

**WHAT’S YOURS IS MINE AND WHAT’S MINE IS
MINE: WHY *TARRANT REGIONAL WATER
DISTRICT V. HERRMANN* SIGNALS THE NEED
FOR TEXAS TO INITIATE INTERSTATE WATER
COMPACT MODIFICATIONS**

Comment

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I. DRASTIC TIMES CALL FOR DRASTIC MEASURES

The prediction that wars will soon be fought over water supplies is hitting closer to home.¹ Texas water is predicted to run out by 2060 if the state continues to suffer from current drought conditions and actions are not taken to secure future water sources.² The struggle for water resembles a tug-of-war contest between states in the southwestern United States; those states that have water want to keep it, and those states that do not have water will do (almost) anything to get it.³ The framers of the Constitution anticipated struggles between states, specifically providing for interstate compacts in the Compact Clause as a means to settle interstate disputes.⁴ One type of interstate compact, a water allocation compact, is a negotiated instrument that establishes each signatory state's entitlement to a shared water source, most frequently a river.⁵

Recent conflicts between states over water governed by interstate water compacts calls into question the utility and legitimacy of western states' water compacts.⁶ The longstanding—and once comprehensive—instrument that is the interstate water compact has been tested and eroded by prolonged droughts, population booms, and industrial advancements, revealing gaping flaws in an interstate water management system that is in desperate need of repair.⁷

Texas is no exception to the water and drought struggle. Drought conditions in the western United States are predicted to continue at least into the near future;⁸ yet one of Texas's largest sources of water—interstate water compacts—is considered inadequate to handle the stresses of drought and population changes.⁹ Interstate water compacts constitute one of the few

1. See Clark S. Judge, *The Coming Water Wars*, U.S. NEWS (Feb. 19, 2013), <http://www.usnews.com/opinion/blogs/clark-judge/2013/02/19/the-next-big-wars-will-be-fought-over-water>.

2. See generally TEX. WATER DEV. BOARD, WATER FOR TEXAS: 2012 STATE WATER PLAN 136 (2012) (explaining that “[t]he primary message of the 2012 State Water Plan is a simple one: In serious drought conditions, Texas does not and will not have enough water to meet the needs of its people, its businesses, and its agricultural enterprises”).

3. See *infra* Part III.A.

4. GEORGE WILLIAM SHERK, DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES 29 (2000); see also U.S. CONST. art. 1, § 10, cl. 3 (“No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”).

5. SHERK, *supra* note 4, at 30–31.

6. See Edella Schlager et al., *The Costs of Compliance with Interstate Agreements: Lessons from Water Compacts in the Western United States*, 42 PUBLIUS 494, 501 (2012). “With climate change producing novel hydrologic regimes, in the future compacts may no longer match the settings in which they were devised. Such mismatches spell compliance problems. Upstream states will find it increasingly difficult to meet their compact defined, water delivery requirements; and downstream states will be challenged to determine whether reduced flows are due to changing precipitation patterns, increased water use in the upstream state, or both.” *Id.* at 507–08.

7. See *infra* Parts II–V.

8. See ANTHONY ARTUSA, CLIMATE PREDICTION CTR., U.S. SEASONAL DROUGHT OUTLOOK, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (2014), http://www.cpc.ncep.noaa.gov/products/expert_assessment/sdo_summary.html.

9. See Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 320 (2010).

avenues Texas may use in its race to secure water for the thirsty state.¹⁰ These compacts, however, are in desperate need of reformation if they are going to facilitate—rather than hinder—Texas water security.¹¹ Perhaps the most compelling reason for Texas to critically weigh the benefits and burdens of its interstate water compacts comes from the recent United States Supreme Court decision, *Tarrant Regional Water District v. Herrmann*, in which the Court successfully sidestepped the opportunity to augment compact interpretation principles with evolving constitutional principles.¹² Thus, the Court sent the message that courts will continue to narrowly construe interstate compacts and that compacting states must modify the compacts themselves if there is to be successful interstate water sharing.¹³

This Comment discusses the most recent litigation involving Texas's interstate water compacts, introducing lessons from each case that are critical to achieving success in future interstate compact litigation or preventing the litigation altogether. To provide perspective concerning the importance of securing additional water resources, Part II introduces a brief background of the dire obstacles Texas faces.¹⁴ Part III highlights the most recent controversy in which Texas and Oklahoma participated—*Herrmann*.¹⁵ This section both summarizes and evaluates the case in order to derive the lessons that may prove to be helpful in upcoming interstate compact conflicts between Texas and New Mexico.¹⁶ Part IV points out how the Supreme Court's language in *Herrmann* hints at the cumbersome process of litigating interstate compacts.¹⁷ Part V compares Texas's current interstate water compacts to the Model Interstate Water Compact and explores the solutions that the Model Compact offers to not only Texas's interstate compacts, but also to all western interstate water compacts.¹⁸ Additionally, Part VI sets forth the recent progress Texas has made in securing water resources through legislative and governmental infrastructure.¹⁹ Part VII concludes this Comment by suggesting that the Texas Legislature and relevant administrative bodies initiate the modification of outdated interstate water compacts in order to immediately begin planning for

10. See Joe Patranella, *Love Thy Neighbor As Thyself: An Analysis of the Texas Water Shortage*, Tarrant Regional Water District v. Herrmann, and *Why Oklahoma Should Be Mandated to Allow Texas to Purchase Water*, 52 S. TEX. L. REV. 297, 298 (2010). Texas has fifteen major rivers and nine major aquifers. *Id.*

11. See *infra* Part VI.A.

12. See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2120 (2013); Christine A. Klein, *Interstate Water Compacts: Tarrant Regional Water District v. Herrmann*, 2013 EMERGING ISSUES 7075, 7075 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327161.

13. See Klein, *supra* note 12, at 7075.

14. See *infra* Part II.

15. See *infra* Part III.A–B.

16. See *infra* Part III.A–B.

17. See *infra* Part IV.

18. See *infra* Part V.A–B.

19. See *infra* Part VI.

additional longer-term and more aggressive water planning to avoid water shortages in the future.²⁰

II. ADDING FUEL TO THE FIRE: CHANGING CONDITIONS AND CIRCUMSTANCES

It is difficult, if not impossible, to measure how important water is to Texas: “Humanity is absolutely dependent on fresh water. That assertion is beyond reproach and justifies categorizing the intrinsic value of water as priceless or even incalculable.”²¹ Texas has eight of the fifteen fastest growing cities in the United States and this population boom has put a strain on available water resources.²² Water also plays a crucial role in sustaining the Texan economy because it is a necessary element in the state’s oil and natural gas industry, farming and agricultural industries, and the manufacturing industry.²³ In addition to being one of the largest oil producers in the world,²⁴ Texas leads the nation in cotton, cattle, and hay production, is second in seed production, and is fourth for overall agricultural exports.²⁵ Clearly, water is priceless to the Lone Star State.

Water is connected to virtually everything. According to a recent report, “[i]f Texas does not implement new water supply projects or management strategies, then homes, businesses, and agricultural enterprises throughout the state are projected to need 8.3 million acre-feet of additional water supply by 2060.”²⁶ Recent drought conditions have prompted a closer look at all water resources throughout the western United States.²⁷ Surface water rights are already allocated and Texans’ current reliance on ground water is unsustainable.²⁸

20. See *infra* Part VII.

21. Gabriel Eckstein, *Precious, Worthless, or Immeasurable: The Value and Ethic of Water*, 38 TEX. TECH L. REV. 963, 963 (2006).

22. See U.S. CENSUS BUREAU, TEXAS CITIES LEAD NATION IN POPULATION GROWTH, CENSUS BUREAU REPORTS (May 23, 2013) [hereinafter TEXAS CITIES LEAD NATION IN POPULATION GROWTH], available at <http://www.census.gov/newsroom/releases/archives/population/cb13-94.html>. The eight cities are San Marcos, Midland, Cedar Park, Georgetown, Conroe, McKinney, Frisco, and Odessa. *Id.*

23. See TEX. WATER DEV. BOARD, WATER FOR TEXAS: 2012 STATE WATER PLAN, *supra* note 2, at 140–44. Water is required for the drilling (hydraulic fracturing) for natural gas, the refining of oil, the production of crops, the raising of livestock, and the manufacturing of various products within Texas. *Id.*

24. See David Blackmon, *Texas Oil and Gas Numbers Fly Off the Charts*, FORBES (Aug. 7, 2013, 3:42 PM), <http://www.forbes.com/sites/davidblackmon/2013/08/07/texas-oil-and-gas-numbers-fly-off-the-charts/>.

25. *Texas Ag Stats*, TEX. DEPARTMENT OF AGRIC., <http://texasagriculture.gov/About/TexasAgStats.aspx> (last visited April 15, 2014).

26. RED RIVER COMPACT COMM’N, REPORT OF THE RED RIVER COMPACT COMMISSION 2012, at 42 (2013), available at http://www.tceq.state.tx.us/assets/public/permitting/watersupply/water_rights/2012_rrcc_reportfinal.pdf.

27. See PETER FOLGER ET AL., CONG. RESEARCH SERVICE, RL34580, DROUGHT IN THE UNITED STATES: CAUSES AND ISSUES FOR CONGRESS (2013), available at <http://www.fas.org/sgp/crs/misc/RL34580.pdf>.

