Interstate Water Transfers

Charles T. DuMars
Law & Resource Planning Associates, P.C.
Albuquerque, NM
ctd@lrpa-usa.com

Impact of Interstate Transfers

- Eliminates boundaries.
- Must consider out-of-state demand.
- May consider out-of-state supply.
- Inability to control out-of-state institutions and laws make controlling out-of-state growth impossible.

Law of Interstate Transfers: Why not just ban them?

- Commerce Clause of the United States Constitution (Art. I, § 8, Cl. 3): The Congress shall have Power ... To Regulate commerce with foreign nations, and **among the several States**, and with the Indian tribes."
- The "affirmative grant of authority to Congress [to regulate interstate commerce] also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 326 n. 1 (1989).

Law of Interstate Transfers: Why not just ban them?

"The few simple words of the Commerce Clause ... reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

Law of Interstate Transfers: Why not just ban them?

- Test: (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Hughes*, 441 U.S. at 336.
- Burden initially on challenger, but shifts to state when discrimination is shown.

Law of Interstate Transfers: Why not just ban them?

- *Sporhase v. Nebraska*, 458 U.S. 941 (1982): dormant commerce clause precludes a state from imposing discriminatory rules on out-of-state transfers of groundwater.
- Facts: Farm straddled the Colorado-Nebraska boundary; farmer wanted to pump water from Nebraska well to irrigate Nebraska and Colorado lands.
- Nebraska law required permit to export groundwater and provides that, if the appropriate conditions are met, the agency "shall grant the permit ***if the state in which the water is to be used grants reciprocal rights*** to withdraw and transport groundwater from that state for use in the State of Nebraska." Neb. Rev. Stat. § 46-613.01 (1978) (emphasis added).
- Colorado did not grant reciprocal rights.

Law of Interstate Transfers: Why not just ban them?

- Sporhase holding 1: Groundwater is an article of commerce and therefore subject to congressional regulation.
- Sporhase holding 2: The Nebraska restriction on the interstate transfer of groundwater imposes an impermissible burden on commerce.
- Sporhase holding 3: Congress has not granted the States permission to engage in groundwater regulation that otherwise would be impermissible.

Background: Equitable Apportionment of Interstate Waters

- "One cardinal rule underlying all the relations of the states to each other is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).
- "Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two states were absolutely independent nations, it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this Court." *Id.* at 98.
- Supreme Court: Compact preferable method to settle disputes. *Washington v. Oregon*, 214 U.S. 205 (1909).

Interstate Compacts as Federal Law

- Compacts Clause of the United States Constitution (Art. I, § 10, Cl. 3): "No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ...."
- "[C]ongressional consent transforms an interstate compact within this Clause into a law of the United States" such that the construction of such an agreement "presents a federal question." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)
- "The requirement of congressional consent is at the heart of this Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 439-40.

Impact of Congressional Assent

- *Intake Water Company v. Yellowstone River Compact Commission*, 590 F. Supp. 293 (D. Mont. 1983) ("Thus, when it approves a[n interstate water] compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area."), *aff'd* 769 F.2d 568 (9th Cir. 1985).
- *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1249 n.8 (Colo. 1996) ("The congressional approval feature of a[n interstate water] compact is particularly important, in that Congress can assent to state laws which might otherwise be invalid as an unreasonable burden on interstate commerce.").

HB 1483

Creates a new 82 O.S. § 105.12A:

A. The State of Oklahoma has long recognized the importance of the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public welfare of its citizens, and has entered into interstate compacts for that purpose.

B. No permit issued by the Oklahoma Water Resources Board to use water outside the boundaries of the State of Oklahoma shall:

1. Impair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact; or

2. Impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority or law, in, over and to water apportioned by interstate compacts.

C. Water apportioned to the State of Oklahoma by an interstate compact is subject to the right and power of the State of Oklahoma to control, among other matters, the method of diversion of the water and the place of use.

D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

HB 1483

Amends the existing 82 O.S. § 105.12 (~~old~~; new):

A. ~~Before~~ In order to protect the public welfare of the citizens of Oklahoma and before the Oklahoma Water Resources Board takes final action on the application, the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and ~~such~~ other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source;

3. The proposed use does not interfere with domestic or existing appropriative uses; ~~and~~

4. If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use must not interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein. In making this determination, the Board shall utilize the review conducted pursuant to subsection B of this section; and

5. If the application is for use of water out of state, the Board shall, in addition to the criteria set forth in this subsection, also evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma.

If so the evidence is determined to be sufficient, and subject to subsection B of this section, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by the Administrative Procedures Act, the decision of the Board shall be final.

HB 1483

Amends the existing 82 O.S. § 105.12 (~~old~~; new):

B.

1. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within ~~such~~ the stream system shall first be considered in order to assure that applicants within ~~such~~ the stream system shall have all of the water required to adequately supply their beneficial uses.

2. The Board shall review the needs within ~~such~~ the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

C. The review conducted pursuant to paragraph 2 of subsection B of this section shall not be used to reduce the quantity of water authorized to be used pursuant to permits issued prior to such review. Such permits, however, remain subject to loss, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

D. On the filing of an application or amendment to use water outside the state, the applicant shall designate an agent in the State of Oklahoma for service of process and to receive other notices.

E. In the event of a conflict between the conditions of use required in Oklahoma and conditions required in another state, the water right holder shall consent to conditions imposed by the Board.

F. Permits and amendments that authorize the use of water outside the state shall be subject to review by the Board at least every ten (10) years after the date of issuance to determine whether there has been a substantial or material change relating to any matters set forth in subsection A of this section. The Board may impose additional conditions as described by Board rules to address any such substantial or material change.

G. Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act.

Tarrant Litigation

- The "plain import" of the provisions of the Red River Compact "is to effect an allocation or division of the waters covered by the compact and that the essence of that process—allocating some portion of the resource in issue to a particular state or its citizens—is inherently inconsistent with the standards that would otherwise apply based on dormant Commerce Clause analysis."
- That is, while the dormant Commerce Clause ordinarily precludes a state giving its residence a preferred right of access to natural resources, "[t]he principle purpose and effect of the [Red River Compact] ... through its provisions for allocation and apportionment of the Red River's waters between the various states, is to do precisely that."

Hugo Litigation

- Very similar claims to Tarrant, filed by the City of Hugo, Oklahoma and joined by the City of Irving, Texas.
- Hugo had contracted to sell water to Irving through a combination of already-held permits and new appropriations.

Hugo Litigation

- Due to recusals, assigned to federal judge in Kansas.
- Hearing on cross-motions for summary judgment in April.
- Court granted OWRB's motion, relying in large part on Judge Heaton's opinion in Tarrant.
- "The Compact here explicitly provides for the allocation of resources along a rational and consistent basis among the relevant states; ***the Compact is openly and unapologetically protectionist.*** Congress approved the Compact, and it is not subject to any dormant Commerce Clause challenge." (Emphasis added).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT, a Texas State Agency,	)	
Plaintiff,	)	
vs.	)	NO. CIV-07-0045-HE
RUDOLF JOHN HERRMANN, ET AL., in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,	)	
Defendants.	)	

ORDER

Plaintiff Tarrant Regional Water District commenced this case in early 2007, seeking a declaratory judgment that certain Oklahoma laws unconstitutionally prevented it from appropriating or purchasing water in Oklahoma.[1] Simultaneous with the filing of this case, plaintiff filed three applications with the Oklahoma Water Resources Board ("OWRB") for permits to appropriate surface or stream water for use in Texas. Each application referenced different quantities of water sought to be taken from particular locations in Oklahoma.

Defendants, who are the members of the OWRB, moved to dismiss plaintiff's complaint on various grounds. That motion was denied by this court by order entered

[1] *Plaintiff is a Texas agency responsible for supplying water to a substantial portion of north Texas.*

October 29, 2007 [Doc. #49]. The denial was upheld on appeal. Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906 (10th Cir. 2008). A scheduling order was then entered, establishing various deadlines and setting this case on the court's December, 2009, trial docket.

During its regular 2009 session, the Oklahoma Legislature adopted (and the Governor signed) H.B. 1483. That bill amended 82 Okla. Stat. § 105.12, one of the "Anti-Export Statutes" challenged by plaintiff, and added a new section of law applicable to permits for water to be used outside the boundaries of Oklahoma. 82 Okla. Stat. § 105.12A. Plaintiff sought, and the court granted, leave to file a supplemental complaint adding the new or changed laws to those being challenged by plaintiff.

Defendants have now filed their motion to dismiss or, in the alternative, for summary judgment [Doc. #90]. Summarized generally, defendants argue that H.B. 1483 "effectively repealed" Oklahoma's restrictions on out-of-state water sales and renders plaintiff's challenge to them moot, thus depriving the court of subject matter jurisdiction. They also argue that, as issues involving the construction of the Red River Compact ("RRC" hereafter) may control this case, the court should defer to the Red River Compact Commission under the doctrine of primary jurisdiction and dismiss the case. Finally, they argue that, if the controversy is not moot and the merits are reached, then the RRC constitutes an expression of federal law sufficient to preclude any challenge to H.B. 1483 or, presumably, other similar statutes, on the basis of invalidity under the Commerce Clause of the U. S. Constitution.

