chemical compounds, and UV exposure could elevate the impact.

Potential health concerns as well as the "ick factor" of using recycled wastewater have created public relations nightmares and environmental justice concerns in other communities. For example, in spite of a comprehensive public outreach program in San Diego's Water Repurification Project, it was stopped indefinitely after political campaigns, using the slogan "Toilet to Tap," called attention to potential health hazards, emphasizing the city's intention to distribute wastewater from affluent communities as drinking water in less affluent ones.

As research continues on the impacts of the endocrine-restricting chemicals present in reclaimed water, both at the Snow Bowl and in the scientific community generally, the determination of significance and duration of effect may be more clearly defined. While the Hopi and other interested parties await the outcome of these further proceedings, their protests for preservation of their sacred mountain site continue.

Emily Bergeron is a doctoral candidate at Cornell University researching issues of Native American rights, environmental justice, and water quality. She can be reached at emilybergeron@mac.com.

The poster features a scenic photograph of a desert landscape with a winding road through a valley, surrounded by large, reddish-brown rock formations and distant mountains under a clear sky. The text is overlaid on the top portion of the image.

32nd Annual
WATER LAW CONFERENCE
JUNE 4-6, 2014 | RED ROCK RESORT | LAS VEGAS, NV

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The 32nd Annual Water Law Conference, being held June 4–6, 2014 at the Red Rock Resort in Las Vegas, continues the tradition of addressing the most important and timely issues for all types of practitioners in the water resources community. The exciting topics include: coping with aging infrastructure; the future of climate change regulation; implications of hydraulic fracturing on eastern and western water basins; the latest in water-related takings; what water lawyers need to know about aquifer mechanics; an ethics presentation on common scenarios in water resources practice; models for allocating interstate water resources; a 101 session and a more in-depth session on the latest Tribal water settlement developments; and a discussion of water issues important to the host community of Las Vegas. While at the conference, don't miss the excitement of Las Vegas or the nearby attractions of Red Rock Canyon National Conservation Area and Hoover Dam.

WATER RESOURCES: IMPLICATIONS OF THE SUPREME COURT DECISION IN *TARRANT*

Theresa Romanosky and Jennifer Cornejo

The United States is currently experiencing its worst drought since 1956, with little hope in the short term for relief. Record heat and below-average rainfall over the past few years have left nearly half of the lower 48 to grapple with drought conditions. When combined with increasing demands on water resources, states are paying close attention to water supplies and, in some cases, searching for new sources of freshwater. As a result, interstate water disputes have arisen over which state has the right to surface water flows. The Supreme Court recently resolved a ten year dispute between Texas and Oklahoma over the Red River Compact. As will be discussed below, the opinion creates a strong presumption in favor of states' sovereign rights to control natural resources within their borders. It also raises important considerations for the drafters of future interstate compacts.

Introduction

On June 13, 2013, the U.S. Supreme Court issued its decision in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013), and unanimously held that the Red River Compact, an interstate water compact that allocates water rights within the Red River Basin among Texas, Oklahoma, Arkansas, and Louisiana, does not preempt Oklahoma statutes that effectively prohibit the transfer of water across its borders. As a result, the Court held, the Red River Compact (Compact) "creates no cross-border rights in Texas."

The Compact is one of 27 interstate compacts allocating water resources amongst states. Interstate water compacts are a popular mechanism for resolving interstate disputes over water rights. An interstate compact is essentially a contract between states that has been approved by Congress under the Compact Clause (U.S. CONST. art. 1, § 10, cl. 3). An interstate compact provides a framework for managing and allocating interstate waters and, once

ratified by Congress, is considered federal law enforceable in federal court. Currently, interstate compacts govern the allocation of water on the Colorado River, Susquehanna River, and Delaware River, among others. Some interstate water compacts actually allocate water between two or more states while others only provide a framework for cooperation between states.

Texas, Oklahoma, Arkansas, and Louisiana signed the Red River Compact in 1978 to resolve disputes over the surface waters of the Red River Basin and fairly apportion the waters of the Red River and its tributaries between the signatory states. The Compact provision pertinent to the dispute states that "Signatory States shall have equal rights to the use of runoff . . . and undesignated flow" from the Reach II, sub basin 5 section of the river, "provided no state is entitled to more than 25 percent of the water" in excess of the amount required to pass through to Arkansas. Texas believed it was entitled to 25 percent of all of the excess water and that it could enter Oklahoma to take it. Oklahoma argued that the language meant each state could take up to 25 percent from its own territory, but could not enter another state to take water without that state's consent.

