

# American Indian Law Review

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Volume 29 | Number 1

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1-1-2004

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### Recommended Citation

Jennifer E. Pelphrey, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127 (2004), <https://digitalcommons.law.ou.edu/air/vol29/iss1/5>

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# OKLAHOMA'S STATE/TRIBAL WATER COMPACT: THREE CHEERS FOR COMPROMISE

Jennifer E. Pelphrey\*

## *I. Introduction*

In 2001, the State of Oklahoma and the Choctaw and Chickasaw Tribes of Oklahoma negotiated a compact for water rights. This State/Tribal Water Compact (the Compact) helped avoid the possibility of years of litigation and expense in pursuit of a water rights allocation settlement among these parties. The Compact was presented to the Oklahoma state legislature for approval in February 2002, but is currently on hold pending a further study of Oklahoma's water needs. The state legislature also imposed a three year moratorium on water sales during the time necessary to complete the study. When the time comes for the Oklahoma legislature to reconsider this Compact, it should be approved as a valuable compromise that is good for both the State and the Tribes involved.

This Comment will discuss the historical background that gives the Choctaw and Chickasaw Tribes a nonfrivolous claim to the water in southeastern Oklahoma and why compacting is a desirable method to resolve water rights issues with the State. It will then outline a similar tribal-state compact recently enacted in Florida, and discuss the Oklahoma Compact as it is currently drafted. Finally, it will discuss the benefits and drawbacks of the draft Compact from the point of view of the Tribes and address some of the mainstream public concerns about the Compact and the possibility of resulting water sales. The conclusion will endorse the usefulness of this Compact as a means to further economic growth in the State of Oklahoma.

## *II. Why the Tribes Have a Legitimate Claim to Water Rights*

### *A. The Appropriative and Riparian Doctrines and Oklahoma's Dual System*

The Choctaw and Chickasaw Nations have laid claim to the water on their lands in southeastern Oklahoma under several authorities. The first authority is enforcement of their riparian water rights. Water rights are typically classified as either riparian or appropriative rights. A riparian property owner may use any

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water running through or beside his land.<sup>1</sup> This right to use “runs with the land,”<sup>2</sup> and is not forfeited by non-use.<sup>3</sup> Riparian rights cannot be quantified, because the only limit to the amount of water each riparian owner may use is an amount that is “reasonable.”<sup>4</sup>

The alternative classification is appropriative water rights. The appropriative system uses a “first in time, first in right” rule when there is a shortage,<sup>5</sup> and recognizes a right to the water only when it is continuously applied to a “beneficial use.”<sup>6</sup> The appropriative system is typically used in arid regions where water shortages are common.<sup>7</sup>

Oklahoma has traditionally used a “dual” water rights system, combining the appropriative and riparian systems because the western half of the state is arid and the eastern half is not.<sup>8</sup> In 1963, the Oklahoma legislature amended state statutes to restrict future riparian rights and adopted a “unitary” appropriation system,<sup>9</sup> but the “dual” system was reinstated after the 1990 Oklahoma Supreme Court decision in *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board* held that the statutory amendments would allow for unconstitutional takings of unused riparian rights still available for future use.<sup>10</sup> Riparian water rights exercised under state law are to be governed by the following rules established in *Franco-American*: “(1) the modified common law riparian right to the reasonable use of the stream is the controlling law in Oklahoma; and (2) the statutory right to appropriate water does not preempt or diminish the riparian common law right.”<sup>11</sup> Under these guidelines, it seems that

1. Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 983 (1998).

2. WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 400 (4th ed. 2004) [hereinafter NUTSHELL].

3. *Id.*

4. Helton, *supra* note 1, at 983 (quotations in original omitted); see also WATERS AND WATER RIGHTS § 7.02(d)(2) (Robert E. Beck ed., 1991 ed., 2001 repl. vol.) (discussing the term “reasonableness” as a relationship).

5. Jessica Bacal, *The Shadow of Lone Wolf: Native Americans Confront Risks of Quantification of Their Reserved Water Rights*, 12 U. BRIDGEPORT L. REV. 1, 16 (1991) (quotations in original omitted).

6. Helton, *supra* note 1, at 983-84 (citing Gary D. Allison, *Franco-American Charolaise: The Never Ending Story*, 30 TULSA L.J. 1, 6-7 (1994)).

7. *Id.* at 983.

8. *Id.* at 984.

9. *Id.* at 986.

10. *Id.*; see *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568, 577 (Okla. 1990).

11. Lisa McDonnell, *Promotion of Ecological and Conservation Values Under the Decision in Franco*, in *THE IMPACT OF FRANCO-AMERICAN CHAROLAISE, LTD. V. OKLAHOMA*

Choctaw and Chickasaw claims to water rights under the riparian doctrine of reasonable use would be upheld because riparian rights have priority over prior appropriators.<sup>12</sup>

### *B. The Winters Doctrine and Reserved Rights*

The full consequences of the *Franco-American* decision to the Choctaw and Chickasaw Tribes are somewhat unclear because a state court decision does not apply to the Tribes' federally issued reserved water rights under the *Winters* doctrine.<sup>13</sup> When the federal government moved Indian tribes onto reservations, it created Indian water rights by allowing the Tribes enough water to use the reserved land for its intended purpose.<sup>14</sup> Even if the agreements creating these Indian reservations did not specifically mention water, the federal government knew that the displaced Tribes would require water if they were to fulfill the government's purpose of becoming a "pastoral and civilized people."<sup>15</sup> Reserved Indian water rights do not require current "beneficial use,"<sup>16</sup> and the rights are retained even if the water is not used.<sup>17</sup> *Winters v. United States*<sup>18</sup> was the first case to adopt the view that tribal water rights do exist, and courts have followed the "*Winters* doctrine" in determining outcomes in subsequent water rights litigation.

### *C. The Five Tribes Doctrine*

Southeast Oklahoma is unique from other tribal reservation areas because of the Five Tribes doctrine.<sup>19</sup> The federal government removed the Five Civilized

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WATER RESOURCES BOARD 249, 252 (Drew L. Kershen ed., 1995) [hereinafter *IMPACT OF FRANCO-AMERICAN*] (quoting *Franco-American*, 855 P.2d at 575-76) (quotations in original omitted).