28. See MARK T. ANDERSON & LLOYD H. WOOSLEY, JR., U.S. DEP’T INTERIOR, U.S. GEOLOGICAL SURVEY, CIRCULAR 1261, WATER AVAILABILITY FOR THE WESTERN UNITED STATES—KEY SCIENTIFIC

One way that Texas quenches its thirst for water is through the use of interstate water compacts.²⁹ Texas is a party to five interstate water compacts, which govern the water in rivers that flow through several neighboring states.³⁰ Interstate water compacts are the “preferred method of allocating interstate waters.”³¹ The interstate compacts have a preferred status because they allow for multiple states to agree on specific allocations of water instead of relying on broad equitable apportionment principles that would otherwise determine water amounts for each state.³² States use interstate compacts for many shared resources; they are not limited to water, but can include education, crime control measures, or even oil and natural gas.³³ The three main functions of an interstate compact are to (1) resolve state boundary disputes; (2) facilitate interstate projects; and (3) create administrative agencies concerned with the function and success of the compacts.³⁴

Interstate compacts are powerful and unique documents because they are an exception to the United States Constitution’s Compact Clause, which reserves certain powers exclusively for Congress.³⁵ To begin the process, governors or legislatures of interested states appoint commissioners to meet and draft the compact with commissioners from other states.³⁶ The compacting states may invite various United States department and agency members to attend negotiations as advisors to the commissioners.³⁷ Negotiators face

CHALLENGES 1, 1 (2005), <http://pubs.usgs.gov/circ/2005/circ1261/pdf/C1261.pdf>. “Near population centers, surface-water supplies are fully appropriated, and many communities are dependent upon ground water drawn from storage, which is an unsustainable strategy.” *Id.* Groundwater is not replenished at the same rate it is depleted. See *Groundwater Facts*, NAT’L GROUND WATER ASS’N (Oct. 18, 2010), <http://www.ngwa.org/Fundamentals/use/Documents/gwfactsheet.pdf>.

29. See Edella Schlager & Tanya Heikkila, *Resolving Water Conflicts: A Comparative Analysis of Interstate River Compacts*, 37 POL’Y STUD. J. 367, 368 (2009) (explaining that “[t]he interstate compact is the principle mechanism by which states allocate water from shared river systems”).

30. See TEX. WATER CODE ANN. §§ 41.009 (West 2008) (The Rio Grande Compact is between Colorado, New Mexico, and Texas.), 42.010 (West 2008) (The Pecos River Compact is between New Mexico and Texas.), 43.006 (West 2008) (The Canadian River Compact is between New Mexico, Texas, and Oklahoma.), 44.010 (West 2008) (The Sabine River Compact is between Louisiana and Texas.), 46.013 (West 2008) (The Red River Compact is between Texas, Oklahoma, Arkansas, and Louisiana.).

31. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 10:24 (2010).

32. See generally *Kansas v. Colorado*, 206 U.S. 46, 117 (1907) (fighting over the Arkansas River, both states were subject to equitable apportionment because the two states did not have an interstate agreement indicating the contrary). Equitable apportionment of an interstate stream may come in the form of congressional apportionment via the Constitution’s Commerce Clause or in the form of a lawsuit via the Supreme Court’s original jurisdiction of controversies between states. See Priscilla M. Hubenak & Tom Bohl, *Multi-Jurisdictional Water Rights*, in *ESSENTIALS OF TEXAS WATER RESOURCES* 14-1, 14-2 (Mary K. Sahn ed., 2d ed. 2012).

33. See JOSEPH F. ZIMMERMAN, *INTERSTATE WATER COMPACTS: INTERGOVERNMENTAL EFFORTS TO MANAGE AMERICA’S WATER RESOURCES* 47–52 (2012).

34. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 4–5 (1997).

35. See U.S. CONST. art. I, § 10 (providing that “[n]o State shall, without the Consent of Congress . . . Compact with another State”).

36. ZIMMERMAN, *supra* note 33, at 27–28.

37. *Id.* at 29.

significant political issues during compact drafting, which can lead to prolonged negotiations or an inability to reach an agreement on the wording of particular terms.³⁸ After all parties reach an agreement, each compacting state's legislature—and later the United States Congress—must ratify the document.³⁹ A compact binds all signatory parties and contains attributes of both federal and state law.⁴⁰ Thus, obligations under the compact will be enforced over any inconsistent state laws.⁴¹ After ratification, a compact is interpreted according to contract law principles.⁴² The existence of this instrument is so unique that “unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms.”⁴³ Throughout the history of the United States, compacts have been a means to direct interstate cooperation, solve problems, and avoid disputes.⁴⁴

Although interstate compacts are the preferred method of interstate water apportionment, some scholars view interstate compacts as strict, inflexible, and rigid.⁴⁵ An additional drawback is the challenging and costly nature of complying with these compacts.⁴⁶ The State of Texas has experienced challenges with several interstate compacts, the most recent being the case of *Herrmann*.⁴⁷ The *Herrmann* case serves as a reminder to western states—especially Texas—that rivers subject to interstate water compacts will likely be the subject of more frequent legal battles in an attempt to secure future water resources for dry states.⁴⁸ The conflict involved the Red River Compact, which

38. See *id.* at 28–29. For example, while negotiating the Red River Compact, Texas and Oklahoma could not come to a mutually acceptable agreement over apportionment of the Reach I waters in the Red River basin; thus, negotiations lasted nearly twenty years. See Paul Elliott, *Texas' Interstate Water Compacts*, 17 ST. MARY'S L.J. 1241, 1273–74 (1986).

39. See TARLOCK, *supra* note 31, § 10:25.

40. See *id.*; see also Richard A. Cairo, *Dealing with Interstate Water Issues: The Federal Interstate Compact Experience*, in CONFLICT AND COOPERATION ON TRANS-BOUNDARY WATER RESOURCES 115, 118–19 (Richard E. Just & Sinaia Netanyahu eds., 1998) (explaining that ratified compacts acquire attributes of federal law but are not federal law in the conventional sense).

41. See BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES & MATERIALS 902 (5th ed. 2012).

42. See *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (holding that New Mexico must fulfill its obligations of the Pecos River Compact and that the special master may choose to allow New Mexico to remedy the shortages with money).

43. 73 TEX. JUR. 3D *Water* § 20 (2012).

44. See ZIMMERMAN, *supra* note 33, at 25.

45. See Schlager & Heikkila, *supra* note 29, at 370 (“A small body of legal scholarship has, however, critically examined the capacity of compacts to manage interstate river basins. These scholars argue that interstate river compacts are inflexible and rigid, unable to respond to new challenges, such as endangered species, intensive groundwater pumping, or water quality issues.” (citation omitted)).

46. See Schlager et al., *supra* note 6, at 494 (“[C]entralized administrative systems result in state governments bearing the costs of compliance actions, whereas polycentric administrative systems distribute costs between the state and water users.”).

47. See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2120 (2013). In the past, Texas has also been involved in litigation over the Pecos River Compact and the Canadian River Compact. See *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 462 U.S. 554 (1983).

48. See Lucas Eaves, *Texas Water Wars Foreshadow Nationwide Trend*, INDEP. VOTER NETWORK (Feb. 18, 2013), <http://ivn.us/2013/02/18/texas-water-wars-foreshadow-nationwide-trend/>.

was entered into by Texas, Oklahoma, Arkansas, and Louisiana.⁴⁹ Interestingly, the compact's goals were to promote comity, reduce controversy, provide equitable apportionment of water, alleviate the natural deterioration of the river basin, conserve water, and identify each state's share of the river.⁵⁰ Unfortunately, these goals proved increasingly difficult to achieve with the strains of drought and ever-increasing water consumption; it seems as though comity decreased as controversy increased.⁵¹

Texas's other interstate compacts are under significant strain as well.⁵² A recent evaluation of Texas's compacts determined that the Rio Grande, the Canadian River, and the Pecos River will face severe climate change risks and the compacts that govern these rivers are inadequate to address these risks.⁵³ The same study found that the Sabine River and the Red River both face substantial climate change risks and each compact is only somewhat adequate to address these risks.⁵⁴ The risk and adequacy of each river and compact are based on numerous factors.⁵⁵ Texas is not unique in that its interstate compacts are generally inadequate to address risks—most western states are in the same position—but Texas's population is growing at a much faster rate than other states and the necessity of addressing the inadequacies of interstate compacts is becoming increasingly important.⁵⁶

Additionally, many interstate compacts do not address federal reserved water rights for Native American tribes, which can conflict with the terms of existing compacts.⁵⁷ The critical point is that a balance must be achieved between the necessity of interstate water compacts and the inflexibility of such

49. See TEX. WATER CODE ANN. § 46.013 (West 2008). The conflict was between Texas and Oklahoma, but all signatory states joined as parties. See *Herrmann*, 133 S. Ct. at 2125. The Red River runs between Oklahoma and Texas, forming the border between the two states. See Elliott, *supra* note 38, at 1267.

50. See OKLA. STAT. ANN. tit. 82, § 1431 (West 2013).

51. See Kathleen A. Miller et al., *Water Allocation in a Changing Climate: Institutions and Adaptation*, 35 CLIMATIC CHANGE 157, 158 (1997) (“Demographic change, increased environmental awareness and changing patterns of water demand have already created pressures for changes in the allocation of water among competing uses. The resulting adjustment process has entailed conflicts as well as cooperative solutions.”).

52. See Hall, *supra* note 9, at 320.

53. *Id.* at 300, 306.

54. *Id.* at 302, 308.

