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THE OKLAHOMA WATER SALE MORATORIUM: HOW FEAR AND MISUNDERSTANDING LED TO AN UNCONSTITUTIONAL LAW

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INTRODUCTION

Water is one of the most basic elements for human survival and development. Beyond the obvious need for human consumption, water serves various roles in industry and commerce that make it a highly sought-after commodity.[2] Experts have called water the new century's "next oil,"[3] and it is understandable that areas with an abundance of

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1. Oklahoma City University School of Law, J.D. 2009. The author would like to thank his father, Bruce Willingham, and his friend and colleague, Andrew Harrell, for their valuable comments, corrections, and suggestions. He would also like to thank Professor Stephen Clowney, currently of the University of Kentucky College of Law, whose enthusiasm and support ultimately made this article possible.

2. OKLA. WATER RES. BD., CONSERVING OKLAHOMA'S WATER 16, 20 http://www.owrb.ok.gov/news/publications/pdf_pub/consweb.pdf. (illustrating that it takes 1,800 gallons of water to create one pair of jeans made from cotton and 32,000 gallons to make one ton of finished steel for an automobile).

3. Rohini Nilekani, *Is Water the Next Oil?*, YALE GLOBAL ONLINE, May 31, 2007, http://yaleglobal.yale.edu/display.article?id=9243.

water want to ensure they continue to have a surplus. However, when states like Oklahoma have an abundance of water and have no reason to believe the supply will decrease or the demand will increase beyond statewide availability,[4] otherwise understandable conservation can become irrational hoarding.

Such is the case in Oklahoma, where legislators have enacted a moratorium on the sale or exportation of surface or ground water outside the state.[5] The legislators created this moratorium based on a misunderstanding of the facts of a proposed water sale with Texas, as well as a reliance on a nonexistent legal concept known as "downstream dependency."[6] The moratorium was the product of misunderstanding and fear; however, in a legal sense, the statute does not pass constitutional muster and the Federal District Court for the Western District of Oklahoma will likely strike it down in a pending law suit.[7] This article offers an explanation of the events that led to the creation of the moratorium and the constitutional troubles that lie in its future. It also discusses the relevant statutes, compacts, case law, and other background information that led to the formation of, and sometimes run contrary to, the moratorium.

I. BACKGROUND

A. OKLAHOMA/TEXAS WATER USE

Oklahoma has an abundance of freshwater resources. With lakes and rivers scattered across the state, Oklahoma's quantity of water greatly exceeds its need especially in eastern Oklahoma where the Ozark Mountains create lakes that are as deep as 180 feet.[8] According to the Oklahoma Water Resources Board ("OWRB"), the state uses 2.6

4. *See* OKLA. WATER RES. BD., STATUS REPORT TO THE OFFICE OF THE GOVERNOR, JOINT STATE/TRIBAL WATER COMPACT & WATER MARKETING PROPOSALS 2 (2002) [hereinafter STATUS REPORT], *available at* http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status.

5. OKLA. STAT. tit. 74, § 1221.A (2008).

6. *See id.* tit. 82, § 1086.1(A)(3); Ray Carter, *State-Tribal Water Compact Draft Unveiled*, J. REC. (Okla. City, Okla.), Nov. 15, 2001, *available at* 2001 WLNR 4918173 ("In the past . . . courts have forced sellers to continue providing water to buyers who have become dependent on that source even during times of drought."); *see also* discussion infra Part III.(b).

7. *See generally* Complaint at 2, Tarrant Reg'l Water Dist. v. Herrmann, No. 5:07CV0045-HE, (W.D. Okla. 2007) [hereinafter Tarrant Complaint] (plaintiffs brief arguing that the moratorium on water supplied to Texas communities is a violation of the Commerce Clause).

8. *See, e.g.*, OKLA. WATER RES. BD., BROKEN BOW LAKE 1, http://www.tulsaaudubon.org/guides/broken-bow-lake-map-owrb.pdf (Broken Bow Lake, in the Red River Basin, has a maximum depth of 179.5 feet).

million acre-feet[9] per year, which is only 7.6% of the 34 million acre-feet of unused water flowing out of the state each year.[10] The bulk of this unused water exists in the channels and tributaries of the Arkansas River and the Red River.[11]

In comparison, Texas will soon see a shortage of water, due mainly to the growth of the Dallas/Fort Worth ("DFW") area. According to the Tarrant Regional Water District ("TRWD"), the population of the DFW area will double by 2060.[12] Furthermore, based on census and local planning jurisdiction databases, the area will also suffer a water deficiency of roughly 400,000 acre-feet per year.[13] The TRWD claims that after studying the feasibility of potential sources of water, Oklahoma's southeastern watersheds are the most practical source to meet the majority of the future water demands of the DFW metropolitan area.[14] The most abundant river basins in Oklahoma are the Muddy Boggy Creek Basin, the Kiamichi River Basin, the Little River Basin, and the Mountain Fork River Basin.[15]