The Compact also gives the states considerable discretion over how they regulate and apportion water, providing that "nothing in the Compact shall 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." This broad disclaimer language protects individual state sovereignty and is frequently included in water sharing compacts among states.

The Court provided three reasons for its decision in favor of Oklahoma. First, the Court acknowledged the "well-established principle" that a state does not cede its sovereign powers easily. Justice Sotomayor wrote that states generally "possess an absolute right to all of their navigable waters and the soils under them for their own common use."

Faced with silence in the Compact on the issue of sovereign authority over a state's waters, the Court refused to infer that Oklahoma surrendered this power in the absence of explicit language delineating such surrender.

Second, the Court observed that other interstate compacts, when they have created cross border rights, expressly address the details of the cross-border relationships and the assertion of those rights. Without explicit guidance on how such interactions would operate, the Court observed that Oklahoma would be faced with a "herculean task" resulting in "a jurisdictional and administrative quagmire." The Court held that "[t]he absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the states' agreement."

Finally, the Court observed that during negotiations with Oklahoma regarding the purchase of water, Texas never mentioned cross-border rights and that no other signatory state had ever made such a claim in the decades since Congress approved the Compact. The Court concluded that the way in which Tarrant went about trying to purchase water from Oklahoma and other sources suggests that it did not believe that the Compact provided Texas with an entitlement to demand the cross-border diversion.

The result of the opinion is that Texas may take up to 25 percent of the excess water in the sub basin from within its borders, and it may demand an accounting if it suspects Oklahoma is diverting more than 25 percent. But Texas may not enter Oklahoma without Oklahoma's consent to divert water to Texas.

Implications of the *Tarrant* decision

It is unclear whether *Tarrant* will have broader impacts outside of the Red River Compact. Some commenters have suggested that the decision was very narrow and tied closely to the facts of the case. In addition, they argue that the nature of interstate water compacts limits the decision to its facts and any broader implications are unlikely. On the other

hand, many interstate water compacts contain disclaimer language similar to that in the Compact. The decision creates a strong presumption in favor of states' rights and a state's sovereign authority over natural resources within its borders. Any state wishing to cross a border or otherwise infringe on the sovereign rights of another state under the auspices of an interstate compact will bear a heavy burden in rebutting this presumption.

Further, on its face, the *Tarrant* decision has broad implications for rapidly growing metropolitan areas in water-scarce states that rely on interstate water allocations. The Dallas Fort Worth metroplex is the fastest growing area in the country with more than 6.5 million residents; the entire state of Oklahoma has fewer than 4 million. The Tarrant Regional Water District estimates that north Texas, including the Dallas Fort Worth area, must double its water supply by 2050 to meet the growing water demands of a booming population and oil and gas development, among other uses. Other rapidly expanding metro areas, such as Houston, Los Angeles, and Anaheim, face similar concerns about increasing water demands. The Court's ruling poses significant challenges for these areas, especially those in the arid West, and may prompt some states to attempt to renegotiate their interstate compacts in light of the *Tarrant* decision.

The Court's ruling also informs how states should draft future interstate water compacts. The Court noted that "[i]nterstate compacts are construed as contracts under the principles of contract law" and, therefore, any analysis must begin with the express terms of the agreement. The *Tarrant* decision clarified that the obligations of each signatory to an interstate compact should be explicit throughout the agreement to avoid any ambiguity that could later become problematic. Future interstate water compacts must unambiguously address cross-border rights, if any are to be created. More broadly, drafters should carefully word any contract provision that could conflict with a state's sovereign rights over its natural resources to reflect the will of all parties.

A Potential Wrinkle: Congressional Approval

States should also be aware of Congress's ability to amend and/or revise interstate compacts during the ratification process. While states may negotiate a compact and obtain near universal assent to its terms, Congress retains full authority to alter, amend, or set conditions on the compact as a part of granting its consent. Because a congressional grant of consent is gratuitous, Congress may impose conditions or limitations on the compact or its members within constitutional boundaries. For example, the Great Lakes Basin Compact originally contemplated participation by Canadian provinces, but Congress denied consent for that aspect of the original draft. Further, Congress generally reserves its authority over navigable waters in interstate water compacts and reserves its right to "alter, amend, or repeal" its consent. Once approved, the compact transforms into federal law, and states are deemed to have agreed to Congress's imposed terms and/or conditions as a part of the compact.

This possibility for Congress to alter the fundamental nature of the agreement without further consent from the state parties supports the notion that the parties must include unambiguous language in the compact that clearly defines the states' intent, making it unnecessary or difficult for Congress to insert clarifying language. However, explicit congressional approval does not mean the compact will automatically stand up in court; Congress's consent is an exercise of political judgment as to the propriety of the compact vis-à-vis national concerns, not a legal judgment as to the accuracy of the form and substance of the compact.