55. See *id.* at 240–42. The risk is evaluated according to total water supply relative to water demand; natural variability; groundwater depletion; dryness ratio; expected impact on water supplies from climate change; infrastructure for storing and delivering water supplies; water use flexibility; and instream use factors. *Id.* at 240–41. Each compact's adequacy is evaluated according to data collection and reporting; geographic and hydrological scope; flexibility and adjustability of allocation; water conservation; ecosystem protection; restrictions on transbasin diversions; watershed governance institutions; duration, revision, and rescission. *Id.* at 241–42.

56. See TEXAS CITIES LEAD NATION IN POPULATION GROWTH, *supra* note 22.

57. See Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 106 nn.16–17 (2003). The topic of federal reserved Native American water rights is beyond the scope of this Comment but is worth mentioning because of its importance.

instruments; interstate waters are most efficiently governed as a single unit, but current compacts are stagnant and a source of interstate discourse.⁵⁸

III. BACK TO THE DRAWING BOARD: *TARRANT REGIONAL WATER DISTRICT V. HERRMANN*

Texans have already seen the consequences of inadequate interstate compacts; the *Herrmann* case is an example of how difficult it is (and will be in the future) to use water governed by an interstate compact as a supplementary water source for future needs.⁵⁹ While *Herrmann* is not the first case to expose compact flaws, it is the most recent exposure and the bitter taste of defeat should inspire Texas's water experts to return to the interstate compact drawing board.⁶⁰

A. Tarrant Regional Water District v. Herrmann

The main regulatory body responsible for administering Oklahoma water is the Oklahoma Water Review Board (OWRB).⁶¹ The OWRB approves or denies each application for Oklahoma water.⁶² The Tarrant Regional Water District (TRWD) provides water to approximately 1.7 million people in Fort Worth and the surrounding area.⁶³ In 2007, unable to secure water from nearby Oklahoma because of the moratorium, TRWD brought suit in the Western District of Oklahoma, seeking a declaratory judgment.⁶⁴ TRWD simultaneously filed applications with the OWRB to purchase water.⁶⁵ TRWD wanted its share of Texas's water under the Red River Compact, but the water district wanted to take its share of water from within Oklahoma's borders to avoid the prohibitive salinity of water in the Red River itself.⁶⁶ The resulting

58. Hasday, *supra* note 34, at 5. Compacts are based on the antiquated theory "that a river basin can be managed effectively only as a unit." *Id.*

59. See generally *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013) (holding that Texas could not receive its allocation of the Red River Compact from a tributary located within Oklahoma's borders).

60. See *infra* Part V.A.

61. See generally *About Us*, OKLA. WATER RESOURCES BOARD, <http://www.owrb.ok.gov/about/index.php> (last updated Feb. 10, 2014) (explaining that the OWRB's "primary duties and responsibilities include water use appropriation and permitting, water quality monitoring and standards, financial assistance for water/wastewater systems, dam safety, floodplain management, water supply planning, technical studies and research, and water resource mapping").

62. See *id.*

63. See *Overview*, TARRANT REGIONAL WATER DIST., <http://www.trwd.com/AboutUs> (last visited Apr. 15, 2013).

64. See *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, at *1 (W.D. Okla. Nov. 18, 2009), *aff'd*, 656 F.3d 1222 (10th Cir. 2011), *aff'd*, 133 S. Ct. 2120 (2013).

65. See *Herrmann*, 133 S. Ct. at 2129.

66. *Id.*; see Amy Joi O'Donoghue, *Texas Water Fight Could Have Implications for Utah and Thirsty West*, DESERET NEWS (Apr. 21, 2013, 11:56 AM), <http://www.deseretnews.com/article/865578728/Texas-water-fight-could-have-implications-for-Utah-and-thirsty-West.html?pg=all>.

litigation wound its way through the federal court system for the next six years.⁶⁷

The *Herrmann* controversy began when water districts in the north Texas area realized they required additional water resources in order to meet the demands of the projected population growth.⁶⁸ TRWD proposed to buy the additional water from Oklahoma, intending to purchase unallocated surface water from the Red River basin.⁶⁹ TRWD's proposal promised to comply with the Red River Compact's requirements, yet Oklahoman political opposition to the TRWD proposal created an obstacle.⁷⁰ Oklahoma residents feared that allowing Texans to purchase water would literally drain their state's water resources.⁷¹ A few years before TRWD applied for water purchases, Oklahoman lawmakers proposed and adopted legislation reflecting the opposition to selling water to out-of-state entities.⁷² One Oklahoman reacted to TRWD's proposal by arguing that it was "like arguing your neighbor has to give you a case of beer because you invited too many folks over and your fridge has run dry."⁷³

1. *Seeing Red: The Red River Compact*

The Red River Compact is the most recent interstate compact entered into by Texas.⁷⁴ The compact was a result of a harsh drought in the 1950s, and negotiations between the states carried on for twenty-two years before a final document was produced.⁷⁵ The Red River Compact is the only interstate compact to which Texas is a party that does not require an annual accounting of

67. See *Herrmann*, 133 S. Ct. at 2120. TRWD filed its original complaint in the District Court for the Western District of Oklahoma. See *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007), *aff'd in part, appeal dismissed in part sub nom.* *Tarrant Reg'l Water Dist. v. Seven Oaks*, 545 F.3d 906 (10th Cir. 2008). The court granted summary judgment in favor of OWRB, but TRWD appealed. See *Herrmann*, 656 F.3d at 1228. The United States Supreme Court granted certiorari, and after oral arguments, granted judgment in favor of OWRB. See *Herrmann*, 133 S. Ct. at 2137.

68. See *Herrmann*, 133 S. Ct. at 2128.

69. See Mark A. Willingham, *The Oklahoma Water Sale Moratorium: How Fear and Misunderstanding Led to an Unconstitutional Law*, 12 U. DENV. WATER L. REV. 357, 362 (2009) (referring to the offer of \$5.1 billion over a 100 year period). Texas argued that the silence of the compact meant the water was unallocated, but Oklahoma argued that the silence existed because the water was allocated. See *Herrmann*, 133 S. Ct. at 2136–37.

70. See OKLA. STAT. ANN. tit. 82, § 1B (West 2013); Willingham, *supra* note 69, at 362.

71. See Willingham, *supra* note 69, at 363.

72. See *id.* at 365–66.

73. Ginger Strand, *Texas: Grasping at Straws*, THIS LAND (July 17, 2013), available at <http://thislandpress.com/07/17/2013/texas-grasping-at-straws/>.

74. See Elliott, *supra* note 38, at 1272.

75. See *If a River Runs Through It, Texas Shares the Water*, NAT. OUTLOOK (Tex. Comm'n on Env't'l Quality, Austin, Tex.), Fall 2010, available at <http://www.tceq.texas.gov/publications/pd/020/10-04/if-a-river-runs-through-it-texas-shares-the-water>; see also Hubenak & Bohl, *supra* note 32, at 14-29 (explaining that the first negotiations began in 1956).

each state's water diversions.⁷⁶ Instead, accountings are made only when one of the signatory states requests it.⁷⁷ In short, no state truly knows how much water another state is taking unless one signatory state requests a measurement.⁷⁸ The ambiguities and gaps in the Red River Compact do not end there.⁷⁹ The *Herrmann* controversy was based on two other ambiguities in the compact: whether each state's share of excess flows was a maximum or minimum requirement and whether the compact allowed or disallowed cross-border diversions.⁸⁰

Based on the compact's ambiguities, TRWD filed its original claim, alleging that the Oklahoma laws preventing the sale and export of water (1) were preempted by the Red River Compact; and (2) violated the dormant Commerce Clause of the Constitution.⁸¹ TRWD argued that as a federal law, the Red River Compact preempted Oklahoma's state laws because "the Compact already apportioned water."⁸² Additionally, TRWD was of the position that Oklahoma's ban on the out-of-state export of water "placed impermissible burdens on interstate commerce, and [was] thus unconstitutional."⁸³ TRWD advanced these two arguments throughout the litigation process.⁸⁴

2. *Falling Short*

Eventually, *Herrmann* reached the Supreme Court of the United States.⁸⁵ By that point, the federal district court and the Tenth Circuit had torn apart TRWD's dormant Commerce Clause argument.⁸⁶ Likewise, the district court dismissed TRWD's argument regarding the preemption of Oklahoma's

76. See TEX. WATER CODE ANN. § 46.013 (West 2008). The compact drafters feared that imposing an annual accounting would impose excessive burdens, both practically and financially, on signatory states. See Elliott, *supra* note 38, at 1272.

77. See TEX. WATER CODE ANN. § 46.013. Before *Herrmann*, no signatory state had ever requested an accounting under the Red River Compact. See Klein, *supra* note 12, at 7075.

78. See TEX. WATER CODE ANN. § 46.013.

79. See *infra* note 80 and accompanying text.

80. See Klein, *supra* note 12, at 7077; see also Arkansas, Louisiana, Oklahoma and Texas Red River Compact, Pub. L. No. 96-564, § 5.05(b)(1), 94 Stat. 3305, 3311 (1980) (showing exact language of statute in question).

81. See Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2007 WL 3226812, at *1 (W.D. Okla. Oct. 29, 2007), *aff'd in part, appeal dismissed in part sub nom.* Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906 (10th Cir. 2008).