The issues raised by the present motion are fully briefed. The court heard oral

argument from the parties on October 22, 2009.[2]

Factual Background

As the present motion is, in part, one for summary judgment, a reference to pertinent undisputed facts is appropriate. The submissions of the parties show the following facts to be undisputed. The RRC was entered into by the states of Oklahoma, Texas, Arkansas, and Louisiana in 1978. The compact was approved by Congress and the President in 1980. Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980). Plaintiff has filed three applications with the OWRB seeking authority to appropriate water in Oklahoma and export it to end users in north Texas. All involve water from tributaries of the Red River which is subject to the RRC.[3] One application (the "Kiamichi River" application) seeks to appropriate approximately 310,000 acre-feet per year from one of two points of diversion downstream from Hugo Lake, on the Kiamichi River. This location is within Reach II, Subbasin 5 as designated by the RRC. The second application (the "Cache Creek" application) seeks to appropriate 125,000 acre feet per year from one of two alternative diversion points on Cache Creek, which is located within Reach I, Subbasin 2 per the RRC. The third application (the "Beaver Creek" application) seeks to appropriate water from a diversion point also located in Reach I, Subbasin 2. Under the terms of the RRC, waters in the areas to which the

[2]*Defendants have since sought to supplement their summary judgment submissions with additional information about the status of plaintiff's effort to acquire water not subject to the RRC [Doc. #124], to which plaintiff has objected [Doc. #126].*

[3]*Although plaintiff initially raised technical objections to certain of defendants' asserted undisputed facts, plaintiff conceded at the hearing that all water within the scope of its three pending applications is water subject to the RRC.*

Kiamichi application applies are allocated equally (subject to certain limits) to the four signatory states to the compact. Waters in the areas to which the Cache Creek and Beaver Creek applications apply are allocated solely to Oklahoma.

Jurisdiction - Implied Repeal

Defendants argue that H.B. 1483 impliedly repealed all provisions of Oklahoma law which potentially affect plaintiff's applications and that this case is therefore moot. It argues that H.B. 1483 — in particular, its addition of paragraph G to 82 Okla. Stat. § 105.12 — renders inapplicable all the statutes previously challenged by plaintiff.[4] The court is unpersuaded.

As defendants acknowledge, repeals by implication are not favored. Nat'l Ass'n. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007). It is presumed that the legislature did not intend, by enacting a new statute, to repeal an existing statute by implication. Strong v. Lauback, 89 P.3d 1066, 1070 (Okla. 2004). A clear, unequivocal and irreconcilable conflict between the "prior" and "new" statutes must exist to warrant a conclusion that the prior statute was impliedly repealed. City of Sand Springs v. Okla. Dep't of Welfare, 608 P.2d 1139, 1151 (Okla. 1980).

Here, the circumstances fall far short of those necessary to warrant a conclusion that

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[4]*That paragraph provides: "Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act [the new statute — 82 Okla. Stat. § 105.12A] and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act."*

all pertinent provisions of Oklahoma law have been impliedly repealed.[5] There is, of course, no explicit repealer in H.B. 1483. It is plain from the text of paragraph G that the legislature had pending applications in mind when it enacted H.B. 1483 and, judging from other background materials submitted by plaintiffs and the circumstances in general, it is clear enough that the pending applications involved in this case were particularly in its mind.[6] Yet it declined to include an explicit repealer in the legislation, rejecting earlier versions of the bill which had done so. Further, while the provisions of H.B. 1483 are, in some respects, inconsistent with various provisions of Oklahoma law not explicitly repealed, at least some are not clearly so. Finally, even if the court was otherwise disposed to accept defendants' assessment of H.B. 1483, it would still not make the issues in this case moot. H.B. 1483 itself includes a requirement of approval by the Oklahoma legislature of any permit for out-of-state, but not in-state, use of water apportioned to Oklahoma under an interstate compact.[7] It is undisputed that a portion of the water sought by plaintiff in its permit applications is

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[5]*One provision initially challenged by plaintiff, the outright moratorium on out-of-state water sales, has expired according to its terms. See 82 Okla. Stat. § 1B (moratorium expired five years from effective date of the act, i.e. November 1, 2009).*

[6]*The news clippings and statements of individual legislators submitted by plaintiff are not essential to the court's conclusions, hence it is unnecessary to belabor whether they are evidence which might be formally considered in determining this motion. They do at least illustrate the point which is otherwise obvious — that H.B. 1483 did not create any "clear and unequivocal" conflict with prior law. Indeed, some of the explanations of H.B. 1483 by OWRB personnel illustrate the technique of "doing a little sidestep" made popular by the fictional Texas governor in a popular 1970's musical involving that state.*

[7]*Title 82 Okla. Stat. § 105.12A (section 1 of H.B. 1483) provides in part: "D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it."*

water allocated to Oklahoma under the RRC.[8] A requirement of legislative approval of an interstate water transfer, when in-state transfers are not similarly conditioned, implicates Commerce Clause concerns. Sporhase v. Nebraska, 458 U.S. 941, 955-56 (1982).[9] Whatever the ultimate outcome of a substantive challenge to the statute might be, there is nonetheless a real question left in play by the nature of H.B. 1483's requirements and plaintiff's claims.

In any event, for multiple reasons,[10] the court concludes the passage of H.B. 1483 has not rendered this controversy moot.

Deferral to the Commission - Doctrine of Primary Jurisdiction

Defendants argue the court should dismiss or stay this case based on the doctrine of "primary jurisdiction." They argue that some or all of the issues raised as to the RRC by plaintiff's claims can and should be presented first to the Red River Compact Commission, a body formed under the RRC, as its determination may make the current controversy go

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[8] *See undisputed facts 3-7, Def.'s Br. 4-5 [Doc. #90]. Specifically, the "Cache Creek" and "Beaver Creek" applications involve water allocated wholly to Oklahoma under the RRC.*

[9] *Sporhase did not conclude that a requirement of legislative approval necessarily violates the Commerce Clause. Rather, it noted that differing requirements for in-state versus out-of-state transfers "would be inconsistent with the ideal of evenhandedness in regulation" but also acknowledged "there are legitimate reasons for the special treatment accorded to requests to transport ground water across state lines." Id.*

[10] *Plaintiff argues that the complaint's reference (¶ 25) to plaintiff's interest in acquiring water by other means — i.e. water other than "compacted" water — leaves issues for disposition even if the court accepts defendants argument that the RRC precludes a Commerce Clause violation. For reasons discussed more fully hereafter, the court has not relied on that argument in concluding H.B. 1483 does not moot the issues in this case.*

away or at least inform the court's further decisions as to matters involving compact interpretation. Defendants indicate they have posed to that body certain questions which grow out of the issues in this case. Plaintiff objects, arguing that the doctrine of primary jurisdiction does not apply and that, in any event, deferral to the Commission is not appropriate in the present circumstances.

The doctrine of primary jurisdiction is a prudential doctrine designed to allocate decision-making authority between courts and administrative agencies. In general, it applies where a particular issue arising under a regulatory scheme has been assigned by Congress to an administrative body, to take advantage of that body's special expertise or competence in the area. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750-51 (10th Cir. 2005). In determining the doctrine's application, courts evaluate both the need to promote consistent application of the regulatory scheme involved and the interest in court reliance on agency expertise in resolving "issues of fact not within the conventional experience of judges." *Id.*, citing Far East Conference v. United States, 342 U.S. 570, 574 (1952).

The court concludes the doctrine of primary jurisdiction does not require or warrant the dismissal or stay of this case. The claims asserted by plaintiff here, though involving issues of compact interpretation, are not based directly on the assertion of rights under the RRC. Moreover, the claims involve what are essentially issues of statutory construction and matters of law, rather than factual matters requiring the resolution of issues of fact "not within the conventional experience of judges." Further, it is unclear whether the

Commission's authority even arguably extends to adjudicating disputes like those involved here, as its authority involves the "making of findings, recommendations, or reports" rather than determining a disputed issue. However, any question in that regard, as applicable to this dispute, is resolved by the express language of the RRC, which provides in pertinent part:

> The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to the instituting or maintaining of any action or proceeding of any kind by a Signatory State in any court or tribunal, or before any agency or officer, for the protection of any right under this Compact or for the enforcement of any of its provisions . . .

RRC, Sec. 10.01(g). If a signatory party to the Compact is not required to "exhaust" this administrative process before proceeding to court, it makes no sense to suggest that a non-party should.

The court concludes the doctrine of primary jurisdiction does not warrant the dismissal or stay of this case.