B. THE RED RIVER COMPACT

The Red River Compact ("The Compact") is an agreement between Arkansas, Louisiana, Oklahoma, and Texas governing the waters of the Red River and its tributaries.[16] Congress approved the Compact in 1980, thereby giving it effect over state law pursuant to Article 1, Section 10, Clause 3 of the United States Constitution.[17] The Compact governs which states own water rights in various sections of the Red River and its tributaries.[18]

The Compact divides the river into five 'reaches' starting on the western border of the Texas panhandle all the way to the Mississippi River.[19] Reach II covers southeastern Oklahoma and northeastern

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9. An *acre-foot* is a unit of volume of water in irrigation: the amount covering one acre to a depth of one foot, equal to 43,560 cubic feet. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 18 (2d ed. 1998).

10. Tarrant Complaint, *supra* note 7, at 4.

11. *See generally* Map of Arkansas and Red River Basins, http://www.owrb.ok.gov/maps/pdf_map/sw.pdf (illustrating the Arkansas and Red River Basins and the rivers' major tributaries).

12. Tarrant Complaint, *supra* note 7, at 2, 5.

13. *Id.* at 5.

14. *Id.*

15. *See* STATUS REPORT, *supra* note 4, at 2.

16. Red River Compact Act, Pub. L. No. 96-564, 94 Stat. 3305 (1980) [hereinafter Red River Compact].

17. U.S. CONST. art 1, § 10, cl. 3; Red River Compact, *supra* note 16§1.

18. *See* Red River Compact, *supra* note 16, § 1.01(a)-(b).

19. *Id.* § 2.12; *See also* Oklahoma Water Resources Board, http://www.owrb.ok.gov/rrccommission/graphics/reach_2_5.jpg (map representing the Red River Compact's five reaches).

Texas and contains five topographic subbasins.[20] Subbasins one and three govern water in Oklahoma from below Denison Dam to Millwood Dam in Arkansas.[21] The Compact's provisions allow unrestricted use of the water in Oklahoma above the lowest dam sites on Red River tributary basins,[22] except for the Little River basin, from which the Compact requires 40 percent of the total annual runoff below the dam sites to flow to Arkansas.[23] The Compact, however, governs the rights of signatory states to all water below the lowest dam sites of Red River tributaries in Reach III.[24] In Oklahoma, state law and tribal compacts govern the water rights above the Red River tributaries' lowest dam sites.[25]

C. OKLAHOMA STATE/TRIBAL WATER COMPACT[26]

In 1975, the Army Corps of Engineers began construction on Sardis Lake, located on a tributary of the Kiamichi River.[27] The construction cost to the federal government still has an outstanding balance of approximately $38 million,[28] and if Oklahoma pays it back the state may use the lake as a reservoir for part of its water supply.[29] In order to make payments to the federal government, the state began to explore the possibility of water sales and other water development programs.[30]

When the Chickasaw and Choctaw Nations learned Oklahoma was investigating the possibility of selling water to the North Texas Municipal Water District in 1992, they laid claim to the waters the state had proposed to sell.[31] This claim was based on the 1830 Treaty of Dancing Rabbit Creek and a similar treaty signed by the Chickasaws in 1832, by which the federal government gave them land and water rights in

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20. Red River Compact, *supra* note 16, art. V.
21. *Id.* §§ 5.01, 5.03.
22. *Id.* § 5.01.
23. *Id.* § 5.03(b).
24. *Id.* § 5.05.
25. *Id.* §§ 2.10(a), 5.01; *see also* Jennifer E. Pelphrey, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 Am. Indian L. Rev. 127, 133 (2004-2005).
26. The author would like to thank Jennifer E. Pelphrey for her article *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AMINDLR 127, which is an excellent analysis of the compact relationship between Oklahoma and the Indian Tribes. Ms. Pelphrey's research contributed greatly to this section of the article and the author recommends it to anyone interested in interstate water law and how it applies to the various tribal nations of Oklahoma.
27. STATUS REPORT, *supra* note 4, at 2.
28. *Id* at 43.
29. *Id* at 3.
30. *Id* at 1.
31. *Id.* at 12.

southeastern Oklahoma.[32] State advisors studied the treaty and reported that the tribal nations had a potentially non-frivolous claim to the waters and recommended that the state of Oklahoma pursue a compact to save the time and cost of settling the matter in court.[33] Additionally, the Supreme Court's preference for settling water rights issues out of court supported Oklahoma's decision to pursue a compact with the Chickasaws and Choctaws.[34] For these reasons, the state began negotiating with the tribal nations to form a water rights compact under which the state could sell the contested water. As a result of these efforts, in November of 2001 the parties created the State/Tribal Draft Water Compact.[35]

The State/Tribal Draft Water Compact covers twenty-two southern Oklahoma counties including six major river basins.[36] Among its purposes are to "resolve mutually exclusive state-tribal claims to water rights," and to "provide the framework for . . . economic development in southeast Oklahoma."[37] Under the State/Tribal Water Draft Compact, the state and the tribal nations would split the net revenue of a water sale, with 50 percent going to Oklahoma, 37.5 percent going to the Choctaw Nation, and 12.5 percent going to the Chickasaw Nation.[38] Oklahoma would spend all of its revenues on improvements located in southeastern Oklahoma, primarily on water infrastructure and other economic development.[39] Furthermore, appointed citizens of southeastern communities would be trustees of funds and would become responsible for distributing the funds properly.[40] Once the State/Tribal Draft Compact addressed the issue of water rights among the parties, the state was free to begin receiving proposals from outside parties for the sale of water.