82. Hubenak & Bohl, *supra* note 32, at 14-31.

83. *Id.*

84. See, e.g., Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2125 (2013).

85. See *id.* at 2120.

86. See Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2010 WL 2817220, at *1 (W.D. Okla. July 16, 2010); see also Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout*, 41 TEX. ENVTL. L.J. 181, 184 (2011) (asserting that "[b]y dismissing Tarrant's Amended Claim . . . the district court essentially punted many of the issues concerning water contracts governed by the Red River Compact to the Tenth Circuit Court of Appeals").

moratorium statute, which the Tenth Circuit affirmed.⁸⁷ Still, TRWD held on for dear life, trying to blow life into the two deflated arguments.⁸⁸ The Supreme Court could have used the *Herrmann* case to give:

legal guidance on the potential preemption of state water law by federal interstate water compacts, or on the constitutionality under the Commerce Clause of state laws purporting to restrict the diversion water from within the borders of one state for use in another. Instead, [the Court] offer[ed] a narrow interpretation of the Red River Compact⁸⁹

Individuals tracking the case through its different stages conceded that the likelihood of TWRD's success was very low;⁹⁰ this prediction turned out to be true.⁹¹ In a final opinion, the Supreme Court unanimously held that the Red River Compact's text did not grant rights to divert water from within Oklahoma's state boundaries (thus, no preemption), and no dormant Commerce Clause violations existed.⁹² After this six-year, six million-dollar battle, TRWD found itself back at square one.⁹³

B. Dormant Commerce Clause Approaches and the Loophole That Almost Was

While TRWD was engaged in its legal battle with Oklahoma, a simultaneous struggle ensued between the City of Hugo, Oklahoma, and the State of Oklahoma.⁹⁴ In *City of Hugo v. Nichols*, the City of Irving, Texas, contracted with the Hugo Municipal Authority to purchase water from Hugo Lake.⁹⁵ The two cities believed they had found a loophole to the Oklahoma water export moratorium and planned for Hugo to apply to the OWRB for extra water allocation, then turn around and sell the excess water allocation to Irving.⁹⁶ Before the OWRB could approve or deny its applications, Hugo filed suit in the Eastern District of Oklahoma, seeking a declaratory judgment based on the argument that Oklahoma's water moratorium statutes were unconstitutional under a dormant Commerce Clause theory.⁹⁷

87. See Andrew, *supra* note 86, at 184.

88. See *Herrmann*, 133 S. Ct. at 2125. Tarrant claims that "the Compact pre-empts several Oklahoma statutes that restrict out-of-state diversions of water. . . . Tarrant argues that the Oklahoma laws are unconstitutional restrictions on interstate commerce. We hold that Tarrant's claims lack merit." *Id.*

89. Klein, *supra* note 12, at 7075.

90. See Andrew, *supra* note 86, at 190. "The Tenth Circuit is not likely to accept a number of the arguments that Tarrant put forth." *Id.* at 187.

91. See *Herrmann*, 133 S. Ct. at 2137.

92. See *id.* at 2136–37.

93. See Strand, *supra* note 73.

94. See *City of Hugo v. Nichols*, 656 F.3d 1251, 1253–54 (10th Cir. 2011).

95. See Andrew, *supra* note 86, at 202.

96. See *City of Hugo*, 656 F.3d at 1254.

97. See *id.* The Supreme Court previously categorized water as an article in interstate commerce. See *Sporhase v. Nebraska*, 458 U.S. 941, 953–54 (1982).

The court granted OWRB's motion for summary judgment, finding that congressional ratification of the Red River Compact amounted to congressional approval of any dormant Commerce Clause conflicts.⁹⁸ The Tenth Circuit did not rule on the dormant Commerce Clause issue on appeal.⁹⁹ Instead, the Tenth Circuit held that Hugo lacked standing to bring suit in the first place and remanded the case back to the district court.¹⁰⁰

Overall, the *Herrmann* and *Hugo* decisions left Texas water agencies looking for another water source that could fulfill their increasing needs. Even after the fight in *Herrmann*, Oklahoma cannot be completely ruled out as a potential source because it arguably has enough water to sustain its state and then some.¹⁰¹ The possibility exists that Oklahoma would someday be willing to sell water, but Texas should look elsewhere before entertaining that option. Small towns in rural Texas have already experienced devastating consequences from the towns' water supplies running dry.¹⁰² The clock continues to tick until Texas is predicted to experience severe water shortages.

C. *Get Up and Dust Yourself Off: Moving Forward After Herrmann*

Where will Texas find more water? Four alternative interstate river compacts exist.¹⁰³ Perhaps the most strategic and beneficial way to secure water and meet the future needs of the state would be to procure water from the other rivers in which Texas owns shares.¹⁰⁴ Unfortunately, Texas will likely face the same hurdles and obstacles that *Herrmann* posed because neighboring states such as New Mexico and Arkansas have similar statutes requiring administrative bodies to satisfy intrastate water needs before allowing out-of-state purchases.¹⁰⁵ This time, however, Texas is aware of the impacts these statutes have on compacts because *Herrmann* held that these arguably protectionist statutes are not preempted by compacts as federal law.¹⁰⁶

98. See *City of Hugo v. Nichols*, No. CIV-08-303-JTM, 2010 WL 1816345, at *1, *7 (E.D. Okla. Apr. 30, 2010), *vacated*, 656 F.3d 1251 (E.D. Okla. 2011).

99. See *City of Hugo*, 656 F.3d at 1254.

100. See *id.* The Tenth Circuit also ruled that Irving lacked standing. *Id.* at 1265.

101. See Patranella, *supra* note 10, at 298.

102. See Holly Heinrich, *Texas Community Without Water Still Waiting for a Solution*, STATEIMPACT (June 24, 2013, 10:06 AM), <http://stateimpact.npr.org/texas/2013/06/24>. The town of Spicewood Beach, Texas, was the first town to run out of water due to the drought. *Id.* The situation required water to be carried to residents via seven-thousand-gallon trucks. *Id.* City officials built an emergency pipeline to nearby Lake Travis in order to restore water to residents. *Id.*

103. See TEX. WATER CODE ANN. §§ 41.009 (West 2008), 42.010 (West 2008), 43.006 (West 2008), 44.010 (West 2008) (outlining the provisions of the Rio Grande Compact, Pecos River Compact, Canadian River Compact, and Sabine River Compact, respectively).

104. See TEX. WATER CODE ANN. §§ 41.009, 42.010, 43.006, 44.010.

105. See ARK. ADMIN. CODE 138.00.2-306.5a (West 2014); N.M. STAT. ANN. § 72-12B-1 (1997).

106. See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2135 (2013).

Furthermore, Texas is looking to other interstate river compacts to curtail water shortages.¹⁰⁷ Recently, a new disagreement with New Mexico arose over the Rio Grande Compact, which governs the amount of water Colorado, New Mexico, and Texas are each entitled to take from the Rio Grande.¹⁰⁸ Similarly, a disagreement regarding the same river has reared its ugly head between Texas and Mexico—an international disagreement.¹⁰⁹ In light of the ongoing struggle for water, Texas can only emerge victorious if past mistakes provide lessons for the future.¹¹⁰ Although *Herrmann* proved only to be a mirage oasis, the opportunity to use the four remaining water compacts as a means to obtain supplementary water still exists.¹¹¹ Texas cannot afford to pass it up.

IV. LESSON ONE: INTERSTATE COMPACTS CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW

As Texas steps back to re-analyze its strategy for securing additional water resources, the state must scrutinize each interstate compact to avoid having the compact used against it, as was the case in *Herrmann*.¹¹² Because contract law principals govern interstate compacts, the obvious starting point is the express terms of the compact.¹¹³ Texas interstate compacts, however, are notorious for lacking important provisions that could entitle the drought-stricken state to additional water.¹¹⁴

Because contract law principles govern compacts, parol evidence may be employed in certain enforcement actions.¹¹⁵ In the past, the Supreme Court used records of negotiations to reconcile the intent of the parties when a case involved interpretation of a compact or ambiguous language in a compact.¹¹⁶

107. See Kate Galbraith, *Texas Allocates \$5 Million for New Mexico Water Lawsuit*, TEX. TRIB. (June 12, 2013), <http://www.texastribune.org/2013/06/12/texas-allocates-5-million-new-mexico-water-lawsuit/>.

108. See *id.*; see also TEX. WATER CODE ANN. § 41.001 (West 2008) (identifying the signatory states).

109. See Press Release, Tex. Comm'n on Envtl. Quality, Rio Grande Valley Suffers While Mexico Withholds Water (Apr. 16, 2013), available at <http://www.tceq.texas.gov/news/releases/4-16waterdeficit>; see also *Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, U.S.–Mex., Feb. 3, 1944, 59 Stat. 1219.

110. See *infra* Parts IV, V.

111. See *infra* Part VI.A–B.

112. See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013). “Tarrant’s argument fails to account for other sections of the Compact that cut against its reading.” *Id.*

113. See *Montana v. Wyoming*, 131 S. Ct. 1765, 1771–72 (2011); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). A compact “remains a legal document that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. at 128.

114. See *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). The Pecos River Compact lacked provisions governing the procedures in the event of a tied vote. *Id.* Storage capacity issues arose over the Canadian River Compact due to ambiguous language. See Elliott, *supra* note 38, at 1262–63.

115. See Hubenak & Bohl, *supra* note 32, at 14–12. The parol evidence rule allows extraneous evidence to be introduced to supplement the interpretation of an ambiguous contract. *Id.*

116. See *Oklahoma v. New Mexico*, 501 U.S. 221, 234–35 (1991); *Texas v. New Mexico*, 462 U.S. at 571–72; *Arizona v. California*, 292 U.S. 341, 359–60 (1934); see also Hubenak & Bohl, *supra* note 32, at 14–9 (recognizing that parol evidence has come up in several conflicts over interstate compact cases and was used to provide supplementary information).