"Dormant" Commerce Clause Claim

The principal thrust of defendants' motion is its argument that the RRC operates to preclude the Commerce Clause and Supremacy Clause claims asserted by plaintiff. The Commerce Clause, Art. I, § 8, cl. 3 of the Constitution, generally "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders . . ." New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982). Water, regardless of its status as property or non-property under state law, is an "article of commerce" to which the Commerce Clause is applicable. Sporhase, 458 U.S. at 953. Congress therefore has the power to regulate

commerce in water and, where it does so, Congress' determination controls. Where Congress has not affirmatively acted to establish federal policy in an area, the Commerce Clause nonetheless constitutes an implicit restraint on state regulation. United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007). However, the existence of unexercised federal power (i.e. the "dormant" aspect), coupled with the fact that water is an article of commerce, does not necessarily render state laws which address or regulate it unconstitutional. Sporhase, 458 U.S. at 954. The determination of the constitutionality of state statutes affecting interstate commerce involves consideration of, among other things, the nature and effect of the statute in issue and the relationship of the statute to the local purpose or interest involved. *See generally* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Plaintiff's Commerce Clause claim raises those issues with respect to the challenged Oklahoma regulatory scheme.

However, as all parties recognize, the "dormant" Commerce Clause is applicable only where Congress' power to regulate in fact lays dormant. If Congress acts to authorize a particular activity or regulation by the states, that state activity is immune from Commerce Clause attack even if it would otherwise be contrary to "dormant" Commerce Clause principles. Northeast Bancorp, Inc. v. Bd. of Gov. of Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."). Defendants argue that Congress, by its ratification of the RRC, has acted to authorize (for water subject to the compact) the sorts of limitations Oklahoma has placed on the interstate sale or transfer of

water.

It is, of course, undisputed that Congress has ratified the Red River Compact. Once Congress has approved an interstate compact, the compact becomes more than just an agreement between the involved states. It also becomes, in legal effect, a federal statute. Texas v. New Mexico, 482 U.S. 124, 128 (1987). And, as noted above, a federal statute can supply the authorization for a state regulatory scheme that would otherwise be contrary to Commerce Clause principles. The central question raised by defendants' motion is whether the compact involved here, the RRC, is a sufficiently clear expression of Congressional intent to do that.

As plaintiff's correctly note, the test for determining whether Congress has authorized the state regulatory scheme in issue is an exacting one. As the Sporhase court noted: "In the instances in which we have found such consent [to otherwise impermissible burdens on commerce], Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause was 'expressly stated.'" 458 U.S. at 960 (citing New England Power Co. v. New Hampshire, 455 U.S. at 343, and Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946)) (internal quotation marks omitted). Some cases have stated the standard as being whether Congress' intent was "unmistakably clear." South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).[11] Still, the degree of specificity required is not without

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[11] *The South Central court stated at 91: "There is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."*

limits.[12] The ultimate question is one of determining congressional intent.

So far as the court can determine, no case has squarely addressed the question of whether Congress' approval of compact language like that involved here is sufficient to insulate state statutes from Commerce Clause scrutiny. Plaintiff relies on Sporhase, correctly noting it is the Supreme Court case which dealt most closely with issues like those involved here. But Sporhase, though it's language provides some support for plaintiff's position, did not involve the same circumstances as are present here. Sporhase involved a Commerce Clause challenge to a Nebraska statute which had the effect of limiting the exportation of ground water to certain neighboring states.[13] Nebraska argued that Congress' intent to defer to state water laws as to ground water was shown by a variety of federal statutes and two interstate water compacts. The Supreme Court rejected the argument, concluding the language in the various statutes addressing federal projects and the compacts did not evidence an intent to remove constitutional constraints on the pertinent state laws:[14]

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[12]*For example, in the Prudential Ins. Co. case, supra, the question was whether Congress, by passing the McCarran Act, intended to insulate from Commerce Clause scrutiny a South Carolina tax statute which imposed a gross receipts tax on insurers organized out of state, but not on in-state insurers. The McCarran Act included language stating state regulation and taxation of insurers was in the public interest, and that its silence should not be interpreted as a barrier to that regulation or taxation, but there was no reference to "discriminatory" tax schemes or the like, as opposed to taxation generally .*

[13]*The Nebraska statute required a permit to withdraw ground water for transportation to another state. It also prohibited the issuance of a permit in circumstances where the laws of the transferee state did not reciprocally permit transfer of water from that state to Nebraska. Sporhase, 458 U.S. at 944. The transferee state involved, Colorado, did not grant reciprocal rights to Nebraska.*

[14]*A typical statute provided that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the*

"Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Id.* at 960. However, the interstate water compacts relied on by Nebraska addressed surface water, rather than ground water, and were directed at showing some broad federal deferral to state water laws in general. Here, the circumstances are at least one step removed from those existing in Sporhase. The particular compact involved here (the RRC) is directly applicable to the water in issue and it specifically contemplates dividing the water — allocating it — between the states involved.

But just as Sporhase does not provide a definitive answer to the question posed here, neither does the principal authority offered by defendants. They rely on Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568 (9th Cir. 1985), where the court concluded Congress' adoption of the interstate water compact involved there avoided a Commerce Clause challenge to a restriction on diversion of water outside the Yellowstone River Basin without the unanimous consent of all signatory states. But the difference is that the restrictive provision which arguably violated the Commerce Clause was not included in the statutes of one of the signatory states, but was included in the compact itself. The court therefore concluded that, as the arguably offending provision was part of the federal law

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control, appropriation, use, or distribution of water used in irrigation." Sporhase, 458 U.S. at 959.

itself (as part of a congressionally approved compact), it could not be the basis for a dormant Commerce Clause claim. Here, of course, the challenged restrictions are not in the RRC, but rather are creatures of state statute.

In the absence of controlling authority, the court concludes the most appropriate guide to determining the scope and nature of Congress' intent is to focus on the nature of an interstate compact, the language Congress used (i.e. the language of the RRC which it ratified) and the logical import of that language. The language of the RRC does not explicitly say "states can limit or stop the out-of-state shipment of water" nor does it make any explicit reference to the Commerce Clause, dormant or otherwise. But the court does not read the various cases to require that level of specificity. What the RRC does specifically state is that it is intended to remove cause for controversies between the signatory states by "governing the use, control and distribution of the interstate water . . ." RRC, Sec. 1.01(a). It is intended to "provide an equitable apportionment" of the water of the Red River between the various states and to provide a basis for state or joint action by "ascertaining and identifying each state's share" in the water. RRC, Sec. 1.01(b) and (e). Each signatory state "may use the water allocated to it by this Compact in any manner deemed beneficial by that state." RRC, Sec. 2.01. A state's "failure . . . to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." RRC, Sec. 2.04. Various provisions provide, with respect to waters allocated to Oklahoma or other states, that the pertinent state "shall have free and unrestricted use" of the water allocated to it. *E.g.* RRC, Sec. 4.02(b) (Oklahoma) and 4.03(b) (Texas). Further, the compact states that nothing

in it "shall interfere or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact." RRC, Sec. 2.10 (emphasis added).

While the question is close, the court concludes the plain import of these provisions is to effect an allocation or division of the waters covered by the compact and that the essence of that process — allocating some portion of the resource in issue to a particular state or its citizens — is inherently inconsistent with the standards that would otherwise apply based on dormant Commerce Clause analysis. Those standards are ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for the state or its citizens — that is, to avoiding giving the residents of one state "a preferred right of access, over out-of-state consumers, to natural resources located within its borders . . ." New England Power Co. v. New Hampshire, 455 U.S. at 338-39 ("The [challenged order] is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. . . . Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance 'simple economic protectionism.'") (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). The principal purpose and effect of the RRC, however, through its provisions for allocation and apportionment of the Red River's waters between the various states, is to do precisely that. As one commentator has noted, in discussing Sporhase and interstate compacts:

> Economic protection is the very purpose of the compact. The split of unappropriated water is intended to free the states from the need to race for the water under the usually applied (though recently questioned) rule of Wyoming

> v. Colorado: "priority is equity" between two states that apply the law of prior appropriation internally, and the same law will fix their shares in an equitable apportionment. A compact halts the race.[15]

As a result, the approval of the RRC by Congress necessarily constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny. Moreover, the Oklahoma statutes which plaintiff challenges here — whether wise or not — are not inconsistent with the RRC insofar as they relate to the waters allocated and apportioned to Oklahoma under the compact. Further, in light of the right of Oklahoma to control compact waters within its borders not inconsistent with the compact and in the absence of a showing that a particular statute is necessarily inconsistent with the compact,[16] the court concludes, for purposes of the current facial challenge, that the superseding effect (over otherwise applicable Commerce Clause standards) extends to all water covered by the compact, whether apportioned wholly or partially to Oklahoma.

So far as the court can determine, none of the many cases concluding Congress' intent to supplant the Commerce Clause was insufficiently clear or insufficiently expressed involved circumstances where the essence of what Congress did do was to allocate resources between states. For example, both Wyoming v. Oklahoma, 502 U.S. 437 (1992) and New

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[15] *Frank J. Trelease, State Water and State Lines: Commerce in Water Resources,, 56 U. Colo. L. Rev. 347, 349 (1985) (emphasis added).*

[16] *An effort by the State of Texas (or another signatory state) to acquire water allocated to it by the compact, if thwarted by one or more of the challenged statutes, might well give rise to a claim under the compact in favor of that state. But that is not the circumstance presented here. Plaintiff, though a political subdivision of the State of Texas, is not Texas and is not entitled to assert in this proceeding rights which Texas has under the RRC.*

England Power, *supra*, conclude the Federal Power Act did not constitute or include a congressional determination to supplant the Commerce Clause standards, but there was no suggestion in either case that the FPA was intended to allocate resources between particular states. Similarly, in South Central Timber, *supra*, national policy as to federal land use was held not to imply approval of parallel state restrictions, but no issue of allocation between the states — of timber or otherwise — was involved. While a more comprehensive and exhaustive review of the cases might conceivably identify a circumstance paralleling the explicit "allocating" or "apportioning" action of Congress involved here, neither the submissions of the parties nor the court's own research have revealed such a case. The circumstances in Sporhase are as close an any appear to get but do not, for the reasons noted above, control the result here.