Conclusion

The *Tarrant* decision strongly supports states' rights and control over natural resources within its boundaries. By observing "[t]he background notion that a State does not easily cede its sovereignty has informed [the Supreme Court's] interpretation of interstate compacts," the opinion also creates a strong presumption in favor of a state's sovereign

rights over natural resources, including water rights, within its boundaries. Although the Court provided three reasons for its decision, this fundamental notion was a large part of the decision. It puts future drafters on notice that clear language in any interstate compact will be required to overcome that presumption as set forth by this opinion and sets the stage for future negotiations with regard to intrastate agreements and bargaining power.

Jennifer Cornejo (jcornejo@velaw.com) is an associate at Vinson & Elkins, LLP, in the firm's Houston, Texas, office. *Theresa Romanosky* (tromanosky@velaw.com) is an associate at Vinson & Elkins, LLP, in the firm's Washington, D.C., office.

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DROUGHT IN THE SOUTHWEST: STRESSED WATER RESOURCES AND STRESSED ENVIRONMENTAL LAWS

Norman A. Dupont

There is little doubt about one thing—that despite abnormally wet weather with copious amounts of snow in parts of the United States—the opposite condition, severe drought, continues to plague large sections of the west and southwestern portions of the country. The U.S. “drought portal,” found at www.drought.gov lists 11 states as drought disaster areas: Arkansas, California, Colorado, Hawaii, Idaho, Kansas, New Mexico, Nevada, Oklahoma, Texas, and Utah. California Governor Jerry Brown has declared a state of emergency due to drought conditions, finding in part that “snowpack in California’s mountains is approximately 20 percent of the normal average for this date” and that other measures of water resources—river systems and groundwater levels—are also dramatically low. The U.S. Department of Agriculture on January 24, 2014, designated two Nevada counties as “primary natural disaster areas,” and three other Nevada adjacent counties were deemed eligible for low-interest loans. USDA Designates 2 Counties in Nevada as Primary Natural Disaster Areas with Assistance to Producers in California (Jan. 24, 2013), available at www.newsroomamerica.com/story/405242.html.

Other southwestern states are in equally stressed conditions due to abnormally low water levels. New Mexico’s largest reservoir, the Elephant Butte Reservoir, is reportedly at its lowest level in four decades, and there is a concern for residents of nearby El Paso, who get approximately 50 percent of their water from that reservoir. J. Metcalf, *Harsh Drought Is Drying Up New Mexico’s Largest Reservoir* (July 29, 2013), available at www.motherjones.com/environment/2013/07/harsh-drought-new-mexico-reservoir. The *Los Angeles Times* reported that New Mexico is the hardest hit of all southwestern drought states, while noting that 87 percent of the southwest is in drought conditions. J. Cart, *New Mexico Is the Driest of the Dry*, *Los Angeles Times*, “Nation” sec. (Aug. 6, 2013). The

National Oceanic and Atmospheric Administration reports no “extreme drought” for New Mexico as of January 2014, but still notes that 80 percent of the state is classified as being in moderate to severe drought conditions. NOAA, National Weather Service, Drought Summary for New Mexico, available at <http://www.srh.noaa.gov/abq/?n=drought> (visited Jan. 24, 2014).

1. Is the Drought Related to Climate Change Conditions?

For resource lawyers, one of the first questions is whether the current drought is related to climate change conditions. Tim Flannery, an Australian scientist warned of such a link in his book, *THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH* 131–32 (Atlantic Monthly Press 2005), noting that:

. . . [M]uch of the America west is in its fifth year of drought. Research shows that such dry conditions have not been seen in the region for around 700 years, at a time when the American southwest was even warmer than it is today. This suggests a relationship between drought and warmer conditions, and as with the Sahel the link seems to lie in rising ocean temperatures.

Flannery’s hypothesis reduced to the observation that warmer ocean temperatures in part of the Pacific could affect the jet stream and storms that accompanied it. A similar report by David Beshears and others published in the Proceedings of the National Academy of Sciences was entitled *Regional Vegetation Die-Off in Response to Global-Change-Type Drought* (2005), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1250231. Beshears and his colleagues began with the technical observation, “Protracted, subcontinental drought in the midlatitudes is a complex response driven in part by anomalies associated with oscillations in sea surface temperature Greenhouse gas forcings are expected to alter these oceanic effects on drought patterns.” More recently, Kevin Trenberth, one of the authors of the Fourth Assessment of the Intergovernmental Panel on

Climate Change (IPCC), and a member of the National Center for Atmospheric Research, published an article with several other colleagues warning that changes in the global water cycle to warming in the 21st century will not be “uniform,” but concluding in part, “Climate change may not manufacture droughts, but it could exacerbate them, and it will probably expand their domain in the subtropical dry zone.” K. Trenbert et al., *Global Warming and Changes in Drought*, 4 NATURE CLIMATE CHANGE 17 (2014).