As with any integrated writing, the parol evidence must not change the compact in any way or contradict the instrument, but should be supplementary in nature.¹¹⁷ Additionally, because most compacts have been in place for decades, courts consider the parties' "course of performance . . . highly significant" evidence of [their] understanding of the compact's terms."¹¹⁸ The Court recognized that following TRWD's interpretation of the compact would cause the "end result [to] be a jurisdictional and administrative quagmire."¹¹⁹ Additionally, the Court was not ignorant to the fact that TRWD first tried to purchase water from OWRB before filing suit, something that seemed to be an important factor in deciding whether TRWD really believed that it was entitled to the water under the compact's terms (or lack thereof).¹²⁰ TRWD was simply trying to cover all of its bases, but the application to buy water that preceded the filing of the suit wound up being one of the three factors the Court found to cut against TRWD's arguments.¹²¹ The Court relied heavily on the parties' course of dealings and TRWD's water application—extraneous evidence—to ascertain the lack of intent in the Red River Compact that would allow Texas to divert its water from within Oklahoma's borders.¹²²

Some of Texas's neighboring states have statutes restricting the sale or export of water outside of the originating state, but only Oklahoma placed an outright ban on these water transfers.¹²³ The New Mexico Water Code mandates that the state satisfy the need for water within its own state before allowing the export.¹²⁴ Similarly, Arkansas requires that its Natural Resource Commission consider whether a water shortage within the state could be alleviated before an interstate transfer is made.¹²⁵ The trend among states to include this type of statute within water codes is not surprising—dry states want to keep as much water as possible—but the statutes can create problems when there is an interstate compact involved.¹²⁶ These statutes create an additional obstacle when arguing dormant Commerce Clause violations, a situation observed in the *Herrmann* controversy.¹²⁷

117. See RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981).

118. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2135 (2013) (quoting *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010)).

119. *Id.* at 2134.

120. *See id.* at 2135.

121. *See id.* at 2132 ("Three things persuade us that cross-border rights were not granted by the Compact: the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing." (emphasis added)).

122. *See id.*

123. See ARK. ADMIN. CODE 138.00.2-306.5a (West 2014); N.M. STAT. ANN. § 72-12B-1 (1997).

124. See N.M. STAT. ANN. § 72-12B-1.

125. See ARK. ADMIN. CODE 138.00.2-306.5a.

126. *See Herrmann*, 133 S. Ct. at 2120 (providing an example of interstate compact litigation coupled with restrictive water export statutes).

127. *See id.* at 2136.

Ultimately, the unanimous Supreme Court opinion in *Herrmann* was a hard pill to swallow after such an extensive legal battle.¹²⁸ The ultimate outcome, however, was rather predictable considering the outcomes of past interstate compact disputes.¹²⁹ The Supreme Court was bound by the Red River Compact itself, as well as precedent requiring the Court to interpret the compact according to contract law principles.¹³⁰ Texas water districts, realizing that additional water sources needed to be located, made the logical decision to pursue interstate rivers.¹³¹ In other words, *Herrmann* presented arguments that needed to be made in order to “test” the Supreme Court’s stance on interstate compacts and the dormant Commerce Clause, but the Supreme Court adhered to precedent, which allows for a more predictable outcome for future interstate compact litigation.¹³²

Because interstate compacts are negotiated instruments, the Supreme Court has given deference to the terms of compacts in the majority of disputes argued before the Court.¹³³ The *Herrmann* case was no exception: “Historically, Texans have turned to two tried and true ways to win water disputes: hire the best lawyer and outspend the opponent or get the law changed.”¹³⁴ *Herrmann* was an attempt to execute both of these strategies simultaneously.¹³⁵ Even though this method did not prevail in *Herrmann*, it should not be abandoned. In fact, the strategy should be used in future litigation; Texas must attempt to get the law changed, which means modifying interstate compacts.¹³⁶

V. LESSON TWO: NOTHING LASTS FOREVER

Currently, Texas relies on interstate compacts that no longer serve the needs of Texans and that contain no provisions for climate variations.¹³⁷ The Supreme Court has given deference to interstate water compacts in several

128. See generally Strand, *supra* note 73 (indicating that Texas spent upwards of \$6 million to litigate the *Herrmann* case).

129. See *Texas v. New Mexico*, 462 U.S. 554, 565 (1983) (providing another example of strict interpretation employed by the Supreme Court in a dispute over the Pecos River Compact).

130. See *Herrmann*, 133 S. Ct. at 2130.

131. See *id.* at 2128. Texas is regarded as particularly litigious over its interstate rivers, but any state that has an exploding population in an arid region should, and probably would, exhaust every potential source for water supplies. See *River Compacts Present Major Challenges for States*, OKLAHOMAN (Sept. 22, 2013), <http://newsok.com/river-compacts-present-major-challenges-for-states/article/3884991/>.

132. See generally *Herrmann*, 133 S. Ct. at 2124 (relying on several previous decisions in the majority opinion to ultimately conclude Texas was not entitled to water within Oklahoma state boundaries).

133. See, e.g., *Kansas v. Colorado*, 533 U.S. 1 (2001); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 462 U.S. at 557.

134. Suzanne Schwartz, *Whiskey Is for Drinking, Water Is for Fighting: A Texas Perspective on the Issues and Pressures Relating to Conflicts Over Water*, 38 TEX. TECH L. REV. 1011, 1012 (2006).

135. See *Herrmann*, 133 S. Ct. at 2124–25. TRWD tried to outspend to get the Compact changed. See *id.* at 2130.

136. See *infra* Part VII.

137. See *infra* Part V.A–B.2.

situations before.¹³⁸ Interstate water compacts, however, are accused of being too rigid and inflexible to respond to changing circumstances in the demands on water resources.¹³⁹ The danger of the Supreme Court relying heavily on instruments with such characteristics is that resulting case law would be just as inflexible and rigid as the compacts themselves.¹⁴⁰ The strict interpretation of compacts leaves no room for the instruments to adapt to variables that inevitably occur in nature.¹⁴¹ The counterargument to this method is that compacts are preferable over costly and lengthy apportionment by Congress or the courts; compacts also provide a fair amount of predictability.¹⁴² Continuing drought and climate change, however, make predictability under interstate compacts a rarity.¹⁴³

The key feature of many western water compacts—a set allocation of water for each party state—is also one of the most problematic obstacles to adaptive management. . . . When water supply patterns were fairly static, the [interstate compact] system worked well enough. However, fixing legal water allocations when supply trends are changing beyond historic observations puts water users on a collision course with reality.¹⁴⁴

The issue of compact inflexibility has not gone unnoticed. Scholars on the subject have acknowledged that the economic, social, and environmental climate when most compacts were implemented was significantly different from today.¹⁴⁵ One expert put the problem into perspective when he explained that “it is unlikely that most of [the compacts] should or would currently receive congressional consent” due to their decades-old age and environmentally outdated character.¹⁴⁶ Assessing Texas’s interstate compacts, the Red River

138. See, e.g., *Kansas v. Colorado*, 533 U.S. at 7 (affirming the award of monetary damages for Colorado’s breach of the Arkansas River Compact); *Texas v. New Mexico*, 462 U.S. at 567 (holding that the Pecos River Compact would be enforced between the two states).

139. See Schlager & Heikkila, *supra* note 29, at 370.

140. See TEX. WATER CODE ANN. §§ 42.010 (West 2008), 43.006 (West 2008) (lacking language about drought effects on the Pecos River Compact and Canadian River Compact, respectively). *But see* TEX. WATER CODE ANN. §§ 41.009 (West 2008) (providing for a debit and credit system to accommodate potential water shortages in the Rio Grande Compact), 44.010 (West 2008) (indicating an equal split of available water in the Sabine River).

141. See generally Hall, *supra* note 9, at 300, 306 (explaining that predicted climate change of increased temperatures and decreased precipitation will adversely affect the Canadian, Pecos, Rio Grande, Red, and Sabine Rivers).

142. See Schlager & Heikkila, *supra* note 29, at 369–70.

143. See Hall, *supra* note 9, at 321.

144. *Id.*

145. See Grant, *supra* note 57, at 106–07.

146. *Alabama-Coosa-Tallapoosa River Basin Compact and Apalachicola-Chattahoochee and Flint River Basin Compact: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearing Before Subcomm. on Commercial and Admin. Law*] (statement of Jerome C. Muys), available at http://commdocs.house.gov/committees/judiciary/hju76809.000/hju76809_of.htm; see also Grant, *supra* note 57, at 106–07 (referencing Muys’ quote). One solution identified by Muys was to create “a congressionally approved and instituted regional arrangement that mandates cooperative and coordinated action by federal agencies that will be in conformity with the regional

Compact was a result of severe drought in the 1950s; this perhaps explains why a provision requiring an annual accounting is missing from the compact.¹⁴⁷ Drafters of compacts could not have predicted that Texas would suffer such a severe drought, just as experts today cannot predict the future century's climatic conditions, but a flexible and malleable compact instrument could aid in adapting future interstate water regulation to ever-changing water needs.