12. Michelle Lynn Gibbens, *Is Franco Moot When It Comes to Tribal and Interstate Claims to Oklahoma Water?*, in *IMPACT OF FRANCO-AMERICAN*, *supra* note 11, at 219, 243. The Choctaw and Chickasaw Nations' lands are located in the eastern non-arid portion of Oklahoma, which has traditionally used the riparian water rights system.

13. *See id.* at 243.

14. Karen Crass, *Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. DENV. WATER L. REV. 109, 111 (1997).

15. Helton, *supra* note 1, at 988 (quoting *Winters v. United States*, 207 U.S. 564, 576 (1908)) (quotations in original omitted).

16. Bacal, *supra* note 5, at 18 (citing Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1298, 1302 (1974)).

17. NUTSHELL, *supra* note 2, at 406.

18. 207 U.S. 564 (1908).

19. *See* Helton, *supra* note 1, at 993.

Tribes to specific unsettled lands within the Indian Territory.<sup>20</sup> At that time it also granted federal land patents to the Five Tribes and the Tribes were authorized to issue tribal patents in the case of a transfer of their tribal land.<sup>21</sup> The doctrine holds that this “permanent homeland”<sup>22</sup> includes rights to all the water within it, not just enough to fulfill the land’s purpose, as under the *Winters* doctrine.<sup>23</sup> In addition, the Supreme Court has held in past decisions that the federal government conveyed specific lands directly to Indian tribes,<sup>24</sup> and that a state that later enveloped tribal land did not inherit rights to the water on that land.<sup>25</sup> The Tribes also point to Oklahoma’s 1906 Enabling Act, federal legislation which says that the State Constitution shall not limit the rights held by the Indians of Oklahoma.<sup>26</sup> The Oklahoma State Constitution, as adopted in 1907, further provides that non-Indian inhabitants of the State do not have rights to Indian lands.<sup>27</sup> The Five Tribes doctrine emphasizes that under federal legislation treating the Five Tribes differently from other tribes on reservations, the Choctaw and Chickasaw Tribes in southeastern Oklahoma would own all the water on their lands, and would not be subject to state authority as to its use or non-use.

#### D. Federal Treaties

As further evidence of the water rights possessed by the Five Civilized Tribes, the Choctaws and Chickasaws point to specific treaties between them and the United States government signed during the 1830s.<sup>28</sup> The treaties indicated that these Tribes would be provided land to inhabit without interference from the government.<sup>29</sup> The Choctaws point specifically to the

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20. *Id.* The Five Civilized Tribes include the Choctaw, Chickasaw, Cherokee, Seminole, and Creek Nations.

21. Oklahoma Water Resources Board, *Status Report on the Joint State/Tribal Water Compact and Water Marketing Proposals, Status Report to the Office of the Governor* 12 (Mar. 2002), available at [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status) [hereinafter *Status Report*].

22. Helton, *supra* note 1, at 993.

23. *Id.* at 994-95.

24. Gibbens, *supra* note 12, at 238 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970)).

25. *Id.* at 238 (citing *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960)). The Cherokee Tribe was one of the Five Civilized Tribes relocated to Oklahoma.

26. *Status Report, supra* note 21, at 12; see also *Cherokee Nation v. Oklahoma*, 461 F.2d 674 (10th Cir. 1972); *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960).

27. *Status Report, supra* note 21, at 12-13.

28. *Id.* at 12.

29. *Id.*

1830 Treaty of Dancing Rabbit Creek,<sup>30</sup> in which the federal government issued to them land and water rights in southeastern Oklahoma.<sup>31</sup> The Treaty promises that the Choctaw Nation will have

jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State.<sup>32</sup>

Under this Treaty, the Choctaw rights to the water within its tribal boundaries were conveyed with the land. The Chickasaws signed a similar federal treaty in 1832.<sup>33</sup>

### *E. Tribal Authority*

Once the Tribes have established their rights to the water on their lands, they need to show the authority to negotiate with the State on behalf of their members. The Tribes have the authority to enter into agreements because they hold these water rights in trust for the tribal members.<sup>34</sup> The court in *Hayes v. Barringer*<sup>35</sup> decided that lands held by the Choctaw and Chickasaw Nations at that time were held

in trust for the individual members of their tribes, . . . were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just share of them against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or of the Indian Nations.<sup>36</sup>

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30. Treaty with the Choctaw, Sept. 27, 1830, U.S.-Choctaw Nation, 7 Stat. 333. This treaty is also called the Treaty of Dancing Rabbit Creek.

31. Memorandum on the Sale of Water to North Texas, Choctaw Nation 2 (Nov. 2001) (on file with author) [hereinafter Choctaw Nation Memorandum] (citing Treaty with the Choctaw, *supra* note 30).

32. Treaty with the Choctaw, *supra* note 30, at art. 4.

33. Treaty with the Chickasaw, Oct. 20, 1832, U.S.-Chickasaw Nation, 7 Stat. 381.

34. Choctaw Nation Memorandum, *supra* note 31, at 4.

35. 168 F. 221 (8th Cir. 1909).

36. Choctaw Nation Memorandum, *supra* note 31, at 5 (quoting *Hayes*, 168 F. at 222) (quotations in original omitted); *see also* *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Wallace v. Adams*, 143 F. 716 (1906); *Ligon v. Johnston*, 164 F. 670 (1908) (cases

This reasoning still applies today and gives the Tribes the authority to enter into a compact with Oklahoma.

This background set the stage for the possibility of a long and torturous road of litigation between the Tribes and the State to clearly define which parties are entitled to rights and use of water in specific areas. These parties undoubtedly considered all their settlement options before deciding to negotiate a compact.

### *III. Alternatives to Compacting*

There are several settlement options outside of compacting that parties could consider before any water rights negotiations begin, such as legislation, contracts, or litigation.<sup>37</sup> The most viable alternative in many situations is litigation. Litigation is attractive because it settles the legal questions at issue with finality and is therefore the most effective means of quantifying rights,<sup>38</sup> but there are also many drawbacks that may discourage parties from pursuing this option. Litigation has “proven [in many situations] to be a circuitous and hazard-strewn route.”<sup>39</sup>

The costs of litigation can be prohibitive. For example, in one Wyoming water rights suit, the Wind River Tribes estimated spending over \$9 million dollars defending their rights, while the State of Wyoming spent almost \$10 million, the Bureau of Indian Affairs spent almost \$2 million and the United States Justice Department spent over \$850,000.<sup>40</sup> These costs encompassed only the legal and consulting fees resulting from the litigation.<sup>41</sup> Additionally, once a verdict was reached, the parties would have to pay for any storage or facility construction costs that were deemed necessary.<sup>42</sup>

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cited by the *Hayes* court).