Still others have suggested that below average precipitation in Texas and Oklahoma may be related to oscillations in Pacific Ocean weather, including the “La Nina” event that results in less rain than El Nino conditions. Much scientific work needs to be done on establishing a firm link between warmer weather due to human contributions and actual weather impacts due to oceanic shifts. But, the water resources lawyer must consider that severe drought conditions could be a long-term problem and not just a short-term situation.

2. Will “Water Wars” Heat Up During Drought Conditions?

Water resource lawyers should anticipate that the pressure for scarce water will lead to more of what is popularly termed “water wars”—litigation over the appropriate allocation of water. Even in states not impacted directly by drought, wars over water rights and challenges to allocation of water stored behind federally funded dams, such as Lake Lanier, sparked fierce court battles that ended only with the denial of certiorari in 2012. *See In re: MDL-1824: Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011), *cert. denied sub nom., Alabama v. Georgia*, ___ U.S. ___ (2012).

In states impacted by drought, water allocation disputes continue to inspire lengthy and contentious litigation. The Supreme Court took up the challenge of one Texas water district against the state of Oklahoma for alleged improper usage of water rights in the Red River just last term. *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. ___,

133 S. Ct. 2120; 186 L. Ed. 2d 153 (2013). In that case, the High Court held that Oklahoma was within its rights under the interstate compact to take certain water. The Court also rejected the Texas water district’s claim that Oklahoma’s particular allocation of water violated the dormant Commerce Clause, holding that absent a demand for an accounting under the terms of the interstate compact the water was in fact allocated to Oklahoma’s benefit.

In an interesting portion of the Court’s opinion, Justice Sotomayor noted that “many of these [interstate] compacts provide for the terms and mechanics of how such cross-border relationships will operate, including who can assert such cross-border rights.” 133 S. Ct. at 2133–34. She then noted a number of such examples, including interstate compacts between Kansas and Nebraska, the Arkansas River Basin compact, and numerous other examples. 133 S. Ct. at 2134 and n.12. Perhaps the High Court was trying to effectively preempt further litigation by suggesting that it would simply rely upon the preexisting language of interstate compacts to decide the issue. *See T. Romanofsky & J. Cornejo, Water Resources: Implications of the Supreme Court Decision in Tarrant*, this issue, *supra*.]

This term, the Court may again take up another disputed set of claims between drought-stricken Kansas and its neighbors, Nebraska, and Colorado, with respect to a matter arising under its original jurisdiction, *Kansas v. Nebraska and Colorado*, Original No. 126. This particular dispute was sparked by Kansas’s petition challenging Nebraska’s use of the Republican River, specifically Nebraska’s increased pumping of the groundwater, which allegedly depleted the flows of the Republican River into Kansas. *See Kansas v. Nebraska & Colorado*, Motion for Leave to File Petition, Petition and Brief in Support (May 2010). The Supreme Court granted leave to file the petition and referred the matter to a designated special master in 2011. *Kansas v. Nebraska, et al.*, 563 U.S. ___ (2011). The special master filed his report to the Court in November 2013, and the Court on

January 13, 2014, accepted the report and set a briefing schedule for filing exceptions to the report. *Kansas v. Nebraska, et al.*, 126 Orig., ___ U.S. ___, Order of Court (Jan. 13, 2014).

Lawyers can also look to increased challenges of water-intensive projects, particularly ones that potentially impact ever more precious water and groundwater. In some instances, environmental advocacy groups utilize concerns over groundwater hydrology to challenge governmental permits for exploration of mining that involves preliminary exploratory drilling activities. *See Idaho Conservation League v. U.S. Forest Service*, No. 1:11-CV-00341, EJM (D. Idaho Aug. 29, 2013), available at http://scholar.google.com/scholar_case?case=14997033717608676109&q=Idaho+Conservation+League+v.+U.S.+Forest+Service&hl=en&as_sdt=2006&as_vis=1.