A. How the Model Water Compact Could Have Avoided Previous Conflicts

Interstate water compacts are far from perfect, but they remain a preferable and important method of allocating interstate waters.¹⁴⁸ The recently suggested Model Interstate Water Compact (Model Compact) provides a solution to supplement the shortcomings of older compacts.¹⁴⁹ The Model Compact addresses what waters should be covered by the compact, the duration of the compact, the structure of the compact commission, the duties and powers of the compact commission, water apportionment and dispute resolution under the compact, and finally, the relationship of the compact to existing law.¹⁵⁰

In the context of the Red River Compact and the issues of *Herrmann*, the Model Compact specifies that any portion of waters not intended to be a part of the compact should be explicitly, unambiguously, and succinctly excluded.¹⁵¹ If this principle were applied to the Red River Compact during negotiations in the 1950s and 1960s, the issue of compact interpretation and construction in *Herrmann* could have been avoided.¹⁵² The dispute in *Herrmann* was over only one section of the Red River Compact.¹⁵³ Any other possible ambiguities or missing provisions were not identified or litigated, but there is a strong likelihood that other, less clear language exists.¹⁵⁴

views of the affected basin states to the maximum extent practicable and consistent with federal legislation.” *Hearing Before Subcomm. on Commercial and Admin. Law, supra*. Such a modification would add a compulsory nature to an otherwise discretionary arrangement. *Id.*

147. *See If a River Runs Through It, Texas Shares the Water, supra* note 75.

148. *See* Jerome C. Muys et al., *Utton Transboundary Resources Center Model Interstate Water Compact*, 47 NAT. RESOURCES J. 17, 21 (2007).

149. *See id.* *But see* Schlager & Heikkila, *supra* note 29, at 386 (opining that “wholesale revisions may not be necessary Rather, it may be more fruitful to address specific shortcomings of compacts”).

150. *See* Muys et al., *supra* note 148, at 18–20. The Model Compact takes into account the geological relationships between surface water and ground water. *Id.* at 27. It also develops a recommendation for the compact to expire after an agreed-upon period of time because virtually all compacts in existence are indefinite and do not contain an end date. *Id.* at 33. These are just a few examples of how the Model Compact is a more modern, flexible, and realistic version of interstate water compact allocations. *See supra* Part V.A–B.2.

151. Muys et al., *supra* note 148, at 28.

152. *See* Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2129 (2013).

153. *See, e.g., id.* (explaining that the contested provision in the case was only the ambiguity of § 5.05(b)(1) and the silence as to where the water could be diverted from).

154. *See id.*

Furthermore, water fights between Texas and New Mexico are becoming a recurring event on the Supreme Court docket.¹⁵⁵ Not only are the two states currently at odds over the Rio Grande, but Texas sued New Mexico in 1974 over the Pecos River Compact, alleging that New Mexico was wrongfully diverting millions of acre-feet of water from the Pecos.¹⁵⁶ The Pecos River Compact did not provide the necessary language for the Court to issue a tie-breaking vote in the disagreement.¹⁵⁷ The battle between the two states took almost twenty years and millions of dollars before the court entered a monetary judgment in favor of Texas.¹⁵⁸ Fortunately, dispute resolution is another key component provided for in the Model Compact.¹⁵⁹ Adding dispute resolution provisions to modified compacts in an attempt to follow the Model Compact has the potential to prevent future confusion or stalemates in this regard.¹⁶⁰

Next, the Model Compact seeks to alleviate the indefinite nature of current interstate water compacts.¹⁶¹ “[A]lmost all of the existing compacts and federal consent statutes are for indeterminate periods with no provision for mandatory periodic review by either the compact states or Congress to evaluate how well the compacts are working and whether changes may be necessary in the regional or national interest.”¹⁶² Among interstate compact experts, there is a general consensus that an ideal compact would include a “sunset provision,” allowing the compact to lapse absent affirmative actions to renew the agreement.¹⁶³ Today, compacts do not allow unilateral withdrawal.¹⁶⁴ Texas water woes are a prime example of why a state would want such a termination provision.¹⁶⁵ Perpetual obligations to comply with outdated compact terms are simply unrealistic and are yet another reason for compact modification.¹⁶⁶

Changing circumstances, such as population booms, growing agricultural demands, and unforeseen drought, are important reasons to limit or avoid compact obligations.¹⁶⁷ “[J]ust as a compact may at some point become no longer in the national interest and require amendment by Congress of its consent legislation, so also may changed circumstances convince one or more

155. See generally *Texas v. New Mexico*, 462 U.S. 554 (1983) (providing one of several cases between Texas and New Mexico to reach the United States Supreme Court).

156. See *id.* at 562.

157. *Id.*

158. See *id.*; Laura Paskus, *Compact Complications: Water Wars Between Texas and New Mexico Are Nothing New—But the Times Are Changing*, UTTON TRANSBOUNDARY RESOURCE CENTER (Mar. 4, 2013), <http://uttoncenter.unm.edu/pdfs/tx%20nm%20paskus%20final-3-4-13.pdf>.

159. See Muys et al., *supra* note 148, at 21.

160. See *id.*

161. See *id.* at 34.

162. *Id.*

163. See *id.*

164. See SHERK, *supra* note 4, at 46–47. With its dual state and federal law nature, congressional consent is required to terminate an existing compact. *Id.*

165. See *supra* Part II.

166. See SHERK, *supra* note 4, at 46–47.

167. See Muys et al., *supra* note 148, at 34.

of the signatory states that their pact no longer serves their mutual interests.”¹⁶⁸ Out of every compact that is currently in effect across the country, the most recent one is nearly twenty years old.¹⁶⁹ With all other compacts being older than twenty years, one can easily imagine how many variables might change over time and how those changing variables could render a compact unnecessary or unfavorable.

Fortunately, the Model Compact has the potential to rectify the current deficiencies in Texas’s water compacts by giving more discretion and power to interstate compact commissions.¹⁷⁰ The decision-making process under current compacts is characterized as too limited because decisions require unanimity from commissioners of signatory states.¹⁷¹ Additionally, even though there is a duty to enforce compacts, signatory states do not always have the incentive to enforce compliance with compacts onto their citizens.¹⁷² The legal dispute between Texas and New Mexico is evidence of this dilemma.¹⁷³ If the New Mexico Compact Commission had both the authority and power to enforce compacts upon citizens of its own state without fearing political repercussions, the legitimacy of the compact would increase, ideally resulting in more trust and fewer disputes among states.¹⁷⁴

Finally, the Model Compact takes into account possible conflicts with existing laws.¹⁷⁵ “The provisions of [the Model Compact] reflect the fact that numerous interstate water compacts may have been superseded or adversely impacted either in whole or in part by subsequently enacted federal legislation.”¹⁷⁶ Environmental regulation is the most common example of this conflict.¹⁷⁷ Texas faced the issue with the Rio Grande Compact, under which the Endangered Species Act and protection of the Silvery Minnow caused minimum flow levels to benefit the City of El Paso.¹⁷⁸ Other protected species that exist in rivers covered by interstate water compacts include the Arkansas River shiner in the Canadian River, the Pecos River blunt-nose shiner, and the southwestern willow flycatcher in the Rio Grande.¹⁷⁹ The issue of federal

168. *Id.*

169. See ALA. CODE § 33-19-1 (2014). The Apalachicola-Chattahoochee-Flint River Basin Compact is the most recent water allocation compact in the United States. *Id.* Alabama, Florida, and Georgia ratified the compact. *Id.*

170. See Muys et al., *supra* note 148, at 39.

171. See Schlager & Heikkila, *supra* note 29, at 372.

172. See *id.*

173. See generally Galbraith, *supra* note 107 (explaining that the heart of Texas’s complaint is that New Mexico is not requiring its citizens to honor the Rio Grande Compact water allocations).

174. See Schlager & Heikkila, *supra* note 29, at 372.

175. See Muys et al., *supra* note 148, at 109.

176. *Id.* at 111. Because compacts become federal law once ratified by Congress and these compacts can come into conflict with other federal laws, statutory construction rules consider the more recent of the conflicting laws as the prevailing law. *Id.* at 110.

177. *Id.*

178. See *id.* at 111, 113 nn.130 & 136.

179. See *If a River Runs Through It, Texas Shares the Water*, *supra* note 75.

reserved Indian water rights also overlaps interstate compacts.¹⁸⁰ Increasing federal regulation is virtually inevitable and states involved in interstate water compacts must be prepared for subsequent changes stemming from regulations; the Model Compact provides an available remedy.¹⁸¹

B. How the Model Water Compact Could Alleviate Future Conflicts

1. Big River, Big Fight: Texas v. New Mexico

The Rio Grande Compact, signed by Colorado, New Mexico, and Texas, is likely to be the next big interstate compact battle.¹⁸² New Mexico is accused of failing to deliver the amount of water required by the Rio Grande Compact, and the shortage is attributed to New Mexico's pumping of groundwater within its state.¹⁸³ Texas has already allocated \$5 million of its 2014 budget to fund the fight.¹⁸⁴ If the drafters of the compact would have taken into consideration how the Rio Grande's waters were going to be allocated in terms of surface and subsurface use, this dispute could have been avoided.¹⁸⁵ The Model Water Compact recognizes the relationship between groundwater pumping and the effect it has on the surface water's flow in the river.¹⁸⁶ The Model Compact suggests that certain interrelated waters need to be covered by the compact.¹⁸⁷ Over the years, the important geological relationship between surface water and ground water has become more apparent.¹⁸⁸ When ground water and surface water are both over-appropriated—especially on an interstate level—then underground aquifers are not recharged and downstream signatory states do not receive their negotiated shares.¹⁸⁹

The Supreme Court recently received the Solicitor General's position on the Rio Grande Compact controversy.¹⁹⁰ Texas alleges that New Mexico is breaching the Rio Grande Compact by allowing groundwater owners to pump an excessive amount of water, drastically reducing surface water in the Rio

180. See Grant, *supra* note 57, at 106 nn.16–17.

181. See Muys et al., *supra* note 148, at 109.

182. See Galbraith, *supra* note 107.

183. See Sandra Postel, *Drought Fuels Water War Between Texas and New Mexico*, NAT'L GEOGRAPHIC NEWS WATCH (Jan. 18, 2013), <http://newswatch.nationalgeographic.com/2013/01/18/drought-fuels-water-war-between-texas-and-new-mexico/>.