37. Bacal, *supra* note 5, at 25 (citing John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights*, 28 NAT. RESOURCES J. 63, 70-71 (1988)). Professor Folk-Williams asserts that a contract could be used if the parties want to resolve conflicts on a narrow issue, but do not need to negotiate problems of legal entitlement. Legislation would be a good choice if a party is seeking additional funding. Litigation would result in a declaration of rights binding on all the parties.

38. See Bacal, *supra* note 5, at 25.

39. *Id.* at 25-26 (quoting David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 521 (1988)) (quotations in original omitted).

40. *Id.* at 26.

41. *Id.*

42. *Id.*

Litigation can also be quite time-consuming. Suits can often continue for up to fifteen or twenty years,<sup>43</sup> and courts usually are not willing to decide water administration issues until water rights are quantified.<sup>44</sup> This means that no action can be taken until the water rights litigation is fully completed. Even when a judgment is rendered, the next steps are often uncertain. A court verdict delivers only “paper rights”<sup>45</sup> and not any actual water or funding to use the water.<sup>46</sup> This could be a problem when Indians on a tribal reservation are dependent on funding from the federal government for their actual water usage.<sup>47</sup>

Furthermore, because the federal government would be acting as a trustee for the tribes in representing their interests in litigation, if the litigation were unsuccessful the Indian tribes would have to show an “abuse of discretion by the government”<sup>48</sup> to prove that they deserved a further opportunity to develop their case in court.<sup>49</sup> Bias may also be an issue because states will be litigating against the tribes in state courts,<sup>50</sup> and state courts may not be experts on the federal water laws they are charged with enforcing.<sup>51</sup>

Because both the State and the Tribes came to see that litigation was a less than ideal solution, they decided to consider an alternative — compacting.

#### IV. *Compacting*

Both the State of Oklahoma and the Choctaw and Chickasaw Tribes can show legitimate claims to the water rights in southeastern Oklahoma. This fact provides them a good reason to work together to resolve their differences and to be able to mutually benefit from possible water sales to other states in the future. Compacting is a good option for these parties because it is effective in solving jurisdictional and quantification problems.<sup>52</sup> The Supreme Court has indicated

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43. Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 ARIZ. L. REV. 195, 197 n.19 (1994).

44. Peter W. Sly & Cheryl A. Maier, *Indian Water Settlements and EPA*, 5 SPG NAT. RESOURCES & ENV'T 23, 24 (1991).

45. Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 100 (1994).

46. *Id.*

47. Bacal, *supra* note 5, at 27 (citing Note, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 YALE L.J. 1689, 1703 (1979)).

48. *Id.* at 28.

49. *Id.*

50. *Id.* at 29.

51. McGovern, *supra* note 43, at 201-02.

52. Bacal, *supra* note 5, at 25.

its preference for settling water rights issues out of court,<sup>53</sup> and there are several advantages to reaching a settlement.

Working out a settlement agreement provides a good opportunity for the parties to openly negotiate the issues.<sup>54</sup> Because the parties are not pressured to agree on each issue, they may more freely discuss their differences. The parties do not have to settle all their differences at once and can reach a compromise instead of a final determinative judgment.<sup>55</sup> The talks can also encompass other issues such as the administration of regulations or the possibility of water sales.<sup>56</sup> Perhaps one of the most attractive qualities of settling through a compact is the shorter period of time in which an agreement can be reached.<sup>57</sup>

Once a compact is approved, each party to the compact must adhere to its provisions unless they all agree to change or abandon the compact.<sup>58</sup> This fact provides the parties enough security to take the process seriously.

### V. *The Florida Seminole Compact*

#### A. *Background*

The Seminole Water Rights Compact of 1987<sup>59</sup> provides a model for any proposed Oklahoma state/tribal compact because it represents the initial recognition of Indian water rights in a riparian state, in this case Florida.<sup>60</sup> The Seminole Water Compact was part of a larger agreement dealing with land claims in addition to water claims.<sup>61</sup> The parties acknowledged that although

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53. John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What Are the Questions?*, 24 AM. INDIAN L. REV. 1, 2 (2000); Sly & Maier, *supra* note 44, at 25; *see, e.g.*, *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *Wyoming v. United States*, 492 U.S. 406 (1989); *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989).

54. McGovern, *supra* note 43, at 197 n.19 (1994) (citing Susanna Eden & Mary G. Wallace, University of Arizona Water Resources Research Center, *Arizona Water Information and Issues*, 29-30 (1992)).

55. *See* Sly & Maier, *supra* note 44, at 25.

56. *See* McGovern, *supra* note 43, at 197 n.19.

57. *See id.* The Oklahoma legislature authorized state officials to begin water resource development discussions with the Tribes in May 1999 and the parties had released the draft Compact by November 2001.

58. Davidson, *supra* note 53, at 2 (citing *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)).

59. *See* Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENVTL. L. 1 (1990).

60. *Id.* at 2.

61. *Id.* at 3. The larger agreement is called the Seminole Indian Land Claims Settlement Act of 1987.

conflicts over land titles had initially prompted negotiations for a settlement, resolution of conflicts over water rights and state jurisdiction issues would be just as important for a lasting compromise.<sup>62</sup>

Tribal concerns about water rights in Florida began when citrus and other types of businesses near the Seminoles' West Big Cypress Reservation began planning groundwater diversions.<sup>63</sup> The Tribe realized that these plans could have a negative effect on its own reservation's groundwater.<sup>64</sup> In addition, canal water to which the Tribe was entitled under a state permit system was routinely not available due to mismanagement of the canal system.<sup>65</sup> The Seminole Tribe also had problems with neighboring landowners improperly diverting water onto or away from tribal land.<sup>66</sup> Therefore, the Tribe realized that it would have to take action to protect and enforce its water rights.