Accordingly, the court concludes that Congress' approval of the RRC constitutes an adoption of standards that preclude a successful Commerce Clause claim in the circumstances existing here, where the water sought via permit or otherwise is within the scope of the RRC. Congress has approved a compact the essential nature of which is to allocate and divide resources.

Supremacy Clause Claim

Plaintiff has also asserted a supremacy clause claim, asserting Oklahoma's statutory scheme is inconsistent with the RRC and hence preempted by federal law. State laws can be preempted in two general ways. If Congress manifests an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not fully displaced state

regulation over the particular subject matter, state law is preempted to the extent it actually conflicts with federal law so as to render compliance with both impossible. California Coastal Com'n. v. Granite Rock Co., 480 U.S. 572, 581 (1987). There is, of course, no suggestion here that Congress has generally preempted the field of water law, involving interstate streams or otherwise. Further, there is no necessary conflict between the federal law here in question — the RRC — and the state laws plaintiff challenges. The compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact. RRC, Sec. 2.10(a). In light of the foregoing discussion as to Congress' intent in the context of a Commerce Clause claim, the court can discern no basis upon which the RRC could be a basis for preemption, at least in the context of any claim which plaintiff has standing to pursue.

Water Not Subject to RRC as Basis for Claim

Plaintiff has also suggested that, even if the court accepted defendants' position as to the effect of the RRC, it should nonetheless permit the challenge to the various statutes to go forward due to plaintiff's interest in acquiring water not subject to the RRC. Plaintiff relies on paragraph 25 of its complaint, which states:

> 25. Plaintiff currently stands willing and able to negotiate for the purchase of water located in Oklahoma, and has identified public and private parties who are interested in negotiating a sale of such water to Plaintiff.

The court concludes, however, that in light of the disposition made here of plaintiff's claims involving water subject to the RRC, any potential claim arising out of plaintiff's interest in non-compacted water is, at this point, too speculative and uncertain to be ripe for resolution.

The court previously rejected a ripeness challenge to plaintiff's claims (Order, October 29, 2007, pp. 4-6) [Doc. #49], concluding there was a real and substantial threat of enforcement of the various state statutes as to plaintiff's pending applications. However, as noted above, those applications relate purely to water subject to the RRC and are therefore within the scope of the court's determination of the pending motion. Insofar as the pleadings reflect, there are no applications pending before the OWRB as to water not subject to the RRC. Further, the allegations upon which plaintiff relies in this respect do not suggest plaintiff has actually contracted for non-compacted water — only that it is willing and able to do so. It does not allege there are persons willing to sell water to plaintiff — only that it has identified private parties willing to negotiate about it. And of course, other aspects of the "other" water, such as whether it is ground water, stream water subject to a different compact, or otherwise, are likewise unidentified. In these circumstances, the court concludes plaintiff's allegations are insufficient to show a non-speculative basis for concluding that an immediate, appreciable threat of injury to it flows from the challenged statutes. *See* Wilson v. Stocker, 819 F.2d 943, 947 (10th Cir. 1987). Therefore, as a case or controversy sufficient to support federal jurisdiction does not presently exist as to any remaining claims not otherwise disposed of by this order, they must be dismissed for lack of jurisdiction.

Summary

In accordance with the foregoing, the court concludes defendant's motion should be granted in substantial part. Defendants' mootness and primary jurisdiction arguments are unpersuasive. However, the fact that the water to which plaintiff seeks access is governed

by the Red River Compact is sufficient, in the circumstances existing here, to preclude the Commerce Clause and Supremacy Clause claims that plaintiff asserts.

Given the nature of this case, it is perhaps appropriate to note the court's view of what this decision does not do. It does not purport to address a potential Commerce Clause claim, by plaintiff or others, to the extent it pursues rights in, or approvals as to, water not subject to the Red River Compact. It does not purport to address in some hypothetical way questions which might arise under other compacts to which Oklahoma is a party, as the court's review has been limited to the Red River Compact. It does not anticipate or address the possibility of a claim by Texas or other signatory state under the compact, based on a claimed compact violation. That is a circumstance different from the claim presented here. Finally, there is nothing in this order which precludes Oklahoma — if the facts on the ground are roughly as plaintiff has alleged — from negotiating, as a good neighbor, some arrangement to use more effectively the water allocated to it under the Red River Compact. The alleged facts suggest Oklahoma has ample room to maneuver in that regard, without harming either its long term or short term interests.

Based on the foregoing, defendants' motion to dismiss and/or for summary judgment [Doc. #90] is **GRANTED IN PART** and **DENIED IN PART**. It is denied insofar as it seeks dismissal of this case on the grounds of mootness due to recent legislation or based on any need to defer to the Red River Commission, under the doctrine of primary jurisdiction or otherwise. It is granted insofar as it seeks summary judgment as to plaintiff's Commerce Clause and Supremacy Clause claims. Any claim premised on plaintiff's efforts to acquire

water not subject to the Red River Compact is dismissed on the basis of ripeness, without prejudice. As to the latter claim, plaintiff is granted leave to file within **thirty (30) days** an amended complaint addressing the deficiencies noted, if it can do so. Defendant's motion to supplement the record as to that subject matter [Doc. #124] is **DENIED**.

In light of the disposition effected by this order, the trial setting and existing scheduling order are **STRICKEN**. The joint motion of the parties for a pretrial conference [Doc. #122] is **STRICKEN** as **MOOT**. In light of this disposition, the pending motion to intervene of the Apache Tribe of Oklahoma [Doc. #111] is also **STRICKEN** as **MOOT**.[17]

IT IS SO ORDERED.

Dated this 18th day of November, 2009.

JOE HEATON
UNITED STATES DISTRICT JUDGE

[17] *The court would not be disposed to grant the motion in any event. Apart from questions of timeliness, the motion misconceives the nature of plaintiff's claims here. Plaintiff does not seek to appropriate or apportion water by this lawsuit; rather, it seeks a determination of the constitutionality of the Oklahoma's regulatory scheme. As a result, the disposition of this case will not impair, impede, or otherwise affect whatever water rights the Apache Tribe may have or assert.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

CITY OF HUGO, OKLAHOMA, an Oklahoma Municipality, and HUGO MUNICIPAL AUTHORITY, an Oklahoma Public Water Trust for the benefit of the City of Hugo, Oklahoma

Plaintiffs,

CITY OF IRVING, TEXAS,

Intervenor-Plaintiff,

v.

Case No. CIV-08-303-JTM

JESS MARK NICHOLS, RUDOLF JOHN HERRMANN, ED FITE, FORD DRUMMOND, JACK W. KEELEY, KENNETH K. KNOWLES, LINDA LAMBERT, LONNIE FARMER, and RICHARD SEVENOAKS, in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the parties' cross-motions for summary judgment. (Dkt. Nos. 50, 97 & 111). The plaintiffs in this case are the City of Hugo, Oklahoma; the Hugo Municipal Authority; and the City of Irving, Texas. The nine individual defendants are the members of the Oklahoma Water Resources Board ("Board"), and the Oklahoma Water Conservation Storage Commission ("Commission"). The plaintiffs note in their supplemental joint motion for summary judgment that they "hereby supplement their previously filed motion Dkt. #50." (Dkt. No. 97 at 1).

The plaintiffs are seeking: 1) a declaratory judgment that certain Oklahoma laws discriminate against the sale of water in interstate commerce in violation of the Commerce Clause of the United States Constitution; and 2) a permanent injunction forbidding the defendants from prospectively enforcing those laws. (Dkt. No. 97 at 25).

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir.1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir.1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir.1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56 (c), the party opposing summary judgment must do more than show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matushita Elec. Indus. Co., Ltd. v. Zenith Radio*

Corp., 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The City of Hugo, Oklahoma, is an Oklahoma municipality located in Choctaw County, Oklahoma. Hugo Municipal Authority is an Oklahoma public water trust formed for the benefit of the City of Hugo, Oklahoma. The City of Irving, Texas is a Texas municipality located in Dallas County, Texas. The Board and the Commission are the state agencies responsible for enforcing the laws enacted by Oklahoma regarding the appropriation, and use of the surface waters of the state.

In 1954, the Board issued the City of Hugo a stream water permit allowing it to appropriate 1,700 acre-feet of stream water per year from the Kiamichi River. In 1972, the Board issued a permit to the Hugo Municipal Authority authorizing the appropriation of an additional 28,800 acre-feet of stream water per year from the Kiamichi River. In July 2005, the City of Hugo transferred its 1954 stream water permit rights to the Hugo Municipal Authority, which the Board approved in August 2005.