184. See Galbraith, *supra* note 107.

185. See TEX. WATER CODE ANN. § 41.009 (West 2008).

186. See Muys et al., *supra* note 148, at 71. "Most existing compact allocations do not clearly address, if at all, the relationship between uses of surface water and hydrologically connected subsurface water." *Id.*

187. See *id.* at 28. "There is a strong consensus on the Advisory Committee and among commenters that hydrologically connected subsurface water should be expressly included in any compact allocations of surface flows." *Id.*

188. See *id.*

189. See THOMPSON ET AL., *supra* note 41, at 902.

190. See Brief for the United States as Amicus Curiae at 12, *Texas v. New Mexico*, No. 141, Original, 2013 WL 6917383, at *13 (U.S. Dec. 10, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/No-141-Texas-v-New-Mexico-2.pdf>.

Grande.¹⁹¹ The amicus curiae brief filed on behalf of the United States supports Texas's position that the Supreme Court of the United States should exercise its original jurisdiction over the controversy.¹⁹² "In claiming that New Mexico is depriving Texas of its lawful share of the water of an interstate stream, Texas asserts a substantial sovereign interest that falls squarely within the traditional scope of [the] Court's original jurisdiction."¹⁹³ A rush to the steps of the Supreme Court every time a compact is allegedly breached is inefficient and cumbersome to every state involved.¹⁹⁴ The Model Water Compact's outline would presumably provide measures to protect against this expensive and lengthy process by requiring parties to exhaust dispute resolution avenues before seeking courtroom action.¹⁹⁵

2. *International Implications and a Domino Effect*

Water concerns for the Rio Grande do not end with the compact.¹⁹⁶ Simultaneous to its fight with New Mexico, Texas has taken affirmative steps toward solving an ongoing struggle with Mexico to honor a 1944 treaty between the United States and Mexico concerning the Rio Grande.¹⁹⁷ The Rio Grande delivers a substantial amount of water to the southern half of Texas and a portion of the water in the river is subject to an international water treaty between Texas and Mexico.¹⁹⁸ This treaty is in jeopardy because of the drastic water shortage in the Rio Grande.¹⁹⁹ Texas has called upon the federal government to compel Mexico to comply with the treaty.²⁰⁰ Both the water treaty and the Rio Grande Compact are a few of the oldest pieces of interstate water governance for Texas.²⁰¹ The recent conflicts over these instruments expose the failures of each of these documents.²⁰² Despite these challenges, the

191. Complaint at 2–3, *Texas v. New Mexico*, No. 141, Original (U.S. Jan. 8, 2013).

192. Brief for the United States as Amicus Curiae, *Texas v. New Mexico*, *supra* note 190, at 12.

193. *Id.*

194. See *Texas v. New Mexico*, 462 U.S. 554, 576 (1983).

195. See Muys et al., *supra* note 148, at 89–90.

196. See *infra* Part V.B.2.

197. See Tex. H.R. Con. Res. 55, 83d Leg., R.S. (2013).

198. See Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.–Mex., Feb. 3, 1944, 59 Stat. 1219; *Water*, EL PASO WATER UTIL. PUB. SERVICE BOARD, http://www.epwu.org/water/water_resources.html (last visited Apr. 16, 2014). It is helpful to think of the Rio Grande as two separate rivers: one governed by an interstate compact and one governed by a treaty. See Hubenak & Bohl, *supra* note 32, at 14–13.

199. See *Water Shortage Issue Related to the Mexican Water Deficit*, TEX. WATER DEV. BOARD, <http://www.twdb.state.tx.us/about/board/rubinstein/mexico/index.asp> (last visited Apr. 16, 2014) (statement from Chairman Carlos Rubinstein).

200. See Tex. H.R. Con. Res. 55, 83d Leg., R.S. (2013).

201. See Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.–Mex., Feb. 3, 1944, 59 Stat. 1219; TEX. WATER CODE ANN. § 41.001 (West 2008). The Rio Grande Compact is the oldest interstate compact that Texas has. See TEX. WATER CODE ANN. § 41.001. The Texas–Mexico Water Treaty is even older; it was created in 1944. See Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.–Mex., Feb. 3, 1944, 59 Stat. 1219.

202. See Paskus, *supra* note 158.

Rio Grande is now the focus of Texas's attention due to water shortages.²⁰³ While the Model Compact does not focus on international water agreements, arguably the same principles and goals would apply.²⁰⁴

While the Model Compact is not an exclusive means to solving interstate compact stagnation, it is a readily available resource for Texas and other states that genuinely want to pursue proactive remedies.²⁰⁵ The bleak outlook for Texas water resources should serve as motivation for compacting states to go back to the drawing board and evaluate practical solutions.²⁰⁶ Otherwise, using a broken tool—the current interstate compacts—will continue to yield unfavorable results.²⁰⁷

VI. HERE IS THE BARK, BUT WHERE IS THE BITE?: TEXAS'S MOTIVATION TO SECURE WATER RESOURCES FOR THE FUTURE

The first step toward Texas water security is acknowledging interstate compact failures and beginning the modification process.²⁰⁸ This acknowledgment is paramount because once Texas is aware of the problem, it can actively pursue remedies. Remedies Texas has explored thus far include periodic water planning reports, statewide efforts to encourage citizen water conservation efforts, and legislation aimed at creating an infrastructure for water projects.²⁰⁹ The second step to water security, at least for Texas, is to implement a water plan that takes interstate compacts into account.²¹⁰

A. Texas's Interstate Water Compacts Need to Be Modified

The interstate water compacts in which Texas participates will likely face increasing interpretation and compliance battles as arid states in the southwestern portion of the country scramble to find more water for their

203. See Galbraith, *supra* note 107.

204. See SHERK, *supra* note 4, at 2. "It is hoped that an understanding of the different means by which interstate water conflicts are resolved . . . will provide examples and guidelines by which international water conflicts might be resolved." *Id.*

205. See *supra* Part V.A–B.

206. See *supra* Parts I–II.

207. See *infra* Part VII.

208. See *supra* Parts II–III, VI.A.

209. See TEX. WATER DEV. BOARD, WATER FOR TEXAS: 2012 STATE WATER PLAN, *supra* note 2, at 1; SAVE TEX. WATER: WATER CONSERVATION ADVISORY COUNCIL, <http://www.savetexaswater.org/> (last visited Apr. 16, 2014); SWIFT, TEX. WATER DEV. BOARD, <http://www.twdb.state.tx.us/swift/index.asp> (last visited Apr. 16, 2014). Other suggestions include building water desalination plants and wastewater treatment and recycling plants. See Kathy Wythe, *Securing Texas Water: Experts Call for Additional Planning Policies, Expanding "New" Water*, TXH2O, Summer 2012, available at <http://twri.tamu.edu/publications/txh2o/summer-2012/securing-texas-water/>.

210. See *infra* Part VI.B.

citizens.²¹¹ Complying with these compacts has become an increasingly difficult obstacle because environmental changes and drought conditions place strains on water sources; upstream states cannot fulfill their obligations under current compacts if the water simply does not exist to send to downstream states.²¹²

Additionally, the terms of the interstate water compacts may no longer serve Texas's best interests. For example, each one of Texas's compacts requires that representatives from compacting states come to a unanimous decision when voting on various actions; however, the unanimity requirement gives the upper-hand to upstream states by allowing the geographically higher state to impede progress by casting an inconsistent vote.²¹³ "The fact that one state is upstream of another state will result in those states having substantially different political requirements regarding the negotiation and ratification of an interstate compact."²¹⁴ Each negotiating state has an incentive to compact for as much water as it can, regardless of the consequences for downstream states.²¹⁵ This is not to say that a compromise cannot be reached, but that states negotiating for water are inherently challenged to find mutually beneficial terms.²¹⁶

Admittedly, modifying problematic interstate compacts is not an easy task. Interstate compact experts acknowledge that a proposal to modify or rescind decades-old compacts will likely be met with political opposition.²¹⁷ Enacting an interstate compact is difficult and modification procedures usually mirror enactment procedures.²¹⁸ To modify a compact, representatives draft the terms, each state's legislature approves the terms, and the United States Congress approves the terms.²¹⁹ Such an avenue of compact modification would likely

211. See CHRISTOPHER H. MEYER, *INTERSTATE WATER ALLOCATION: THE LAW AND ITS IMPLICATIONS FOR THE PACIFIC NORTHWEST* 7–8 (2010), available at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/RP_CAMP/PDF/2010/05-21-2010_InterstateWaterAllocation.pdf.

212. See Complaint, *Texas v. New Mexico*, *supra* note 191, at 2–3.

213. See Schlager & Heikkila, *supra* note 29, at 371. "Many western compacts require unanimity. . . , thus conferring a veto power in a single state which can preclude its compact partners from administrative enforcement of asserted compact rights and obligations. This situation gives leverage to an upstream state . . . to 'stonewall' discussions and negotiations in the commission forum, since by virtue of its geographical advantage (i.e., 'highority is better than priority') it may have already stored or used the volumes in dispute." *Id.* (quoting Jerome Muys, *The Western States' Experience With Interstate Water Issues*, Eastern Water Resources: Law, Policy and Technology Conference, Hollywood, Florida (May 6–7, 2004) (paper prepared for the panel "Lessons From the West," American Bar Association Section of Environment, Energy, and Resources)).