Meanwhile, the State of Florida enacted a comprehensive Water Resources Act that established a regulatory system for water rights.<sup>67</sup> The conflict between the State and Tribe came to a head when the Seminoles argued that the State had no right to dictate how the Tribe conducted its own activities on its own land and refused to comply with the State's regulations.<sup>68</sup> The Tribe adopted the *Winters* doctrine rationale for its water claims and also argued that, in the alternative, they had riparian and groundwater use rights.<sup>69</sup> The two sides found themselves at an impasse and agreed that, due to the drawbacks of litigation, negotiating a compact was the way to solve some major conflicts that needed attention before they developed into an unmanageable situation.<sup>70</sup>

Through this settlement, the Tribe hoped to retain specific rights to enough water to meet its current needs and sustain future growth while also shielding itself from adjacent landowners who might infringe on those rights.<sup>71</sup> It also hoped to maintain a measure of independence from state regulation.<sup>72</sup>

Knowing that the Tribe was looking to maintain some independence from state regulation, the State pursued "an enforceable commitment from the

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62. *See id.* at 7.

63. *Id.* at 8.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.* at 11.

71. *Id.*

72. *Id.* at 14.

Tribe”<sup>73</sup> in which the Tribe would agree to not undermine Florida’s water and environmental policies in administrating its own regulatory policies.<sup>74</sup>

### *B. Seminole Compact Provisions*

The Seminole Compact successfully addressed both tribal and state concerns, and the Tribe was able to keep its autonomy from state regulation. It agreed to comply with the “essential terms and principles of the state [water management] system”<sup>75</sup> without having to follow the letter of state law.<sup>76</sup> In return for the State’s nonintervention, the Seminole Tribe agreed to comply with the State’s water management guidelines through its own water code, and agreed to submit to personal jurisdiction in federal court if it did not adhere to the terms of the Compact.<sup>77</sup>

The Seminole Compact was a successful compromise because both sides gave up something of value in order to gain an equally valuable benefit. The Tribe retained its water rights without risking an unfavorable court ruling, but also gave up the possibility of expanding the scope of those rights through a favorable court ruling.<sup>78</sup> The State acknowledged the validity of the current tribal water rights but also gained immediate tribal compliance with the goals of its water management system.<sup>79</sup>

### *C. Comparison to Oklahoma Compact*

In comparing the Seminole Compact with the Oklahoma Compact, one can see that the “something of value” that a tribe is willing to give up can mean very different things in different situations. While the Seminole Compact was spurred by Florida’s lack of acknowledgement of tribal water entitlements and the implementation of a regulatory system that the Tribe refused to acknowledge, Oklahoma’s State/Tribal Compact came about because the Tribes wanted the opportunity to benefit from the water resource the State was proposing to sell. Therefore, the results of the two compacts, and the compromises to which each of the Tribes necessarily agreed, corresponded with those unique circumstances.

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73. *Id.* at 11.

74. *Id.* at 11-12.

75. *Id.* at 14 (quoting the Seminole Compact, which is published in *Seminole Indian Land Claims Settlement Act of 1987: Hearings on S. 1684 Before the Senate Select Comm’n on Indian Affairs*, 100th Cong. 83-122 (1987)) (quotations in original omitted).

76. *Id.* at 14.

77. *Id.* at 23.

78. *Id.* at 24.

79. *Id.*

In its negotiations with the State of Florida, the Seminole Tribe was interested in retaining its autonomy and did not want to relinquish any administrative control to the State. The Choctaws and Chickasaws, on the other hand, were willing to give Oklahoma administrative control in return for a portion of any net revenue generated by future water sales. While the Seminoles just wanted their fair share of land and water to use as a resource, the Choctaws and Chickasaws were more interested in economic development that might be encouraged by proper management of the valuable resource in abundance on their lands. Thus, while the two compacts addressed many of the same issues commonly confronted in a riparian state, they inevitably offered different compromises that best suited the Tribes' differing objectives.

## VI. Oklahoma State/Tribal Compact

### A. Background

The State of Oklahoma owes the federal government approximately \$38 million<sup>80</sup> in outstanding debt relating to construction of Sardis Lake by the Army Corps of Engineers between 1975 and 1982.<sup>81</sup> Through the provisions of the Sardis Lake Water Storage Contract, if the State pays this debt, the federal government will allow it to use Sardis Lake as a reservoir for part of its water supply.<sup>82</sup> In order to fund debt payments, the State began to explore the possibility of water development in southeastern Oklahoma, including water sales.<sup>83</sup> Once the Choctaw and Chickasaw Nations learned that State officials had begun negotiations with the North Texas Municipal Water District in 1992, they laid claim to the water the State was proposing to sell.<sup>84</sup> They claimed rights to this water based on the historical events discussed above.

Formal authorization for the State to pursue discussions with the Tribes regarding water development plans did not come until May 1999, when the Oklahoma legislature adopted House Concurrent Resolution (HCR) 1066.<sup>85</sup> At

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80. *Status Report*, *supra* note 21, at 43.

81. *Id.* at 2.

82. *Id.* at 3. From 1984 to 1989, Oklahoma made its annual debt payments. The legislature decided not to authorize further payments after 1989, but two more payments were made in 1997 and 1998. The State has paid the Army Corps of Engineers a grand total of approximately \$4.4 million, leaving an outstanding balance of approximately \$38 million, including late payment interest. See also the Sardis Water Storage Contract Payments chart found in *id.* at 4.

83. *Id.* at 1.

84. *Id.* at 12.

85. *Id.* at 14-15; see H.R. Con. Res. 1066, 1999 Leg., 1999 Reg. Sess. (Okla. 1999). House Resolution 1066 authorized the Oklahoma Water Resources Board to conduct meetings with

this point, the two sides began initial discussions on the possibility of a water rights compact, and these discussions eventually led to the November 2001 unveiling of the draft State/Tribal Water Compact.<sup>86</sup> Twenty-two southern Oklahoma counties are included within the Compact's parameters, and a portion of the land included was once Choctaw and Chickasaw tribal land.<sup>87</sup>

The Compact area houses six major river basins which support these six major reservoirs: Atoka Lake and McGee Creek Lake in the Muddy Boggy Creek Basin, Sardis Lake and Hugo Lake in the Kiamichi River Basin, Pine Creek Lake in the Little River Basin, and Broken Bow Lake in the Mountain Fork River Basin.<sup>88</sup> The Clear Boggy and Blue River Basins are the other two river basins included in the Compact area.<sup>89</sup>

### *B. Main Provisions*

The Compact is a compromise agreement between the Tribes and the State that impacts management of the water existing in the Compact area.<sup>90</sup> The purposes of the Compact include "resolv[ing] mutually exclusive state-tribal claims to water rights," "utilizing one set of water quality standards," and "provid[ing] the framework for [further] economic development in [southeastern] Oklahoma."<sup>91</sup> The Compact will also establish a commission for administrative purposes.<sup>92</sup>

#### *1. Resolving Claims to Water Rights*

As outlined above, the Tribes appear to have a legitimate, nonfrivolous claim to water rights that the State also claims in southeastern Oklahoma. This

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representatives of the Choctaw and Chickasaw Nations and empowered local citizens and entities to formulate a comprehensive Kiamichi River Basin Water Development Plan to address water resources issues in the Kiamichi River Basin.