In 2002, the Hugo Municipal Authority filed a stream water application with the Board requesting appropriation of an additional 200,000 acre-feet of stream water annually from the Kiamichi River. At about the same time, the Oklahoma Legislature instituted a moratorium on the "sale or exportation of surface water and/or groundwater outside this state," subject to the provisions of the rest of the section. Okla. State. tit. 82, § 1B(A); Okla. Stat. tit. 74, §1221.A. The moratorium was effective June 6, 2002, following Hugo Municipal Authority's filing of its 2002 application, stating that "no state agency, board, commission, committee, department, trust or other

instrumentality of this state or political subdivision thereof . . . shall contract for the sale or exportation of surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water." Okla. Stat. tit. 82, §1B(B).

On May 12, 1978, the authorized representative of the States of Arkansas, Louisiana, Oklahoma, and Texas approved the Red River Compact ("the Compact"). They had received Congressional consent to negotiate and enter into such an agreement. On December 22, 1980, the President signed Public Law No. 96-564, in which Congress gave its consent to the Compact. The Compact divides the Red River and its tributaries into reaches and subbasins for purposes of apportionment of water and administration of the Compact.

On August 7, 2008, the City of Hugo and the City of Irving entered into a contract whereby Hugo would sell, and Irving would purchase substantial quantities of Oklahoma stream water. The Kiamichi River is the source of the stream water. In November 2008, Hugo Municipal Authority filed petitions to change the place of use for the 1954 and 1972 permits. The petitions requested amendments authorizing out-of-state municipal use as the principal use of the appropriated water. On March 25, 2009, the Board requested additional information, including the water needs of the intended added place of use, Irving, Texas.

The moratorium on out-of-state water sales has now expired according to its terms. *See* 82 Okla. Stat. § 1B (moratorium expired five years from effective date of the act, i.e. November 1, 2009).

In addition to the moratorium, the Oklahoma Legislature has enacted other legislation regulating the sale or use of Oklahoma water for out-of-state interests. *See* Okla. Stat. tit. 82, § 105.16(B) (providing that surface water must be put to use within seven years unless the Board

determines that an extension is in the interest of beneficial water use in Oklahoma); Okla. Stat. tit. 82, § 1085.2(2) (prohibiting the Board from making a contract to convey title or use of water outside of Oklahoma without authorization by the Oklahoma Legislature).

The Board provided water supply and usage data that indicated almost fourteen times as much stream water flows out of the state during a given year than is actually allocated for use in the state. The specific segment of the Kiamichi River that is the source of the stream water that Hugo intends to sell to Irving is only 2.4% of the adjusted total stream water available.

All of the permits at issue in this case have a point of diversion upstream of the Hugo Dam at the Hugo Reservoir. Hugo Reservoir is within Reach II, Subbasin 1. The Compact provided that Oklahoma is apportioned the water of Subbasin 1 of Reach II, and shall have unrestricted use thereof.

In support of their cross-motion for summary judgment, the defendants allege:

1. The doctrine of primary jurisdiction requires this court to allow the Red River Compact Commission to interpret the red river compact it administers before imposing a federal judicial ruling on the red river compact.

2. HB 1483 repealed by implication the Oklahoma moratorium challenged by plaintiffs. The new provision constitutionally retains water compacted to Oklahoma within Oklahoma unless and until the Oklahoma Legislature determines to the contrary.

3. The dormant commerce clause, as interpreted in *Sporhase*, has no application when Congress has expressly authorized constraints on interstate commerce through an interstate surface water compact.

4. The apportionment of water by the federal Red River Compact authorize the restrictions on out-of-state transport of water to which plaintiffs object. Plaintiffs have offered no valid basis for challenging that apportionment.

PRELIMINARY NOTE

At the outset, the court notes that several issues it will address in this case were recently reviewed by Judge Heaton in *Tarrant Regional Water District v. Hermann*, No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009). Judge Heaton's excellent and exhaustive opinion provides a detailed outline for the court to utilize in its order.

DOCTRINE OF PRIMARY JURISDICTION

Defendants maintain the court should dismiss this case based on the doctrine of "primary jurisdiction." They argue that some or all of the issues raised as to the Compact by plaintiffs' claims can and should be presented first to the Red River Compact Commission ("the Compact Commission"), a body formed under the Compact, as its determination may either resolve the current controversy or at least better inform the court's further decisions as to matters involving the Compact interpretation. Defendants have posed questions to the Compact Commission, which the defendants allege grow out of the issues in this case. Plaintiffs maintain that the doctrine of "primary jurisdiction" does not apply, and deferral to the Compact Commission is not appropriate in the present circumstances.

"The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight." *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir.1996) (quoting *National Communications Ass'n, Inc. v. American Tel. and Tel. Co.*, 46 F.3d 220, 223 (2d Cir.1995)). In determining the doctrine's application, courts evaluate both the need to promote consistent application of the regulatory scheme involved and the interest in court reliance on agency expertise

in resolving "issues of fact not within the conventional experience of judges." *Far East Conference v. United States,* 342 U.S. 570, 574 (1952).

While plaintiffs' claims involve issues of Compact interpretation, there is no direct assertion of rights under the Compact. The claims before the court are issues of statutory construction, and matters of law. There are no undisputed material facts, therefore the court finds it is unnecessary to seek the Compact Commission's expertise in resolving "issues of fact not within the conventional experience of judges." *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750-51 (10th Cir. 2005). The court finds dismissal based on the doctrine of primary jurisdiction is not appropriate.

REPEALED BY IMPLICATION

Defendants next argue this case is moot, asserting that H..B. 1483 (paragraph G to Okla. Stat. tit. 82, § 105.12) impliedly repealed all provisions of Oklahoma law which potentially affect plaintiffs' applications, citing:

> Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act.

As Judge Heaton noted in *Tarrant:*

> [R]epeals by implication are not favored. *Nat'l Ass'n. of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007). It is presumed the legislature did not intend, by enacting a new statute, to repeal an existing statute by implication. *Strong v. Lauback,* 89 P.3d 1066, 1070 (Okla.2004). A clear, unequivocal and irreconcilable conflict between the prior and new statutes must exist to warrant a conclusion that the prior statute was impliedly repealed. *City of Sand Springs v. Okla. Dep't of Welfare,* 608 P.2d 1139, 1151 (Okla.1980).

Tarrant at *2.

Neither party alleges that H.B. 1483 contains an explicit repealer. Some of H.B. 1483's provisions are inconsistent with various provisions of prior Oklahoma law while other provisions are consistent. Therefore, H.B. 1483 as a whole is not in irreconcilable conflict with prior Oklahoma law to the extent that the prior statutes are impliedly repealed. *See id.* at 1151.

The parties do not dispute that H.B. 1483 requires the Oklahoma legislature's approval of any permit for out-of-state, but not in-state, use of water apportioned to Oklahoma under an interstate compact that. *See* Okla. Stat. tit. 82, § 105.12A(D). The issue before this court is identical to the one addressed in *Tarrant:* whether a requirement of legislative approval of an interstate water transfer, when in-state transfers are not similarly conditioned, implicates Commerce Clause concerns. *Tarrant* at *2.

Since H.B. 1483 did not explicitly nor implicitly repeal the provisions that plaintiffs are contesting, the court finds the passage of H.B. 1483 did not render this controversy moot. Thus, the court is must address the substantive claims.

"DORMANT" COMMERCE CLAUSE CLAIM

There is no dispute among the parties that: 1) water is an "article of commerce" to which the Commerce Clause is applicable; 2) Congress has the power to regulate commerce in water and, where it does so, Congress' determination controls and 3) the "dormant" Commerce Clause is applicable only where Congress' power to regulate in fact lays dormant. Defendants maintain the Compact precludes the plaintiffs' Commerce Clause claims. The issue is whether Congress regulated the Kiamichi River with the Compact.

Once Congress authorizes state actions, they are invulnerable to constitutional attack under the Commerce Clause. *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 653-654 (1981); *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204 (1983). In *Tarrant*, the court correctly noted that once Congress approves an interstate compact, the compact is more than an agreement between the involved states, it becomes a federal statute. *Tarrant at *4* (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)).

The issue is whether Congress' intent is sufficiently clear. Defendants allege that Congress authorized the kinds of limitations Oklahoma placed on the interstate sale or transfer of water, when it ratified the Compact. The plaintiffs take a contrary position.

There is guidance to determine whether Congress has authorized the state regulatory scheme. The Supreme Court has found a range of specificity sufficient to determine congressional intent. *See Sporhase v. Nebraska,* 458 U.S. 941, 960 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. at 343; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946) (in the instances in which Congress' consent is found for otherwise impermissible burdens on commerce, Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) ("[t]here is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear").

Congress ratified the Compact, but the parties disagree as to its scope and its relationship to the challenged Oklahoma regulatory scheme. Just as in *Tarrant*, the court is yet to find a case

directly addressing the question of whether Congress' approval of compact language such as that involved here is "sufficient to insulate state statutes from Commerce Clause scrutiny." 2009 WL 3922803 at *4. As in *Tarrant*, the plaintiffs rely on *Sporhase,* asserting that it is the Supreme Court case which dealt most closely with issues analogous to those involved here.