In other instances, water districts, turning to groundwater resources in times of need, may now take more active roles in suing the alleged polluters to compel a cleanup of those limited resources. *See Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053 (C.D. Cal. 2003) (allegations of water agency that water within its jurisdictional boundaries was impacted by private parties' alleged discharge of perchlorate into soils and groundwater). In yet other instances, water districts may find themselves as targets of private party suits alleging that the pumping operations they engaged in caused the expansion of a plume of contamination into the groundwater. *See Coppola v. Smith*, 935 F. Supp. 2d 993, 1005 (E.D. Cal. 2013) (noting allegations of complaint that California Water's alleged operation of a well "caused PCE to move to previously uncontaminated areas beneath the water table, which exacerbated the contamination plume").

To be sure, many of the specific cases arose prior to the recent drought conditions cited in this article. But, these specific suits may well portend the expansion of similar types of litigation involving claims of impacts to surface water, groundwater, and other water resources are likely to continue, if

not increase in a period when water is a very scarce and precious commodity.

3. The Search for Water and Water Storage Will Continue

Beyond litigation, the search for water usable in other forms (reclaimed water), and water storage facilities to make increased use of water before runoff is likely to continue at an unabated pace, particularly in drought-impacted states. California's Department of Water Resources is coordinating studies with the federal Bureau of Reclamation to consider new water storage projects in that state. *See Reclamation Releases Progress Report on the North-of-the-Delta Offstream Storage Investigation* (Dec. 30, 2013), available at www.usbr.gov/newsroom/newsrelease/detail.cf?recomrdID=45624. Efforts to expand the use of "reclaimed" or "recycled water continue on the legislative front with introduction of bills designed to encourage federal-state cooperative efforts (<http://www.acwa.com/news/water-recycling/rep-matsui-introduces-bill-expand-local-water-recycling-efforts>). Even without legislative efforts, the California Department of Water Resources reports that in that state "over 525,000 acre-feet of wastewater is recycled each year. About half of that (48%) is used for agricultural irrigation. Another 20% is used for landscape irrigation, and about 12% is used for groundwater recharge." (Quoted on Association of California Water Agencies webpage, California's Water: Water Recycling Imitates Nature, available at <http://www.acwa.com/content/water-recycling/californias-water-water-recycling-imitates-nature> (last visited Jan. 25, 2014).

In Colorado, various cities have taken up the initiative to obtain and reutilize water, including the city of Aurora's ambitious five-million-gallon Sand Creek Water Reclamation Facility. *See city of Aurora webpage, Reclaimed Water*, available at www.auroragov.org/LivingHere/Water/Information/ReclaimedWater/index.htm. The city of Denver's Web site indicates that upon completion, its water reclamation facility will be capable of supplying up

to five billion gallons of reclaimed water for industrial and irrigation uses. *See* Denver Water webpage, Recycled Water, available at <http://www.denverwater.org/waterquality/recycledwater/> (last visited Jan. 24, 2014). Examples of similar uses of recycled water also abound in other states throughout the drought-impacted regions of the United States.

4. Scarce Water Resources Will Continue to Demand Efforts by Water Lawyers

Water has always been a scarce resource in the southwestern United States. As Marc Reisner put it in his classic book, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 3 (Penguin, rev. ed. 1993):

Any place with less than twenty inches of rainfall is hostile terrain to a farmer depending solely on the sky, and a place that receives seven inches or less—as Phoenix, El Paso, and

Reno do—is arguably no place to inhabit at all. Everything depends on the manipulation of water—on capturing it behind dams, storing it, and rerouting it in concrete rivers over distances of hundreds of miles. Were it not for a century and a half of messianic effort toward the end, the West as we know it would not exist.

Drought, and the possibility of more to come in the southwest due to (in part) climate change that will not be quickly or easily reversed, emphasizes the critical role that the creative water resources lawyer must play to continue this “messianic” effort to provide for the most fundamental resource necessary for the continued existence of all species in the southwest—water.

Norman A. Dupont is a shareholder at Richards Watson Gershon, where he practices environmental law and litigation.

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2014 CALL FOR NOMINATIONS

THE SECTION INVITES NOMINATIONS FOR THE FOLLOWING AWARDS:

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The Environment, Energy, and Resources Dedication to Diversity and Justice Award will recognize people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial, and ethnic diversity in the environment, energy, and natural resources legal area. Accomplishments in promoting access to environment/energy/resources rule of law and to justice can also be recognized via this award.

ABA Award for Distinguished Achievement in Environmental Law and Policy

This award recognizes individuals and organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

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The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year [consideration may be given to allowing projects that occurred in the 2012-2013 or 2013-2014 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 5, 2014.

These Awards will be presented at the ABA Annual Meeting in Boston in August 2014.

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