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32. *Id.*; *see also* Treaty with the Chickasaws, U.S.-Chickasaw Nation, art. IV, Oct. 20, 1832, 7 Stat. 381; Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Nation, art. II, Sept. 27, 1830, 7 Stat. 333.

33. STATUS REPORT, *supra* note 4, at 14-15.

34. *See* Colorado v. Kansas, 320 U.S. 383, 392 (1943) (articulating the Supreme Court's the preference for states to negotiate disputes concerning water rights instead adjudication).

35. *See* STATUS REPORT, *supra* note 4, at 6.

36. *Id.* at 2, 16.

37. OKLA. WATER RES. BD., DRAFT STATE/TRIBAL WATER COMPACT & WATER MARKETING PROPOSALS, PUBLIC DISCUSSION DRAFT, art. 1, § 1.1 (2001), *available at* http://www.owrb.state.ok.us/studies/legislative/southeast/se_plan.php#status [hereinafter DRAFT WATER COMPACT].

38. *Id.* art. 5, § 5.3(b).

39. *Id.* § 5.3(c).

40. *See* Ray Carter, *State-Tribal Water Compact Draft Unveiled*, J. REC. (Okla. City, Okla.), Nov. 15, 2001, *available at* 2001 WLNR 4918173.

D. THE NORTH TEXAS WATER AGENCY PROPOSAL

The North Texas Water Agency ("NTWA") sought to give Oklahoma and the tribal nations $5.1 billion, over the 100-year term of the contract in exchange for 120,000-160,000 acre-feet/year of water from the Kiamichi River, and an additional 200,000 acre-feet/year of water from the Little River.[41] In addition, the NTWA would pay for the entire water transfer infrastructure needed to complete the transfer to north Texas.[42] Residents of the area would not feel the effect of the water sale because the sale would limit NTWA's purchase to only excess "water flowing unused out of the State of Oklahoma into the Red River."[43] The NTWA proposal would also conform to the terms of the Red River Compact, specifically the requirement that 40 percent of the below dam runoff of the Little River must flow to Arkansas.[44] Nevertheless, the proposed water sale with Texas drew significant attention from local citizens due to the fear that any sale would result in a lack of water to fulfill Oklahoma citizens' future water needs.[45]

II. OPPOSITION TO THE WATER SALE

A. OPPOSITION AT THE LOCAL LEVEL

The proposed sale of resources from one state to another created an understandable amount of concern from the local citizens. In southeastern Oklahoma, the Southern Oklahoma Water Alliance ("SOWA") has been one of the main voices protesting the sale of Oklahoma's water. Charlette Hearne, SOWA's state chairman, is concerned that Oklahoma does not have enough water to spare for Texas, stating "[o]nce it's gone, it's gone and the only thing we will get from it is to hear the fish flapping in Sardis Lake."[46]

One of the reasons the group opposes the water sale stems from the state's lack of collaboration and transparency during contract negotiations.[47] However, Duane Smith, the executive director of the OWRB, said that keeping the negotiations private was necessary to continue making progress.[48] Mr. Smith stated, "it's a very difficult process to negotiate a contract in public when it changes at virtually any meet-

41. *See* STATUS REPORT, *supra* note 4, at 10, 44.
42. *Id.* at 26.
43. *Id.*
44. *Id.* at 32-33.
45. *See* Kelly Kurt, *New Deal Brings Competing Economic Visions*, J. REC. (Okla. City, Okla.), Nov. 12, 2001, at 1, *available at* 2001 WLNR 4913553.
46. Tom Lindley and Mick Hinton, *Water War Spills Across State Line*, TULSA WORLD, August 25, 2008, at A1, *available at* http://www.tulsaworld.com/ (search "Water War Spills Across State Line").
47. *See* Kurt, *supra* note 45
48. *Id.*

ing that's done."[49] Furthermore, the State/Tribal Draft Water Compact requires that the Oklahoma legislature vote on any sale of water after the contract terms are final, creating the opportunity for public examination.[50]