86. *Id.* at 6.

87. *Id.* at 16. The Compact applies to all or parts of the following counties: McCurtain, LeFlore, Haskell, Latimer, Pushmataha, Choctaw, Bryan, Atoka, Pittsburg, Coal, Marshall, Johnston, Pontotoc, Garvin, Murray, Carter, Love, McClain, Hughes, Jefferson, Stephens, and Grady.

88. *Id.* at 2.

89. *Id.*

90. Ray Carter, *State-Tribal Water Compact Draft Unveiled*, J. REC. (Okla. City), Nov. 15, 2001, available at 2001 WL 4527561.

91. Oklahoma Water Resources Board, *Status Report on the Joint State/Tribal Water Compact and Water Marketing Proposals, Draft State/Tribal Water Compact, Public Discussion Draft 1* (Mar. 2002), available at [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status) [hereinafter *Water Compact*].

92. *Id.* at 14.

Compact specifies a release of tribal claims to the “appropriation rights to stream water” in the Compact area and allocation rights to the use of groundwater in the Compact area.”<sup>93</sup> This means that the State would have full water rights administration authority.<sup>94</sup> The terms of the Compact include the opportunity for the Tribes to have input on any changes proposed for water use rules and permit applications in the Compact area, and further opportunity for arbitration to block undesirable water uses or amendments to the Compact.<sup>95</sup> The Compact allows for arbitration in cases where changes to the Compact negatively affect the economic security or sovereignty of the Tribes, violate Oklahoma Water Resources Board (OWRB) rules or current water marketing contracts, or allow for water use in quantities “in excess of [an applicant’s] present or future needs.”<sup>96</sup>

The Compact further emphasizes guidelines for water use and water resources development by ranking water users in order of priority.<sup>97</sup> Users with the highest priority are those located in the affected counties in southeastern Oklahoma.<sup>98</sup> The next priority is the remainder of Oklahomans.<sup>99</sup> The third consideration is for maintaining adequate lake and reservoir levels in the Compact area, followed by consideration for any necessary “water and wastewater infrastructure projects” in the area.<sup>100</sup> State, tribal, and municipal obligations to the United States for water storage construction and maintenance costs, river integrity, and wildlife protection areas adjacent to the reservoirs complete the priority list for those affected by the Compact.<sup>101</sup>

The Compact allows for the possibility of out-of-state water sales as negotiated by state officials only after approval by the Tribes, the Oklahoma Governor, and the state legislature.<sup>102</sup> Such a sale contract could not continue indefinitely, and would have to include an express rejection of potential “downstream dependency” claims.<sup>103</sup> A sale contract would also have to allow for alteration of the agreement to raise water prices and allow for reduction of

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93. *Id.* at 3.

94. *Id.*

95. *See id.* at 4-6.

96. *Id.* at 5-6.

97. *Id.* at 6-7.

98. *Id.* at 6.

99. *Id.*

100. *Id.* at 6-7.

101. *Id.* at 7.

102. *Id.*

103. *Id.*

water supply based on emergency situations.<sup>104</sup> Sales of groundwater would be off limits, as would sales of water for recreational purposes.<sup>105</sup> The water sold would have to be water that the buyer actually needs.<sup>106</sup>

## 2. *Water Quality Standards*

Congress' Clean Water Act did not include water quality regulations directly aimed at tribal lands, but tribes may be indirectly affected by state programs enacted to comply with this Act.<sup>107</sup> Because of this fact, an Indian tribe can apply to the federal government for Environmental Protection Agency (EPA) treatment as a state.<sup>108</sup> This "tribe as state" (TAS) status allows a tribe to assume responsibility for many aspects of federal environmental programs on its lands.<sup>109</sup> For a tribe to qualify for TAS status, the Administrator of the EPA must determine that the tribe has "a governing body that has authority to carry out substantial governmental powers and duties,"<sup>110</sup> that the tribe can "[carry] out the functions of an effective water quality standards program,"<sup>111</sup> and that the tribe has the "capability to administer such a program."<sup>112</sup>

The Compact allows the Tribes to adopt Oklahoma's water quality standards or to establish their own water quality standards in the event one of the Tribes is approved for TAS treatment under the Clean Water Act.<sup>113</sup> If the Tribe qualifies under TAS status to adopt its own standards, those standards would only apply to its own waters running through its land.<sup>114</sup> The Tribes would be able to submit a claim for arbitration if they believe the State's proposed water quality standards would negatively affect the water on their lands.<sup>115</sup> The State would have the same claim for arbitration if it believes a tribal water quality standard would negatively affect its own land.<sup>116</sup> The Compact emphasizes

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104. *Id.* at 8.

105. *Id.*

106. *Id.*

107. Jane Marx et al., *Tribal Jurisdiction Over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 325 (1998).

108. *See id.*

109. *Id.*

110. Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 380 (1997) (citing 40 C.F.R. § 131.8(b) (1996)).

111. *Id.* (quoting 40 C.F.R. § 131.8(a)(4) (1996)) (quotations in original omitted).

112. *Id.* (citing 40 C.F.R. § 131.8(b) (1996)).

113. *Water Compact*, *supra* note 91, at 10; *see* 33 U.S.C. § 1313 (2000) (Oklahoma's water quality standards and implementation plans); *id.* § 1377(e) (Indian tribes' treatment as states).

114. *Water Compact*, *supra* note 91, at 10.

115. *Id.* at 12.

116. *Id.*

communication between parties so that neither side is negatively affected by the other side's water quality decisions.<sup>117</sup>

A good working relationship between parties will be vital when it comes to water quality issues. Because water in a river, by its nature, continuously flows and does not stay on any one parcel of land for long, it is very important for upstream and downstream landowners to come to terms on acceptable water quality standards.