While this court finds that some *Sporhase* language provides support for the plaintiffs' position, the facts distinguish the two cases. *Sporhase* involved a Commerce Clause challenge to a Nebraska statute which limited the exportation of ground water to certain neighboring states. Nebraska argued that Congress' intent to defer to state laws regulating ground water was incorporated in a variety of federal statutes and two interstate water compacts. The Supreme Court rejected that argument, concluding the compact and statutory language did not evidence an intent to remove constitutional constraints on the pertinent state laws. *Sporhase* at 959. The Supreme Court concluded: "Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Id.* at 960.

In *Sporhase*, Nebraska relied on interstate water compacts that addressed surface water, rather than ground water, and were directed at showing some broad federal deferral to state water laws *in general*, as opposed to a *specific intent* to authorize a regulatory scheme. Based on the court's reading of *Sporhase,* the Supreme Court found there was no specific intent by Congress to address the exportation of *ground water* based on the ratification of a compact that only addressed

surface water. Here, the Compact addressed the water in issue, and it specifically contemplated dividing the water by allocating it among the Compact states.

The defendants also cite *Intake Water Co. v. Yellowstone River Compact Comm'n,* 769 F.2d 568 (9th Cir.1985). The *Intake Water* court rejected a Commerce Clause challenge to an interstate water compact which restricted the diversion of water outside the Yellowstone River Basin unless the signatory states unanimously agreed to the diversion. But those facts are inapposite with the instant facts. The restrictive provision in *Intake Water* which arguably violated the Commerce Clause arose from the state compact – not in the statutes of the relevant states. The Ninth Circuit found that the Commerce Clause was not violated since the challenged provision was federal law, having been approved by Congress. As federal law, it could not be the basis for a dormant Commerce Clause claim. *Intake Water*, 769 F.2d at 569-70. The case is not controlling since here the challenged restrictions are not in the Compact, but are found in Oklahoma statutes.

Given the lack of controlling authority, it is appropriate for this court to look to a variety of factors, including: 1) the nature of an interstate compact; 2) the language Congress used in the Compact it ratified; and 3) the logical import of that language. *See Tarrant*, 2009 WL 3922803 at *5. The Compact does not explicitly prohibit the export of water, and makes no reference to the Commerce Clause. The court does not find that to be detrimental to its analysis based on the fact there is no definitive level of specificity required. *See Sporhase* at 960; *New England Power* at 343; *Prudential Ins. Co.* at 427; *South-Central Timber Dev., Inc.* at 91.

First, the court looks to the language of the Compact. According to Section 1..01(a), the Compact's intent is to "govern[] the use, control and distribution of the interstate water" between

the signatories, and so reduce potential legal conflicts. To achieve this aim, the Compact seeks to "provide an equitable apportionment" of the Red River water, and create a basis for state or joint action by "ascertaining and identifying each state's share" of the water. Compact, § 1.01(b) and (e). Each signatory "may use the water allocated to it by this Compact in any manner deemed beneficial by that state." Compact, § 2.01. The Compact expressly provides that a state does not waive or forfeit its rights by failing to use all of the water allocated to it. Compact, § 2.04. The Compact further expressly provides that nothing in it should be construed to "interfere or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water." Compact, § 2.10. Instead, the Compact grants each state "free and unrestricted use" of the water allocated to it. Compact § 4.02(b) (Oklahoma) and 4.03(b) (Texas).

The Commerce Clause serves to thwart state efforts to unfairly advance their own interests at the expense of the larger national economy, efforts which serve to give a state's own citizens "a preferred right of access, over out-of-state consumers, to natural resources located within its borders." *New England Power Co. v. New Hampshire,* 455 U.S. at 338-39. The Compact here explicitly provides for the allocation of resources along a rational and consistent basis among the relevant states; the Compact is openly and unapologetically protectionist. Congress approved the Compact, and it is not subject to any dormant Commerce Clause challenge. That approval "*necessarily* constituted [Congress'] consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Tarrant*, 2009 WL 3922803 at *6 (emphasis in *Tarrant*).

This insulating effect extends to the state statutes which have been challenged here as well. The relevant Oklahoma statutes are not inconsistent with the Compact where they address the waters

allocated and apportioned to Oklahoma under the Compact, and that state's right to control waters within its borders is not inconsistent with the Compact. The court's review of all of the evidence and argument fails to indicate the existence of any inconsistency between the relevant Oklahoma statues and the Compact.

Here, Congress approved the Compact, setting standards for the allocation of water resources, via permit or otherwise under the terms of the interstate agreement. That approval of allocation standards successfully protects the Compact from dormant Commerce Clause challenge. Therefore the court finds that the defendants' motion for summary judgment is appropriately based on the plaintiffs' claim that there is a violation of the Commerce Clause. The contested legislative enactments are not in violation of the Commerce Clause based on Congress' ratification of the Compact.

IT IS ACCORDINGLY ORDERED THIS 30th day of April, 2010, that the defendants' cross-motion for summary judgment is granted in part, and denied in part. It is denied insofar as it seeks dismissal of this case on grounds of mootness due to recent legislation or based on any need to defer to the Compact Commission, under the doctrine of primary jurisdiction. It is granted insofar as it seeks summary judgment as to the plaintiffs' Commerce Clause claims. (Dkt. No. 111).

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment (Dkt. No. 50) and supplemental motion for summary judgment (Dkt. No. 97) are denied.

IT IS FURTHER ORDERED the following motions be denied as moot: 1) Dkt. No. 91 - plaintiffs' joint motion for preliminary injunction filed on September 4, 2009; and 2) Dkt. No. 92 - defendants' motion to vacate order filed on September 8, 2009.

s/ J. Thomas Marten

J. THOMAS MARTEN, JUDGE

570 F.3d 625, 73 Fed.R.Serv.3d 1053
(Cite as: 570 F.3d 625)

H

United States Court of Appeals,
Fifth Circuit.

Jim HOOD, Attorney General, ex rel. State of MISSISSIPPI, Acting for Itself and Parens Patriae for and on behalf of the People of the State of Mississippi, Plaintiffs-Appellants,

v.

The CITY OF MEMPHIS, TENNESSEE; Memphis Light Gas & Water Division, Defendants-Appellees.

No. 08-60152.

June 5, 2009.

Background: State attorney general brought action against municipality in neighboring state seeking past and future damages as well as equitable relief related to alleged wrongful appropriation of groundwater from interstate aquifer. The United States District Court for the Northern District of Mississippi, Glen H. Davidson, Senior District Judge, 533 F.Supp.2d 646, dismissed action. Plaintiff appealed.

Holdings: The Court of Appeals, Carl E. Stewart, Circuit Judge, held that:
(1) Tennessee was necessary and indispensable party, and
(2) suit fell within original and exclusive jurisdiction of United States Supreme Court.

Affirmed.

West Headnotes

[1] Federal Courts 170B 818

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk818 k. Dismissal. Most Cited Cases
A district court's decision to dismiss for failure to join an indispensable party is reviewed for an abuse of discretion.

[2] Federal Civil Procedure 170A 201

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)1 In General
170Ak201 k. In general. Most Cited Cases
While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder. Fed.Rules Civ.Proc.Rule 19(a)(1), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 203

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)1 In General
170Ak203 k. Who are indispensable parties. Most Cited Cases
If a necessary party cannot be joined without destroying subject-matter jurisdiction, a court must then determine whether that person is "indispensable," that is, whether litigation can be properly pursued without the absent party. Fed.Rules Civ.Proc.Rule 19(a)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 219

170A Federal Civil Procedure
170AII Parties
170AII(E) Necessary Joinder
170AII(E)2 Particular, Necessary or Indispensable Parties
170Ak219 k. Governmental bodies and officers thereof. Most Cited Cases
Tennessee was necessary and indispensable party in action brought by Mississippi alleging that Tennessee municipality wrongfully appropriated groundwater from interstate aquifer, since determination of Tennessee's sovereign interest in its water rights without its participation in suit would have been prejudicial, district court could not have fashioned restrictions in judgment so as to avoid threat of prejudice to Tennessee, and Mississippi would have adequate remedy in equitable apportionment action in Supreme Court. Fed.Rules Civ.Proc.Rule 19(a)(1), 28 U.S.C.A.

[5] Water Law 405 1040

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405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1040 k. In general. Most Cited Cases
(Formerly 405k152(2))
The amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share.

[6] States 360 ⚿6

360 States
360I Political Status and Relations
360I(A) In General
360k6 k. Compacts between states. Most Cited Cases

Water Law 405 ⚿1040

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1040 k. In general. Most Cited Cases
(Formerly 405k127)

Water Law 405 ⚿1042

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1042 k. Interstate compacts or other agreements. Most Cited Cases
(Formerly 405k127)
Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment.

[7] Water Law 405 ⚿1040

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1040 k. In general. Most Cited Cases
(Formerly 405k127)

Water Law 405 ⚿1044

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1043 Federal Regulation and Oversight
405k1044 k. In general. Most Cited Cases
(Formerly 405k127)
Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.