Another concern of SOWA was that any sale of water would result in a lack of water for Oklahomans in the future.[51] Charlette Hearne opposes selling water to Texas because she feels "[i]t's not that [Texas] need[s] our water. It's not a humanitarian situation right now . . . [t]hey're just water hogs."[52] However, in December of 2001, the Choctaw and Chickasaw tribes hired Jones & Stokes, an independent consultation group from California, to advise them on any water issues a sale might bring.[53] The study calculated the percentage of use and runoff of the Kiamichi River for the last seventy-five years and placed emphasis on the lowest and second-lowest runoff years.[54] The study found that even in the driest year, water runoff totaled 360,000 acre-feet.[55] The NTWA proposal requested 120,000 acre-feet of water per year from the Kiamichi River; thus, had the water sale been finalized during the lowest runoff year, the NTWA would only be using 33% of the total runoff water.[56] Furthermore, the State/Tribal Draft Compact states that any water sale contract would allow for alterations or cancellations during times of drought.[57]

B. DOWNSTREAM DEPENDENCY

The biggest fear of SOWA, and other local groups opposing the sale, stems from the concept of "downstream dependency." The common understanding of the term is that once Texas becomes dependent on Oklahoma for its water, courts will force Oklahoma to continue to give water to Texas indefinitely, even if Oklahoma is experiencing a drought.[58] To determine if this concept had any legal merit, Oklahoma Governor Frank Keating asked Oklahoma College of Law professor Drew L. Kershen to write a legal opinion on the issue in November of 2001.[59]

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49. *Id.*
50. *See* DRAFT WATER COMPACT, *supra* note 37, art. 5, § 5.3(a).
51. Kurt, *supra* note 45.
52. *Id.*
53. *See* STATUS REPORT, *supra* note 4, at 20.
54. *Id.* at 21.
55. *Id.*
56. *See id.* at 10.
57. *See* DRAFT WATER COMPACT, *supra* note 37, art. 5 § 5.3(a).
58. *See* Carter, *supra* note 40.
59. Legal Opinion from Drew L. Kershen, Earl Sneed Centennial Professor of Law, Univ. of Okla. Coll. of Law, to Chickasaw Governor Anoatubby, Choctaw Chief Pyle, and Okla. Governor Keating (Nov. 11, 2001) (on file with author).

According to Professor Kershen, the closest legal concept to downstream dependency, as SOWA understands it, is "equitable apportionment of interstate streams between sovereigns."[60] As the phrase implies, this legal theory deals with water rights of non-navigable waterways that run between states. Professor Kershen stated that "the Supreme Court of the United States has ruled that the equitable apportionment of the interstate streams between sovereigns protects the upstream state in its water rights [even though] . . . the downstream state . . . may be adversely affected."[61]

This legal theory was an issue in *Nebraska v. Wyoming* when Nebraska sued Wyoming and Colorado for an equitable share of the North Platte River that had been partially diverted for irrigation purposes.[62] Applying the rule of prior appropriation, the Court stated:

> The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others.[63]

In other words, any water in the state of Oklahoma that Texas would like to use is subject to the upstream rights of Oklahoma before a court considers the downstream rights of Texas. Furthermore, the Court stated that downstream water rights do not trump the rights of the upstream state even when the downstream use is more economical.[64] The Supreme Court's general deference to local administrative agencies in matters of appropriation of water rights reinforces the priority rule due to the complexity, and technicality of fact patterns associated with determining ownership:

> There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. We noted in *State of Colorado v. Kansas* that these controversies between States over the waters of interstate streams "involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to

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60. *Id.* at 2-3.

61. *Id.* (citing Nebraska v. Wyoming, 325 U.S. 589 (1945); Colorado v. Kansas, 320 U.S. 383 (1943); Kansas v. Colorado, 206 U.S. 46 (1907)).

62. Nebraska v. Wyoming, 325 U.S. 589, 591-92 (1945).

63. *Id.* at 617 (quoting Wyoming v. Colorado 259 U.S. 419, 470 (1922)).

64. *Id.* at 621 ("We are satisfied that a reduction in present Colorado uses is not warranted. The fact that the same amount of water might produce more in lower sections of the river is immaterial. The established economy in Colorado's section of the river basin based on existing use of the water should be protected." (internal citations omitted)).

> the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution."[65]

Extending the logic of this decision, if the Court applied this rule to any conflict arising out of a water sale between Oklahoma and Texas, this rule would require them defer to the water sale contract, the Compact,[66] the State/Tribal Draft Water Compact,[67] and the advisory opinion of the Oklahoma Water Resources Board[68] before appropriating water based solely on judicial discretion. Therefore, SOWA's assertion that Texas would claim the "right" of downstream dependency has no merit.

C. OPPOSITION AT THE STATE LEVEL

Legislators at the state level have been largely sympathetic to grassroots groups such as SOWA. The primary legislator championing this cause was then-Oklahoma State House Representative, now State Senator, Jerry Ellis.[69] Ellis drafted bills and held press conferences urging the Attorney General and the public to oppose any water sale to Texas.[70] In a press conference held on April 2, 2008, Ellis stated that any sale of water would result in losses to the agricultural, hunting, fishing, and other recreational industries due to a drop in lake and stream levels.[71] This, despite the fact that Texas proposed removing only a fraction of the runoff water below the water-regulation dams.[72] Ellis has further stated that the theory of downstream dependency would result in Texas acquiring an irreversible right to Oklahoma's water and effectively "drain Oklahoma like a backyard swimming pool."[73]

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65. *Nebraska*, 325 U.S. at 616 (internal citations omitted) (quoting Colorado v. Kansas, 320 U.S. 383, 392 (1943)).