### 3. *Framework for Economic Development*

Net revenue from any sale of water would be split evenly between the State of Oklahoma and the Choctaw and Chickasaw Tribes, giving "50% to the State, 37.5% to the Choctaw Nation, and 12.5% to the Chickasaw Nation."<sup>118</sup> Both the Tribes and the State agree that revenues will be spent primarily on economic development in the southeastern Oklahoma area affected by the Compact.<sup>119</sup> State spending could be for projects including water infrastructure development and other economic development.<sup>120</sup> Appointed citizens of southeastern Oklahoma communities would be trustees of the funds and would see that they were properly distributed.<sup>121</sup> The Tribes' revenues would be used "only for economic development, education, tribal government [and] . . . service programs, . . . health care, . . . housing, . . . and other similar programs" for their members.<sup>122</sup>

### 4. *Compact Commission*

The Compact also creates the Southeast Oklahoma State-Tribal Intergovernmental Compact Commission (Commission).<sup>123</sup> The Commission

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117. *Id.* at 11. Allowing tribes to regulate their own water quality may sometimes cause problems. *See, e.g., City of Albuquerque v. Browner*, 865 F. Supp. 733 (D.N.M. 1993). The Isleta Indian Pueblo in New Mexico applied and qualified for TAS status. The Pueblo then adopted and the EPA approved a higher standard for the Pueblo's water quality, which was then applied to the upstream city of Albuquerque. The city's costs skyrocketed as they were forced to comply with the almost unattainable water quality standards set by the Pueblo. The Oklahoma Compact seeks to avoid this type of problem by providing for tribal consultation, and if necessary, arbitration, with the State prior to any implementation of stricter water quality standards under TAS authority.

118. *Id.* at 8.

119. *Id.* at 8-9.

120. *Id.*

121. Carter, *supra* note 90, at 4.

122. *Water Compact*, *supra* note 91, at 9.

123. *Id.* at 14 (quotations in original omitted).

would be responsible for recommending changes to state and tribal laws and rules, financing water monitoring, maintaining and operating the infrastructure, administering water sale contracts, and obtaining financing for infrastructure projects.<sup>124</sup>

### VII. Water Sale Contract Proposals

After HCR 1109 was passed by the Oklahoma legislature in May 2000, the OWRB was free to accept proposals from outside parties for water sale contracts.<sup>125</sup> Two proposals in particular were pursued, and the OWRB staff, along with the Choctaws and Chickasaws, held negotiations with these two parties.<sup>126</sup> The OWRB determined that, if approved, both of these water sales could proceed simultaneously, while still maintaining adequate water supplies for the people of Oklahoma.<sup>127</sup> As a safeguard, the Compact provides that every “out of state use of water must be authorized by the [Oklahoma] Governor and Tribal Nations and approved by the Oklahoma Legislature.”<sup>128</sup>

#### A. North Texas Water Agency (NTWA)

The NTWA proposal sought to buy water from the Kiamichi, Little River, and Mountain Fork Rivers<sup>129</sup> in return for an approximate payment of \$339 million over the life of the contract term.<sup>130</sup> The NTWA would have also been responsible for funding any “water transfer infrastructure”<sup>131</sup> necessary to complete the transfer.<sup>132</sup> Oklahoma citizens would have felt little or no impact in water supply from this sale because the NTWA would have been allowed to buy only excess “water flowing unused out of the State of Oklahoma into the Red River or [into] . . . Arkansas.”<sup>133</sup> Discussions with the NTWA broke down

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124. *Id.* at 15-17.

125. House Resolution 1109, in general, authorized the OWRB to develop a plan “to efficiently utilize the water supplies of the Kiamichi River for the benefit of the Kiamichi River basin region and adjacent regions in the state.” H.R. Con. Res. 1109, 2000 Leg., 2000 Reg. Sess. (Okla. 2000).

126. *Status Report*, *supra* note 21, at 8.

127. *Id.* at 24.

128. *Water Compact*, *supra* note 91, at 7.

129. *Status Report*, *supra* note 21, at 26.

130. *Id.* at 44.

131. *Id.* at 26.

132. *Id.*

133. *Id.* The potential impact of a water sale on water flows into Arkansas is a consideration, and any contract for sale would have to comply with water diversion stipulations found in the Red River Compact. State parties to the Red River Compact include Oklahoma, Arkansas,

in early 2002 because the two sides could not agree on how much the water was worth, but both sides remain optimistic that talks will continue in the future.<sup>134</sup>

The NTWA water sale proposal drew significant attention because of the popular perception that a water sale to Texas would deprive Oklahomans of sufficient water resources to meet their future needs. Some circles of opinion took the view that Oklahoma water should be used only in Oklahoma; however, restricting the interstate transfer of water could be found unconstitutional under the dormant commerce clause as imposing an impermissible burden on interstate commerce.<sup>135</sup>

### *B. Oklahoma City Water Utilities Trust (OCWUT)*

The second proposal the OWRB pursued came from OCWUT. OWRB and tribal discussions with OCWUT produced two options to increase the central Oklahoma water supply.<sup>136</sup> One option would allow a diversion of water from the Kiamichi River Basin or would allow OCWUT to use water from Sardis Lake.<sup>137</sup> The other option would be a combination that would utilize mostly water diverted from the Kiamichi River Basin, with limited use of water storage in Sardis Lake.<sup>138</sup> Lake levels and river flows would not be significantly impacted by this arrangement, but further environmental studies would be done to ensure protection of wildlife habitats.<sup>139</sup> If OCWUT agreed to use solely Sardis Lake storage water, it would also agree to repay the federal government the approximately \$38 million owed by the State for Sardis Lake's construction.<sup>140</sup> OCWUT could choose instead to use Kiamichi River Basin waters at no cost because they are public waters.<sup>141</sup>

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Texas, and Louisiana. *Id.* at 32.

134. *Id.* at 25; *see also* Letter from NTWA to Governor Keating, *available at* [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status) (expressing NTWA's hope for future negotiations).

135. Choctaw Nation Memorandum, *supra* note 31, at 8; *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

136. *Status Report*, *supra* note 21, at 40.

137. *Id.*

138. *Id.*

139. *Id.* at 42.

140. *Id.* at 43.

141. *Id.*

### VIII. Public Concerns

On an issue as broad as water rights and water sales, some state citizens will understandably have legitimate concerns. Citizens' groups, such as the Southern Oklahoma Water Alliance, have voiced several concerns about the proposed Compact and the consequences of out-of-state water sales.