[8] Water Law 405 ⚿1040

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1040 k. In general. Most Cited Cases
(Formerly 405k152(11), 405k127)
Equitable apportionment doctrine applied to determination of relative rights of Mississippi and Tennessee to aquifer located beneath portions of Tennessee, Mississippi, and Arkansas; although that particular water source was located underground, as opposed to resting above ground as lake, aquifer flowed, if slowly, under several states, and it was indistinguishable from lake bordered by multiple states or from river bordering several states depending upon it for water.

[9] Federal Courts 170B ⚿1142

170B Federal Courts
170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts
170Bk1142 k. Supreme Court, exclusive or concurrent jurisdiction. Most Cited Cases
Mississippi's claim against Tennessee municipality for past and future damages, as well as equitable relief related to alleged wrongful appropriation of groundwater from interstate aquifer, that necessarily asserted control over portion of interstate resource that municipality currently utilized pursuant to Tennessee law, clearly implicated Tennessee's water rights and thus suit fell within original and exclusive

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jurisdiction of United States Supreme Court as controversy between two or more States. 28 U.S.C.A. § 1251(a); West's T.C.A. § 68-221-707(a-b).

[10] Water Law 405 ⚿1040

405 Water Law
405II Comprehensive Water Resource Planning and Management in General
405II(C) Interstate Water Resources Management in General
405k1040 k. In general. Most Cited Cases
(Formerly 405k152(4))

A suit involving interstate water does not automatically invoke the jurisdiction of the Supreme Court and strip a federal district court of jurisdiction.

***626** Alan B. Cameron, Larry D. Moffett, Daniel, Coker, Horton & Bell, Oxford, MS, C. Michael Ellingburg (argued), Daniel, Coker, Horton & Bell, Jackson, MS, for Plaintiffs-Appellants.

Leo Maurice Bearman (argued), David L. Bearman, Chad Devon Graddy, Kristine Leporati Roberts, Baker, Donelson, Bearman, Caldwell & Berkowitz, Christopher S. Campbell, Harris Shelton Hanover Walsh, PLLC, Memphis, TN, Barry W. Ford, Walker W. Jones, III, Baker, Donelson, Bearman, Caldwell & Berkowitz, Jackson, MS, Elbert Jefferson, Jr., City of Memphis, Law Div., Memphis, TN, for Defendants-Appellees.

William Barry Turner, Nashville, TN, for Amicus Curiae.

***627** Appeal from the United States District Court for the Northern District of Mississippi.

Before HIGGINBOTHAM, BENAVIDES and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this lawsuit, the state of Mississippi seeks damages from the City of Memphis and Memphis Light, Gas and Water ("MLGW") (collectively, "Memphis"), for the alleged conversion of groundwater in the Memphis Sands Aquifer (the "Aquifer"). The district court dismissed Mississippi's lawsuit without prejudice, holding that Tennessee is an indispensable party to the suit and that the court was without power to join Tennessee. We AFFIRM.

I. BACKGROUND

The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas. There is no interstate compact governing use of the Aquifer's water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas. The Aquifer is the primary water source for both DeSoto County, Mississippi, and the city of Memphis, Tennessee, which lies just across the state line from DeSoto County. Mississippi seeks past and future damages, as well as equitable relief, related to Memphis's allegedly wrongful appropriation of groundwater from the Aquifer. [FN1] Mississippi alleges that part of the groundwater that Memphis pumps from the Aquifer is Mississippi's sovereign property and that the state must therefore be compensated.

> FN1. Although there was some dispute between the parties below as to the basis of jurisdiction, federal question jurisdiction is present both because 28 U.S.C. § 1331(a) includes suits brought by a state and because federal common law will apply to the dispute. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

MLGW, a division of the City of Memphis, owns and operates one of the largest artesian water systems in the world. It is responsible for providing gas, electricity, and water to its residential, business, governmental, and other customers, who are primarily citizens of Memphis. Although three of its groundwater well fields are located near the Tennessee border, all of MLGW's wells are located within Tennessee, and Memphis and Tennessee contend that this municipal water program operates under the direction and control of Tennessee law.[FN2]

> FN2. *See, e.g.*, TENN.CODE ANN. § 68-221-707 (Tennessee Department of Environment and Conservation exercises supervision over operation of public water systems, including features of operation that affect quantity of water supplied). Mississippi contends that Memphis's groundwater pumping is not controlled by Tennessee law, but cites no legal authority for that conclusion, and neither does it address the provisions of Tennessee law cited in Memphis's brief.

Mississippi asserts that MLGW's groundwater pump-

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ing has created an underground "cone of depression" centered under Memphis and extending into Mississippi. Mississippi states that this cone of depression causes groundwater that would otherwise lie beneath Mississippi to flow across the border and into the cone under Tennessee, and thus become available to be pumped by Memphis. Mississippi argues that due to the growth of Memphis's water system the Aquifer is being drawn down at a higher rate than it is being replenished, thus causing water levels to drop.

Mississippi filed its first complaint against Memphis in February 2005. Memphis filed a motion to dismiss on several bases, including that the state of Tennessee***628** was an indispensable party pursuant to Federal Rule of Civil Procedure 19. The motion to dismiss was denied in August 2005. Memphis then moved to "amend" the district court's order or to certify an interlocutory appeal. Construing the motion to amend as a motion for rehearing, the district court denied both motions in September 2005. Memphis filed an answer and subsequent amended answer. Mississippi filed an amended complaint in October 2006, eliminating certain claims and clarifying its request for an award of monetary damages for Memphis's alleged misappropriation of Mississippi's groundwater.

In June 2007, Memphis moved for judgment on the pleadings, again arguing that Tennessee was an indispensable party to the suit. Memphis also moved for partial summary judgment on several of Mississippi's claims. In September 2007, the court denied the motions.

In late January 2008, shortly before the bench trial was to start, the district court announced that it had decided *sua sponte* to revisit the issue of Tennessee's possible status as an indispensable party and thus the court's subject-matter jurisdiction. After briefing from the parties and oral argument, the district court dismissed the suit for failure to include Tennessee, an indispensable party.[FN3] Mississippi appeals.

> FN3. In its opinion dismissing this suit, the district court directed that the Arkansas Attorney General should be put on notice of the pendency of this action and any future action filed in the U.S. Supreme Court, although the court refrained from determining whether Arkansas is also an indispensable party.

II. DISCUSSION

A. Standard of Review

[1] We review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438-39 (5th Cir.2003). Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and "[Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be." *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir.2006). However, "[a] court abuses its discretion when its ruling is based on an erroneous view of the law." *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir.1995).

[2] Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED.R.CIV.P. 19(a)(1). While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after "an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." *Pulitzer-Polster*, 784 F.2d at 1309.

***629** [3] If the necessary party cannot be joined without destroying subject-matter jurisdiction, the court must then determine whether that person is "indispensable," that is, whether litigation can be properly pursued without the absent party. *HS Res.*, 327 F.3d at 439. The factors that the district court is to consider in making this determination are laid out in Rule 19(b):

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> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by; (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED.R.CIV.P. 19(b).

Mississippi contends that the district court misapplied Rule 19 in holding that Tennessee is a necessary and indispensable party because its suit does not implicate any sovereign interest of Tennessee. Mississippi argues that its suit does not require an equitable apportionment of the Aquifer because the state owns the groundwater resources of the state as a self-evident attribute of statehood, and thus there is no interstate water to be equitably apportioned. Mississippi further argues that it is not seeking relief for damages caused by the direct actions of Tennessee, and therefore the suit is not an action between states invoking the original jurisdiction of the Supreme Court.

Memphis responds that the district court correctly determined that the nature of Mississippi's claims and asserted ownership of a water resource that it shares with Tennessee makes Tennessee an indispensable party to suit. Memphis argues that because Tennessee's sovereign ownership rights in the Aquifer water, the same which Mississippi seeks to protect, are implicated, the case cannot be properly resolved without Tennessee's participation. Memphis points to a century of Supreme Court case law addressing the equitable apportionment of interstate waters among states to argue that the district court correctly held that joining Tennessee would create a suit between states that must be filed in the Supreme Court.[FN4]

> FN4. Tennessee, participating in this appeal as *amicus curiae,* asserts that it has a sovereign interest in its share of Aquifer water as great as that asserted by Mississippi, and it therefore is a necessary and indispensable party to any suit over Memphis's withdrawals from the Aquifer.

B. Tennessee is a Necessary Party to this Water Ownership Dispute

[4] The district court held that Tennessee was a necessary party under Rule 19(a)(1) because in its absence complete relief could not be accorded between Memphis and Mississippi. The court explained that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required. In so holding, the district court rejected Mississippi's argument, renewed on appeal, that only Mississippi's water is at issue. Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary is that the Aquifer's water is not an interstate resource subject to equitable apportionment, and therefore Tennessee's sovereign interests are not implicated by the suit.