66. *See* Red River Compact, *supra* note 16.

67. *See* DRAFT WATER COMPACT, *supra* note 37.

68. A court would defer to the OWRB over any Texas water administrative agency because the source of the water sold is located within Oklahoma's borders. STATUS REPORT, *supra* note 4, at 29.

69. *See*, Jeff Packham, *Statewide Water Plan Proposed for Future of Oklahoma*, J. REC. (Okla. City, Okla.), April 20, 2006, *available at* 2006 WLNR 10715909 (Mr. Ellis "encourag[ed] officials to take care of Oklahoma first," stating, "[d]on't worry about Texas or any other state.").

70. *See, e.g.*, audio recording: Water Moratorium Press Conference, Representative Jerry Ellis, Oklahoma State Capitol (Apr. 2, 2008) [hereinafter Ellis Press Conference] (on file with author).

71. *Id.*

72. *See* STATUS REPORT, *supra* note 4, at 10.

73. *See* Ellis Press Conference, *supra* note 70.

In addition, Ellis introduced a resolution[74] expressing confidence in the Oklahoma Attorney General in defending against the *Tarrant County* case.[75] The House Resolution states a laundry list of reasons Oklahoma should not sell water to Texas. These reasons include that "Dallas/Fort Worth . . . has indulged itself, swimming unsustainably in a dwindling supply of H20"; "north Texans should . . . reduce their demand through . . . xeriscaping and installation of composting toilets"; "the State of Texas has affronted the great State of Oklahoma by its audacious action in filing a lawsuit"; and that if Oklahoma sold Texas water it would sell "our children's and grandchildren's birthright."[76] Ellis has frequently criticized the political nature of the *Tarrant County* case and once said that "allow[ing] this issue to be decided by the courts would gut democracy and the result would be Communism without a firing squad."[77]

The stated purpose of Ellis' constant efforts to withhold a water sale, other than conservation, is to complete a long-term study of Oklahoma's water needs.[78] He would like a projection for the next fifty years before the state considers a water sale.[79] The Oklahoma legislature established the Joint Committee on Water Planning in 2002 with the task of assessing Oklahoma's future water needs.[80] Ellis relied on the notion that this committee will forecast Oklahoma's water needs, even though the group has never met to discuss the matter.[81] According to Senator Jeff Rabon, a member of the committee, the group has not determined conservation or preservation needs, nor has it organized, met, or reported any conclusions on the work directed to it by the legislature under the law establishing the group.[82]

Under these facts, it would appear that the legislature has no genuine intention to create a comprehensive water plan. The moratorium simply acts as a ruse to appease groups like SOWA. The legislation set

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74. H.R. 1031, 51st Leg., 1st Sess. (Okla. 2007).

75. *See generally* Order Denying Motion to Dismiss, Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, (W.D.Okla. Oct. 29, 2007); *see also* discussion *infra* Part V.

76. H.R. 1031.

77. Max Baker, *Proposal to Capture Water has Oklahoma Steaming*, FORT WORTH STAR-TELEGRAM, Jan. 21, 2007, at B6, *available at* 2007 WLNR 1196230.

78. Eric Aasen, *Parched Texas Looks to Oklahoma for Water*, DALLAS MORNING NEWS, Aug. 5, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/080507dnmetoklawater.28025a2.html.

79. Baker, *supra* note 77.

80. Waters and Water Rights Act of 2002, ch. 485, sec. 4 § 1C, 2002 Okla. Sess. Laws. (creating the Joint Committee on Water Planning, repealed by OKLA. STAT. tit. 82 § 1C) [hereinafter Water Rights Act].

81. Interview with Jeff Rabon, Dist. 5 Senator (D-Hugo), in Okla. City, Okla. (April 2, 2008).

82. *Id. See also* Waters and Water Rights Act of 2002, sec. 4 § 1C.

the moratorium to expire in 2004; [83] however, Representative Ellis, among others, extended the law's expiration until 2009, in the name of "doing a state-wide scientific water study to [determine] supply and demand."[84] This remains the lawmaker's position even though the *Tarrant County* lawsuit exposed the fact that the committee has never met.[85]

D. THE WATER SALE MORATORIUM

Ultimately, local groups like SOWA, armed with a misunderstanding of the law governing water rights such as downstream dependency, pressured state legislators into passing a moratorium that prohibited any sale of water outside the state. The Oklahoma House of Representatives passed the moratorium in 2002 by a vote of 99-0.[86] Specifically, it bans any "sale or exportation of surface water and/or groundwater outside [Oklahoma] . . . for a three year period . . . ."[87] House Representative Debbie Blackburn drafted the moratorium and originally set it to expire in 2004; [88] however, as previously stated, Representative Ellis's amendment extended it until 2009.[89] The law explains those prohibited from selling water:

> [N]o state agency, authority, board, commission, committee, department, trust or other instrumentality of this state or political subdivision thereof, nor elected or appointed officer, member of any governing body or other person designated to act for an agency or on behalf of the state, or a political subdivision thereof shall contract for the sale or exportation of surface water or groundwater outside the state, or sell or export surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water.[90]

This category includes the OWRB and prohibits it from issuing water permits to out-of-state applicants. However, the law makes no mention of conforming to the Red River Compact, which would cover waters within the state boundaries as tributaries of the Red River up to the lowest water regulation dams.[91]

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83. OKLA. STAT. tit. 82 § 1B (2008).
84. Ellis Press Conference, *supra* note 70.
85. Tarrant Complaint, *supra* note 7, at 4.
86. *See* Leg. 48-1410, 2d Reg. Sess. (Okla. 2002).
87. OKLA. STAT. tit. 82 § 1B (2008).
88. H.B. 2895 § 1(A), 48th Leg., 2d Sess. (Okla. 2002) (amended bill codified at OKLA. STAT. tit. 82, § 1B (2008)).
89. H.B. 2440 § 1(B), 51st Leg., Reg. Sess. (Okla. 2004) (codified at OKLA. STAT. tit. 82, § 1B (2008)).
90. OKLA. STAT. tit. 82 § 1B(B) (2008).
91. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305, at §§ 5.01, 5.03 (1980) (granting the consent of the United States to the Red River Compact among Arkansas, Louisiana, Oklahoma and Texas).

Another notable part of the moratorium is Section 1C, which establishes the Joint Committee on Water Planning ("Committee").[92] This section describes the goals of the Committee and the procedural requirements for its establishment, some of which are determining "[t]he long-term sustainability of Oklahoma's water supply" and "[t]he methods for developing, managing, protecting and conserving water resources of the state . . . ."[93] It also establishes the timetable for the Committee's work and creates a deadline for their recommendations: "[t]he work of the Committee shall be finalized no later than January 15, 2005, and any written recommendations of the Committee shall be made available to the public and delivered to each member of the Oklahoma Legislature by February 1, 2005."[94]

According to Senator Rabon, the Committee violated this section.[95] The Legislature allocated funding to the Committee; however, the Committee did not issue reports, recommendations to the public or the legislature, or hold a single meeting.[96] Therefore, the Committee arguably executed the moratorium in bad faith. Bad faith aside, the moratorium fails to adhere to the basic interstate commerce guidelines of the Constitution.

III. THE MORATORIUM'S UNCONSTITUTIONALITY

Under the Commerce Clause of the Federal Constitution, only the United States Congress may regulate commerce between the states.[97] "The Framers intended the Commerce Clause . . . to preserve economic union and suppress interstate rivalry"[98] and prevent individual states from bolstering their respective economies at the expense of other states.[99] The Framers intended that "the peoples of the several states must sink or swim together, and in that long run prosperity and salvation are in union and not division."[100] The Commerce Clause grants power to Congress and does not operate as a restriction on the states.[101] However, if Congress is the sole authority on interstate com-

92. OKLA. STAT. tit. 82 § 1C (repealed 2007).
93. *Id.*
94. *Id.*
95. Interview with Jeff Rabon, *supra* note 81.
96. Jennifer Mock, *House Speaker Calls for Ending 18 Panels: Entities Include Men's Health Task Force that Never Met*, THE OKLAHOMAN, Jan. 23, 2007, at 4A, *available at* 2007 WLNR 1392885; Tony Thornton, *North Texas Water District Sues Over State Moratorium: Interstate Commerce Violation Alleged in Federal Court Action*, The Oklahoman, Jan. 12, 2007, at 13A, *available at* 2007 WLNR 673752.
97. U.S. CONST. art. I, § 8, cl. 3.
98. Dennis v. Higgins, 498 U.S. 439, 453 (1991) (Kennedy, J. dissenting).
99. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).
100. *Id.* at 523.
101. U.S. CONST. art. I, § 8, cl. 3; *see* U.S. v. Se. Underwriters Ass'n, 322 U.S. 533, 551-52 (holding that the Commerce Clause allows Congress to legislate against state com-

merce regulation, then no state may pass a law impeding that right.[102] Therefore, the Supreme Court recognizes the doctrine of the "Dormant Commerce Clause," which deems any state law unconstitutional that burdens or discriminates against interstate commerce.[103]

A. DORMANT COMMERCE CLAUSE TEST

Courts evaluate a potential Dormant Commerce Clause violation under a four-prong test. First, a court determines whether any act of Congress preempts the state law in question.[104] If the state law directly conflicts with the Congressional act, and the court cannot severe the offending provision from the statute, then the law is unconstitutional.[105] A court severs a provision if the remainder after severance is operative law.[106] Second, if no direct conflict exists, then the court looks to the language on the face of the statute and determines whether the law discriminates against interstate commerce or is even-handed.[107] A law discriminates against interstate commerce if the law is "basically a protectionist measure . . . ."[108] Alternatively, the law is even-handed if it can "be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[109]