#### A. Water Ownership

Concern about original ownership of water rights and the role of the Tribes in the water sale contracts has surfaced, but as shown above, the Choctaws and Chickasaws have a nonfrivolous claim to these waters. State advisors were convinced that the Tribes showed a sufficiently valid claim to the water and recommended that the State pursue a compact with the Tribes. If the Compact is enacted, the State will have saved the taxpayers a significant amount in potential litigation costs. As neither side knew what the litigation result would be, it was prudent to negotiate a compact instead and to agree on a split of water sale revenues. The State will control the Tribes' water and administration rights, while the Tribes will receive half of all water sale revenues.<sup>142</sup> This is a compromise that benefits both parties.

#### B. Private Negotiations

An initial complaint from citizens was that negotiations with Texas regarding a possible water sale did not allow for public input.<sup>143</sup> But Duane Smith, executive director of the OWRB, says this was necessary to keep making progress. "It's a very difficult process to negotiate a contract in public when it changes at virtually any meeting that's done," he said.<sup>144</sup> Because the Compact and any water sale contract must be approved by the Oklahoma legislature, there is opportunity for public examination and further negotiation if necessary.

#### C. Downstream Dependency

Citizens' groups have also been very vocal about what they term "downstream dependency" issues. The concern is that once Texas becomes dependent on the Oklahoma water source, courts would force Oklahoma to

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142. Carter, *supra* note 90.

143. Kelly Kurt, *New Deal Brings Competing Economic Visions*, J. REC. (Okla. City), Nov. 12, 2001, available at 2001 WL 4527444.

144. *Id.*

continue to uphold that obligation indefinitely.<sup>145</sup> Oklahoma Governor Frank Keating, Chief Gregory E. Pyle of the Choctaw Nation, and Governor Bill Anoatubby of the Chickasaw Nation asked Oklahoma attorney and Oklahoma College of Law professor Drew L. Kershen to address these concerns in a legal opinion in November 2001.<sup>146</sup> Professor Kershen divided his opinion into answering two questions.<sup>147</sup> The first was “whether the concept of downstream dependency or any analogous dependency arguments had legal merit,” and the second was whether a “contractual waiver of any downstream dependency claims” that might exist would be valid.<sup>148</sup>

In response to the first question on the legal merit of “downstream dependency,” Professor Kershen found only one legal reference to this term,<sup>149</sup> but pursued research of “analogous concepts in four distinct areas”<sup>150</sup> to determine the merits of this type of argument.<sup>151</sup> The first area he researched concerned “[p]ersons with state prior appropriation rights dependent upon water claimed by tribal nations.”<sup>152</sup> He found that, “[n]o matter how dependent citizens of Oklahoma have become upon the use of water obtained under the laws of the State of Oklahoma, these Oklahoma dependencies will not trump the legal rights of tribal nations to water within the boundaries of the State of Oklahoma.”<sup>153</sup>

The second area Professor Kershen researched was the “Equitable Apportionment of Interstate Streams between Sovereigns.”<sup>154</sup> This area would encompass litigation between states concerning water rights. Professor Kershen concluded that “the Supreme Court of the United States has ruled that the equitable apportionment of interstate streams between sovereigns protects the upstream state in its water rights [despite the fact that] the downstream state . . . may be adversely affected.”<sup>155</sup>

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145. Carter, *supra* note 90.

146. Legal Opinion from Drew L. Kershen, Oklahoma attorney and Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law, to Chickasaw Governor Anoatubby, Choctaw Chief Pyle, and Oklahoma Governor Keating (Nov. 11, 2001) (on file with author) [hereinafter Kershen Legal Opinion].

147. *Id.* at 1.

148. *Id.*

149. *Id.* at 2.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 2-3; *see, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Kansas v. Colorado*, 206 U.S. 46 (1907).

The next area Professor Kershen researched was the “Temporary Transfer of Water Rights.”<sup>156</sup> Professor Kershen asserted that state water law in most states “establishes that these temporary transfers [of water rights] automatically expire at the end of the term of the temporary transfer and that all water rights automatically revert to the original water rights holder.”<sup>157</sup>

The final area Professor Kershen researched was “Irrigation Run-off and Seepage and Developed Water.”<sup>158</sup> Professor Kershen determined that “the clear majority of courts have also held the neighboring landowner, who has become accustomed to using the seepage water or run-off, has only a dependent water right.”<sup>159</sup>

As a result of his research, Professor Kershen was able to conclude that a “downstream dependency” or analogous claim by the State of Texas against the State of Oklahoma would not have merit and would not be upheld.<sup>160</sup>

Professor Kershen also addressed the validity of a “contractual waiver of any downstream dependency claims” in his legal opinion.<sup>161</sup> He found that Oklahoma statutes as currently written would support stopping the flow of a water supply to a purchaser of water under terms of a negotiated contract.<sup>162</sup> In addition, an express waiver of water use rights, or “downstream dependency” rights, would be upheld as a valid waiver provision under contract law.<sup>163</sup>

#### *D. Environmental Impact*

Environmental concerns also abound.<sup>164</sup> Because no official plan of action for utilizing southeastern Oklahoma’s waters has been adopted, the state has not completed appropriate environmental studies.<sup>165</sup> OWRB officials are confident, however, that the State will adhere to state and federal environmental

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156. Kershen Legal Opinion, *supra* note 146, at 4.

157. *Id.*; *see, e.g.*, CAL. WATER CODE §§ 1735-1737 (2004); COLO. REV. STAT. § 37-83-106 (2003); S. D. CODIFIED LAWS §§ 46-5-38 to 46-5-40 (Michie 2003).

158. Kershen Legal Opinion, *supra* note 146, at 4.

159. *Id.* at 5.

160. *Id.* at 5-6.

161. *Id.* at 6.

162. *Id.* at 7.

163. *Id.* at 8.

164. *See Marie Price, Controversial Water Compact Headed to Legislature*, J. REC. (Okla. City), Oct. 12, 2001, available at 2001 WL 4526964.