214. SHERK, *supra* note 4, at 37.

215. See *id.* Upper and lower states have different interests in terms of measurement and delivery obligations, existing water uses, interbasin diversions, and downstream requirements—just to name a few. *Id.* at 39–43.

216. See *id.* at 37–38.

217. See Hall, *supra* note 9, at 323.

218. See *supra* Part II.

219. See ZIMMERMAN, *supra* note 33, at 41–42. "A proposed compact amendment will become effective only with its enactment by each state legislature, approval of each governor, consent of Congress, and approval of the President if the original compact received such approval." *Id.* at 41.

take significant amounts of time because the process is burdened with bureaucratic hurdles.²²⁰ The ultimate benefit of updated interstate water management and the additional water resources to provide for Texas's erupting population, however, would be well worth the effort. Instead of allocating millions of dollars to engage in legal battles, the money would be put to better use if the Texas Legislature used it to fund committees or assist already existing governmental agencies in initiating interstate compact revisions. The road to a more comprehensive interstate compact exists in the Model Compact and it would be foolish for the Texas Legislature to allow faulty compacts to govern interstate waters when a solution readily exists.

B. Leave It All on the Battlefield: Texas Water Planning Must Increase in Scope

Lessons that Texas can learn from *Herrmann* will be worthless if not implemented. Fortunately, Texas has made progress in securing future water resources and perhaps the most important stride toward implementing these lessons is the work of the 83rd Texas Legislature.²²¹ During this term, the legislature introduced three key bills: Senate Joint Resolution 1, House Bill 4, and House Bill 1025.²²² All three pieces of legislation were aimed at funding billions of dollars for the development of a water infrastructure called the State Water Implementation Fund for Texas (SWIFT).²²³ "Money in the fund[] would be administered . . . for the purpose of implementing the state water plan"²²⁴

Texas citizens approved the implementation of SWIFT on the 2013 election ballot.²²⁵ With bi-partisan support and overwhelming popularity, the proposition is the most important plan that Texas has launched toward securing future water resources for the thirsty state.²²⁶ As promising as these measures

220. *See id.* at 41–42.

221. *See* Tex. H.B. 1189, 83d Leg., R.S. (2013).

222. Tex. S.J. Res. 1, 83d Leg., R.S. (2013); Tex. H.B. 4, 83d Leg., R.S. (2013); Tex. H.B. 1025, 83d Leg., R.S. (2013).

223. HOUSE RESEARCH ORG., AMENDMENTS PROPOSED FOR NOVEMBER 2013 BALLOT, FOCUS REP. 15 (Aug. 7, 2013), available at <http://www.hro.house.state.tx.us/pdf/focus/amend83.pdf>. Infrastructure formation will likely consist of new reservoirs, desalination plants, interbasin transfers, water marketing, reusing treated effluent, conservation measures, and aquifer development. *See* Ronald Kaiser, *Conjunctive Management and Use of Surface and Groundwater Resources*, in *ESSENTIALS OF TEXAS WATER RESOURCES*, *supra* note 32, at 5-1.

224. HOUSE RESEARCH ORG., AMENDMENTS PROPOSED FOR NOVEMBER 2013 BALLOT, FOCUS REP., *supra* note 223, at 16. The money comes from the Economic Stabilization Fund, commonly referred to as the "Rainy Day Fund" to essentially "act like a down-payment on a mortgage that will allow the state to borrow billions more for hundreds of water projects outlined in its official Water Plan." Terrence Henry, *How Prop 6 Passed, and What's Up Next for Water Projects in Texas*, STATEIMPACT (Nov. 5, 2013, 8:42 PM), <http://stateimpact.npr.org/texas/2013/11/05/texas-water-fund-passes/>.

225. *See* Henry, *supra* note 224. "The measure had widespread support from both sides of the aisle . . . [and] passed with over 73 percent of the vote." *Id.*

226. *See id.*

might be, the funds will not be available until 2015; while SWIFT serves as a potential long-term solution for many water shortages, the current shortages would presumably continue.²²⁷

Tragically, the 83rd Texas Legislature ignored an opportunity to initiate interstate conversation regarding interstate water cooperation.²²⁸ A representative introduced a bill that would have created a commission to “initiate and carry out discussions with representatives of neighboring states” for four key purposes: (1) “the identification and development of sources and methods of augmenting water supplies”; (2) water planning; (3) funding for water supply projects; and (4) additional legislation for water supply needs.²²⁹ These four purposes would have been mandatory for the commission.²³⁰ Unfortunately, after the bill was delegated to the Natural Resources Committee, it never made it out of the committee for a vote.²³¹ Although the bill showed promise and had the potential to kick-start the discussion about large regional water planning reform, the Texas Legislature failed to follow through.²³²

With significant water-related activity in the Texas Legislature during the 83rd session, state leaders are clearly motivated toward achieving Texas water security.²³³ Acknowledging interstate compact deficiencies and proposing interstate conversation regarding water compacts are vital initial steps toward achieving water security; however, acknowledgement must be turned into action and progress because initial steps are just that—*initial* steps.²³⁴ The dialogue for interstate water compact reform must continue in the legislature because Texas cannot afford to be without sufficient water and involved in expensive compact litigation.²³⁵

VII. QUENCHING THIS TEXAS-SIZED THIRST

The future holds an uphill battle for Texas water resources, but the rewards outweigh the burdens. Texas can achieve future water security by

227. See *SWIFT FAQs*, TEX. WATER DEV. BOARD, <http://www.twdb.state.tx.us/newsmedia/swift/faq.asp> (last visited Apr. 16, 2014).

228. See Tex. H.B. 1189, 83d Leg., R.S. (2013). House Bill 1189 was introduced by Texas State Representative Lyle Larson from San Antonio, Texas, a member of the Natural Resources Committee. *Id.*

229. *Id.*

230. *Id.*

231. See *Legislative History for H.B. 1189*, TEX. LEGISLATURE ONLINE (Apr. 16, 2013), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB1189>. The Natural Resources Committee has jurisdiction over all matters pertaining to natural resources conservation; appropriation, allocation, and development of land and water resources; water districts and authorities; administrative regulation of water resources; the Texas Water Development Board (TWDB), the Multi-State Water Resources Planning Commission, and most importantly, river compacts. See Shana L. Horton & Constance Courtney Westfall, *State and Federal Government Entities with Water Resource Jurisdiction*, in *ESSENTIALS OF TEXAS WATER RESOURCES*, *supra* note 32, at 6-23.

232. See *Legislative History for H.B. 1189*, *supra* note 231.

233. See *supra* Part VI.B.

234. See *supra* Part VI.A.

235. See Galbraith, *supra* note 107; *supra* notes 22–25 and accompanying text.

initiating the conversation to modify current interstate water compacts, aggressively pursuing additional long-term water infrastructure through legislative and administrative cooperation, and protecting the invaluable water resources that already exist.²³⁶ The United States Supreme Court has consistently reinforced its refusal to judicially modify interstate water compacts and the task must be addressed by compacting states.²³⁷ Texas, using the Model Compact, should revise its compacts to specify waters that are expressly included and excluded from each compact, to change the commission's structure in order to give commissioners more power and fewer political attributes, to clearly indicate fixed measurements and accountings of diverted water, to include dispute resolution alternatives to each compact's preference, and to coincide with existing laws.²³⁸ The task is up to the Texas Legislature to begin, and a significant place to start would be by passing House Bill 1189.²³⁹

While Texas begins to implement voter-approved water infrastructure projects, there are several gap-years that Texas could put to beneficial use by taking the lessons learned from *Herrmann* and applying them to the ongoing battle with New Mexico to secure water from the Rio Grande.²⁴⁰ The new water plans for Texas, even when fully implemented, are only meant to secure water for the next fifty years.²⁴¹ Additional water sources will need to be identified and reserved for the state in anticipation of population, economic, and agricultural growth past the initial fifty-year mark.²⁴²

Texas is already a leader in many other ways and should strive to be a leader in interstate water modernization as well. Interstate water compacts provided numerous benefits throughout the last century and they remain the preferable interstate water allocation method today.²⁴³ Because compacts will be a fixture in American water law for many years to come, however, compacting states cannot ignore the maintenance that needs to be performed on these instruments. Although compact modification presents a formidable challenge, Texas lawmakers have already taken great strides towards achieving long-term water security, and the Texas Legislature should capitalize on existing momentum to confront interstate water compact problems.²⁴⁴ Just as stagnant water breeds disease, stagnant interstate water compacts breed interstate litigation.²⁴⁵ The strict and inflexible interstate compacts that Texas struggles with need to be reformed for modern water needs.

236. See *supra* Part VI.A–B.

237. See *supra* Part I; see also sources cited *supra* note 12.

238. See *supra* Part V.A–B.

239. See *supra* Part VI.B.

240. See *supra* Part V.B.1.

241. *Proposition 6 Targets Projects in 50-Year Water Plan*, EDITORIALS: STAR-TELEGRAM (Oct. 17, 2013), <http://www.star-telegram.com/2013/10/17/5255750/proposition-6-targets-projects.html>.

242. See *supra* Part II.

243. See *supra* Part II.

244. See *supra* Part VI.B.

245. See *supra* Part III.A–C.