If the law is even-handed, then courts employ a balancing test, known as the *Pike* test, to determine whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.[110] Therefore, the state must show the law creates a legitimate public benefit that justifies the burden imposed on interstate commerce.[111] Furthermore, the state must show that no less restrictive alternative to the challenged law will accomplish the stated public benefit, thus making the burden on interstate commerce necessary.[112] However, courts consider the no less restrictive alternative requirement within the whole of the test, and accordingly this determination is not

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merce regulations, legislate transactions that reach across state lines affecting people of multiple states, and govern other affairs which the states cannot govern due to limited territorial jurisdiction).

102. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (Federal laws preempt conflicting state laws).

103. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36-37 (1980); Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829).

104. Cooley v. Bd. of Wardens, 53 U.S. 299, 318-19 (1851).

105. INS v. Chadha, 462 U.S. 919, 931-32 (1983) (citing Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

106. *Id.* at 934.

107. C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389-90 (1994).

108. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

109. *Id.*

110. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

111. *Id.*

112. *Id.*

individually dispositive of constitutionality.[113] If the state fails the *Pike* balancing test, the state law is unconstitutional.

If the law is discriminatory against interstate commerce and not even-handed, then courts apply strict scrutiny review. First, courts presume the statute is unconstitutional when applying this standard of review.[114] Strict scrutiny is the highest form of judicial scrutiny with a strong presumption against constitutionality.[115] It shifts the burden of proof onto the state to prove the statute can pass constitutional muster.[116] The state can overcome this presumption by proving that the law is necessary, that there is no less restrictive alternative, and that it serves a compelling governmental goal.[117] Under strict scrutiny, however, and unlike the *Pike* balancing test, the no less restrictive alternative requirement is individually dispositive.[118] Importantly, the Supreme Court has found a facially discriminatory (meaning the language on the face of the statute discriminates against interstate commerce) statute to survive strict scrutiny review only once,[119] meaning any statute found to be facially discriminatory against interstate commerce is almost certainly unconstitutional.

The market participation exception is one notable deviation from the Dormant Commerce Clause test.[120] This exception protects states that enter into a market as a private entity and allows the state to choose business partners free from the constraints of the Dormant Commerce Clause.[121] The exception draws a distinction between a state as a market participant versus a market regulator. The exception is permissible due to the underlying intent of the Commerce Clause, that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace . . . [and] . . . [t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[122]

Accordingly, a state may impose the same restrictions on interstate commerce as any private business.[123] However, "[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market."[124]

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113. *Id.*
114. Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992).
115. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137 (2003).
116. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (citing Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 353 (1977)).
117. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).
118. *Id.*
119. Maine v. Taylor, 477 U.S. 131, 151-52 (1986).
120. Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980).
121. *Id.* at 436.
122. *Id.* at 437.
123. *See id.*
124. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

Specifically, defining the market the state enters into is the key component of qualifying for the market participation exception.[125] The state must show that market entry does not have a regulatory effect on a separate market, even if the separate market closely relates to the market entered.[126] Courts rarely apply the market participation exception; however, when the exception applies a court starts the analysis with a high level of suspicion.[127]

B. APPLYING THE TEST TO THE WATER MORATORIUM

The first part of the Dormant Commerce Clause test requires a determination of whether an Act of Congress preempts the moratorium.[128] The Red River Compact may preempt the moratorium because compacts derive power from Congress and therefore have the effect of federal law.[129] The section of the Red River Compact that may preempt the moratorium is in Article V governing Reach II.[130] In this section, Oklahoma's unrestricted right to enforce water rights ends at the last downstream dam sites before the tributaries enter the Red River.[131] Therefore, Texas arguably has rights under the Red River Compact for the water between the last dam site and the Red River. This argument would directly conflict with the moratorium, which prevents the export of water from the state. Therefore, the Red River Compact may arguably preempt the moratorium.

On the other hand, if the court finds no preemption, then the next step is determining whether the statute is discriminatory or even-handed. The moratorium is likely discriminatory because a ban on selling water is a protectionist measure to keep water for Oklahoma, and protectionist measures are *per se* discriminatory against interstate commerce.[132] However, for the sake of thoroughness, this article will assume the moratorium is even-handed. Therefore, a court would hold the moratorium "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[133]

As an even-handed statute, the moratorium would be subject to the *Pike* balancing test, which balances the legitimate public benefit against

125. For example, in *Wunnicke,* the "timber market" is not the same as the "timber processing" market. *Id.* at 97-98 (explaining that courts must narrowly define "market" to avoid the exception swallowing the rule).

126. *Id.* at 97.

127. *See id.* at 93, 97-98.

128. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154 (1982).

129. *See* U.S. CONST. art. I, § 10, cl. 3.