165. Oklahoma Water Resources Board, *Status Report on the Joint State/Tribal Water Compact and Water Marketing Proposals, Questions & Answers: State/Tribal Water Compact & Southeast Water Development Plan 2* (Mar. 2002), available at [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status).

regulations before approving a course of conduct.<sup>166</sup> There have also been some questions about the possible sale of groundwater, but contract terms expressly state that no groundwater will ever be sold.<sup>167</sup> The Draft Water Contract with the NTWA stipulates that “the parties agree that the Water for sale and use out of State under this Contract is limited to surface water that is in excess of the needs of Oklahoma; and . . . no water from groundwater sources will be included in any such sale to NTWA.”<sup>168</sup> The State/Tribal Compact also includes terms that expressly prohibit the sale of groundwater.<sup>169</sup>

### *E. Limited Water Supply*

Others have been concerned that a sale of water to Texas could negatively impact the growth potential of Oklahoma cities. One view is that if water is such a valuable resource for continued economic growth, Oklahoma should use all the water it has available for its own economic development.<sup>170</sup> One opponent of the proposed water sale to Texas was reluctant to pipe water to Texas because “[i]t’s not that they need our water. It’s not a humanitarian situation right now. . . . They’re just water hogs.”<sup>171</sup> Along this same vein, some Oklahomans feel that the State should not run the risk that it will one day face a water shortage due to water sale contracts with other states.<sup>172</sup>

In response to these types of concerns, in December 2001, Jones & Stokes, independent consultants from California retained by the Choctaw and Chickasaw Tribes to advise them on water issues raised by the Compact, published a Review of Issues and Assumptions on the proposed water sale contract with the NTWA.<sup>173</sup> Their review tracked projected water levels in each phase of the proposed sale to the NTWA and determined percentages of use in each phase.<sup>174</sup> Percentages of use were determined by studying the last seventy-

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166. *Id.*

167. Oklahoma Water Resources Board, *Status Report on the Joint State/Tribal Water Compact and Water Marketing Proposals, Draft Inter-Regional Water Supply Contract 5* (Mar. 2002), available at [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status).

168. *Id.*

169. *Water Compact*, *supra* note 91, at 8.

170. *See* Kurt, *supra* note 143.

171. *Id.* (quoting Charlette Hearne, Oklahoma citizen and opponent of the Compact).

172. *See id.*

173. Choctaw & Chickasaw Tribes — Oklahoma State Proposed Water Transfer Contract, Review of Issues and Assumptions by Jones & Stokes, Independent Consultants, to the Choctaw and Chickasaw Tribes 1-6 (Dec. 5, 2001) (on file with author) [hereinafter Jones & Stokes].

174. *See id.*

five years worth of data of the annual volume of Kiamichi River runoff flowing into Hugo Reservoir.<sup>175</sup> The study placed emphasis on the lowest runoff, second lowest runoff, and the range of runoff amounts in 90% of the years studied.<sup>176</sup> These numbers are important because parties to water sale contracts must agree that the water provided to fulfill a contract must be water in excess of the amount needed to keep the reservoir elevations at acceptable minimum levels “to fully protect recreation and wildlife benefits.”<sup>177</sup> This history can also be used to simulate future data to ensure that Oklahoma’s water needs will be met before any water is sold.<sup>178</sup>

Historical data shows that the median runoff of the Kiamichi River at Hugo is 1.5 million acre-feet per year.<sup>179</sup> In the NTWA water sale contract proposal, discussions were centered around annual sales of approximately 120,000 acre feet in the twenty-year Phase I.<sup>180</sup> This sale proposal would allow access to only 8% of the total runoff in the average year from the Kiamichi River basin into the Hugo Reservoir.<sup>181</sup> Even in the very driest year on record since 1925, water runoff totaled 360,000 acre-feet into Hugo.<sup>182</sup> Had the NTWA water sale contract been in place at that time, a sale of 120,000 acre-feet would still have consumed only 33% of the total water runoff *for that particular year*,<sup>183</sup> and, *in total*, “would only have lowered Hugo reservoir one foot.”<sup>184</sup>

The Compact also contains language that requires any water sale contract to contain language authorizing alteration or cancellation of the contract during

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175. *Id.* at 2.

176. *Id.*

177. *Id.*

178. *See id.*

179. *Id.* at 7.

180. Oklahoma Water Resources Board, *Status Report on the Joint State/Tribal Water Compact and Water Marketing Proposals, Draft Inter-Regional Water Supply Contract, Exhibit C2* (Mar. 2002), available at [http://www.owrb.state.ok.us/studies/legislative/southeast/se\\_plan.php#status](http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status). In Phase II, the volume of water available for sale would increase to 160,000 acre-feet per year, and in Phase III, it would increase to 320,000 acre-feet per year, with additional supply coming from the Little River and Mountain Fork River Basins.

181. *See* Jones & Stokes, *supra* note 173, at 7 fig.1. The median runoff into the Hugo Reservoir is 1,500,000 acre-feet per year. If 120,000 acre-feet of that runoff were sold each year, the water sold would total only 8% of the total runoff available on an annual basis.

182. *Id.* at 2. The driest year on record since 1925 was 1963, when there was a runoff of 360,000 acre-feet into Hugo. The second driest year on record since 1925 was 1956, when the runoff totaled 450,000 acre-feet.

183. *Id.* at 7 (emphasis added). Readers should carefully note that selling 33% of available runoff for a single dry year translates into selling only a tiny portion of water reserves available in the Hugo Reservoir at any given time.

184. *Id.* at 4 (emphasis added).

times of drought.<sup>185</sup> State and tribal leadership want to ensure that the water needs of the people of Oklahoma are met before any water is sold to third parties.

Public interest in an issue as important as compacting for water rights and negotiating water sale contracts is a good thing. When the issue is looked at objectively, it seems that public concerns can be addressed and that small compromises will gain large rewards in potential positive impact for the State, the Tribes, and their people.

### *IX. Benefits of the Compact Outweigh Its Drawbacks*

As noted, a successful compact negotiation requires concessions from both parties to reach a compromise. In the Oklahoma Compact, the Choctaw and Chickasaw Tribes will lose some autonomy and authority over how their water is used. The biggest drawback of the Compact for the Tribes seems to be the broad release of water rights claims and administrative authority.

Benefits to the Tribes, however, outweigh any potential drawbacks. If the Compact is enacted, the Tribes will have avoided the expense and turmoil of litigation and lowered administrative costs since the State will be responsible for administrative duties. Because water sale efforts will be coordinated with the State through the Commission, there is a better chance that an outside contract will be reached and the economic benefits of such a sale will become a reality. The Tribes have also retained a right to arbitration in many situations, so they will be able to influence future proposals that may affect their land and members. The Tribes also will still have a voice in state water quality standards and may still apply under the Clean Water Act for TAS status to protect their own water quality standards.

In summary, the Oklahoma State/Tribal Water Compact is a progressive step towards efficient compromise for the greater good of the people of southeastern Oklahoma.

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185. *Water Compact*, *supra* note 91, at 8.