[5][6] We find that the district court made no error of law as to the necessity of ***630** equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment. *Id.*

[7][8] "Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982). The Supreme Court has described the applicability of this doctrine in broad terms:

> [W]henever ... the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. 46, 97-98, 27 S.Ct. 655, 51 L.Ed. 956 (1907). Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development

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and application of the equitable apportionment doctrine. The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water. *See, e.g.,* Nebraska v. Wyoming, 515 U.S. 1, 115 S.Ct. 1933, 132 L.Ed.2d 1 (1995) (allocation of North Platte River); Wisconsin v. Illinois, 449 U.S. 48, 50, 101 S.Ct. 557, 66 L.Ed.2d 253 (1980) (amending order allocating usage of portions of Lake Michigan).[FN5]

> FN5. A handful of Supreme Court cases mention aquifers in the context of interstate water disputes. *See* Texas v. New Mexico, 462 U.S. 554, 556-57, n. 1, 2, 103 S.Ct. 2558, 77 L.Ed.2d 1 (1983) (discussing role of New Mexico aquifers feeding the Pecos River, subject of litigation, and possible detrimental effects of pumping); Wisconsin, 449 U.S. at 50, 101 S.Ct. 557 (court order amending prior decree with requirements including "to the extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"). While these opinions do not address aquifer allocation directly, the fact that the aquifers were not treated differently from any other part of the interstate water supply subject to litigation supports the conclusion that the Aquifer at issue must be apportioned.

Mississippi argues that it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries, citing to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc. Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries. The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.[FN6] *See, e.g.,* ***631** *Hinderlider,* 304 U.S. at 102 (Colorado's contention that it "rightfully may divert and use ... the waters flowing within her boundaries in this interstate stream ... cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other," quoting *Wyoming v. Colorado,* 259 U.S. 419, 466, 42 S.Ct. 552, 66 L.Ed. 999 (1922)).

> FN6. Notably, the equitable apportionment doctrine has been used to address other migratory interstate resources, including the apportionment of fish that make an interstate migration. *See Idaho v. Oregon,* 462 U.S. 1017, 1024, 103 S.Ct. 2817, 77 L.Ed.2d 387 (1983) ("Although that doctrine has its roots in water rights litigation, the natural resource of [migratory salmon] is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.").

The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation. Therefore, we find no error in the district court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis. *See Pulitzer-Polster,* 784 F.2d at 1309.

C. Tennessee's Joinder Would Destroy Subject-Matter Jurisdiction

[9] After finding Tennessee to be a necessary party, the district court held that it was without power to join the state because original and exclusive jurisdiction over a suit between Mississippi and Tennessee would reside in the United States Supreme Court. *See* 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Mississippi argues that even if Tennessee's presence in the suit is necessary, it does not invoke the Supreme Court's original jurisdiction, and the district court could therefore retain jurisdiction over the case. We disagree.

Mississippi argues that the district court has subject-matter jurisdiction because this suit is only against Memphis, not Tennessee, and would at most be subject to the Supreme Court's original but non-exclusive jurisdiction. *See* 28 U.S.C. § 1251(b)(3) ("The Supreme Court shall have original but not exclusive jurisdiction of ... All actions or proceedings by a State against the citizens of another State."). The Supreme Court has in the past stated a preference that such suits be brought in the district court in the first instance. *See United States v. Nevada,* 412 U.S. 534, 538, 93 S.Ct. 2763, 37 L.Ed.2d 132 (1973). Missis-

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sippi's argument that its suit is not against Tennessee hangs on the assertion that only Memphis's actions, and not Tennessee's, are at issue. *See Milwaukee*, 406 U.S. at 97, 92 S.Ct. 1385 (holding that where Illinois sued Milwaukee for polluting Lake Michigan, not mandatory to sue Wisconsin as well). However, that contention ignores that, in contrast to *Milwaukee*, this suit requires an allocation of water rights between states: Memphis's actions are not wrongful unless there is a defined allocation of water that it is allowed to pump. Tennessee is a necessary party under Rule 19(a) on that basis, and the suit is thus one between two states.

[10] Mississippi correctly argues that a suit involving interstate water does not *automatically* invoke the jurisdiction of the Supreme Court and strip the district court of jurisdiction. However, the cases to which Mississippi analogizes are distinguishable. Four cases upon which Mississippi relies most heavily are suits against the U.S. Army Corps of Engineers ("Corps of Engineers"), not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a). *See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir.2005) ("*Alabama II*") (recognizing that Alabama's suit against ***632** the Corps of Engineers was not a dispute between states, despite intervention of other states as parties, because the litigation was over how the Corps of Engineers should fulfill its obligations under federal law); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1254-55 (11th Cir.2002) (same); *Alabama v. U.S. Army Corps of Eng'rs*, 382 F.Supp.2d 1301, 1309-12 (N.D.Ala.2005) ("*Alabama I*") (same); *also South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir.2003) (same).

Mississippi also relies heavily on *Illinois v. City Milwaukee*, the case that the district court identified as the basis for its earlier rulings denying Memphis's arguments that Tennessee is an indispensable party. 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). *Milwaukee* is distinguishable. *Milwaukee* involved a federal common law nuisance action to stop alleged pollution of Lake Michigan by the city of Milwaukee's sewage disposal practices. The Supreme Court denied Illinois's motion for leave to file a bill of complaint against Wisconsin, holding that the action did not trigger the Supreme Court's exclusive jurisdiction. The Court found that, under appropriate pleadings, Wisconsin could be joined as a defendant, but that it was not a mandatory defendant on the facts of the case. *Id.* at 97, 92 S.Ct. 1385. The Court concluded that the case fell under 28 U.S.C. § 1251(b)(3), giving the Supreme Court original but not exclusive jurisdiction over certain actions, and therefore Illinois could and should file suit in the appropriate federal district court. *Id.* at 108, 92 S.Ct. 1385.

Mississippi argues that *Milwaukee* is a more analogous case than the water-allocation cases because Mississippi, like Illinois, merely seeks to enjoin the actions of the city of Memphis and does not have any claim against Tennessee as a state. Mississippi's argument fails, however, because of the crucial factual difference between the two cases: *Milwaukee* involved stopping the pollution of what was agreed to be an interstate water body, while Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law. *See, e.g.*, TENN.CODE ANN. § 68-221-707(a)-(b) ("The [Tennessee Department of Environment and Conservation] shall exercise general supervision over the operation and maintenance of public water systems throughout the state .... [including] all the features of operation and maintenance which do or may affect the quality or quantity of the water supplied."). Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis. *Cf. Colorado v. Kansas*, 320 U.S. at 393, 64 S.Ct. 176 (noting that controversy between states over rightful shares of the Arkansas River "is not to be determined as if it were one between two private riparian proprietors or appropriators"); *Kansas v. Colorado*, 206 U.S. at 100, 27 S.Ct. 655 (noting the court must consider the effect that one state's increased share of water has on another state in order to determine amount of water each is entitled to from river).

Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).

D. There Was No Abuse of Discretion in Dismissing the Suit

Having concluded that Tennessee is a necessary party whose joinder would deprive the district court of subject-matter jurisdiction, we turn to whether the district***633** court abused its discretion in dismissing the suit under Rule 19(b). When assessing the Rule 19(b) factors, the relevant inquiry is "whether, in equity

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and good conscience, the action should proceed among the existing parties or should be dismissed." FED.R.CIV.P. 19(b); *see Pulitzer-Polster*, 784 F.2d at 1312 ("[W]e must assess the factors set out in Rule 19(b), seeking to avoid manifest injustice while taking full cognizance of the practicalities involved.").

We find no abuse of discretion in the district court's determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed. Clearly a judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights. The specter of a determination of Tennessee's water rights without the its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party. *Cf. Hinderlider*, 304 U.S. at 106-07 (noting that judicial apportionment of water from an interstate stream is binding on all water claimants from each state); *New Jersey v. New York*, 283 U.S. 336, 346, 51 S.Ct. 478, 75 L.Ed. 1104 (1931) ("[A river] offers a necessity of life that must be rationed among those that have power over it.... Both States have real and substantial interests in the River that must be reconciled as best they may."). Further, there was no error in the district court's finding that it could not fashion restrictions in the judgment so as to avoid the threat of prejudice to Tennessee's sovereign interests or that a judgment rendered without Tennessee's participation would be inadequate. *Cf. Idaho v. Oregon*, 462 U.S. 1017, 1025, 103 S.Ct. 2817, 77 L.Ed.2d 387 (1983) ("[W]henever ... the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them...."); *Colorado v. Kansas*, 320 U.S. at 392, 64 S.Ct. 176 ("The reason for judicial caution in adjudicating the relative rights of states [to shares of interstate water] is that ... they involve the interests of quasi-sovereigns, [and] present complicated and delicate questions....").

Finally, Mississippi will have an adequate remedy despite this suit's dismissal. *See* 28 U.S.C. § 1251(a). In an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of Aquifer water that may be withdrawn by either party. *See Colorado v. Kansas*, 320 U.S. at 391, 64 S.Ct. 176; *New Jersey*, 283 U.S. at 346, 51 S.Ct. 478.[FN7]

FN7. Of course, the parties might also negotiate an interstate compact allocating the resource going forward rather than continue litigation. *See Colorado v. Kansas*, 320 U.S. at 392, 64 S.Ct. 176 (encouraging the parties to seek a negotiated, political solution rather than requiring the Supreme Court to make a necessarily imperfect determination).

III. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

C.A.5 (Miss.),2009.
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