130. Red River Compact, *supra* note 16 art. V.

131. *Id.* § 5.01 ("This subbasin includes those streams and their tributaries *above* existing . . . dam sites, wholly in Oklahoma . . . ." (emphasis added)).

132. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

133. *Id.*

the burden on interstate commerce.[134] The stated public benefit of the moratorium is to provide for "conservation, preservation, protection, and optimum development and utilization of . . . water . . . within Oklahoma."[135] However, this does not specify the precise benefit provided by the moratorium. Furthermore, the Supreme Court specifically states that claims of conservation in the face of a burden on interstate commerce do not pass constitutional muster.[136] Also, the moratorium's stated goals require the Committee to determine water use, and the Committee has not met.[137] The Committee's bad faith[138] would certainly weigh heavily on any court decision. Considering these facts, a court may find that the moratorium has no actual benefits and certainly none justifying the restriction it places on interstate commerce, for example, restricting willing parties from buying and selling water. Therefore, the moratorium is likely unconstitutional under the *Pike* balancing test.

Alternatively, a court will more likely find the moratorium discriminatory against interstate commerce and apply strict scrutiny, which carries a strong presumption against constitutionality.[139] In order to refute this presumption, the state must show that the moratorium is necessary, with no less restrictive alternative, and serves a compelling governmental goal.[140] A compelling governmental goal is a higher standard than the legitimate public benefit required by the *Pike* balancing test, and the state must show the governmental goal carries a very high level of benefit to the state, thus justifying the burden on interstate commerce.[141]

As discussed above, the moratorium's stated benefits are vague and further burdened by the Committee's bad faith in failing to hold a meeting. Therefore, this increases the state's difficulty in establishing that the goals of the moratorium can survive strict scrutiny review. In addition, the state must show that no less restrictive alternative exists to the moratorium that could accomplish the same legislative purpose. This poses a difficult requirement for the state to satisfy because there is little correlation between the vague notion of water conservation and

134. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

135. OKLA. STAT. tit. 82 § 1B(A) (2008).

136. West v. Kan. Natural Gas Co., 221 U.S. 229, 260 (1911).

137. OKLA. STAT. tit, 82 § 1C(B) (2006) (repealed 2007); Interview with Jeff Rabon, *supra* note 81.

138. "Bad faith" here means the failure of the Committee to attempt to create a plan for water conservation when conservation was the reason the statute was created. *Id.* § 1B(A) (stating the legislative purpose "to provide for the conservation . . . of surface water and groundwater within Oklahoma . . . .").

139. McConnell v. Federal Election Comm'n, 540 U.S. 93, 137 (2003); Maine v. Taylor, 477 U.S. 131, 144 (1986) (citing Hughes v. Oklahoma, 441 U.S. 332, 337 (1979)).

140. *Taylor*, 477 U.S. at 138 (citing *Hughes*, 441 U.S. at 336).

141. *Id.*

a complete ban of water sales. The state could allow water sales but require contract terms that encourage conservation, such as quotas or percentage of runoff requirements. It seems unnecessary to ban sales completely, and the burden that the ban places on interstate commerce certainly does not justify this action. Therefore, the moratorium would likely fail strict scrutiny, and a court would likely determine that the legislation is unconstitutional.

Finally, the state could not assert the market participation exception to an interstate commerce analysis. Here, the state is not a participant in the water sales market.[142] The market participation exception views the state as a private business,[143] and in this regard, Oklahoma is not a private business. Instead, Oklahoma is merely a regulator of public property by requiring permits for the use of state water through the OWRB. Case law establishes that state ownership of water is a legal fiction that does not permit the state to distribute water as a private entity would.[144] If Oklahoma acted as a private business in water sales, then the state would charge its own citizens and municipalities for the use of the state's water rather than simply requiring permits and beneficial use.[145]

C. RELEVANT CASE LAW SUPPORTING UNCONSTITUTIONALITY

Many cases support the idea that the water sale moratorium is unconstitutional. In *City of Altus v. Carr*, a southern Oklahoma city attempted to purchase groundwater from an adjoining Texas county, which prompted the Texas legislature to pass a statute prohibiting the exportation of water without the approval of the legislature.[146] The city sued, and the Texas Attorney General asserted that statute's purpose was conservation and groundwater was not an article of commerce.[147] However, the court held that, although conservation alone may not burden interstate commerce, this did not present such a case.[148] Furthermore, the claim that groundwater is not an article of commerce failed because "its conservation is in a sense commercial –the business welfare of the state, as coal might be, or timber."[149] The statute failed

142. *See* S. Cent. Timber Dev. v. Wunnicke, 467 U.S. 82, 93, 97 (1984) (discussing the market-participant doctrine).

143. Reeves, Inc. v. Stakes, 447 U.S. 429, 436-41 (1980) (discussing treatment of the state under the market-participant doctrine).

144. Sporhase v. Nebraska, 458 U.S. 941, 951 (1982).

145. *See id.* at 952.

146. City of Altus v. Carr, 255 F.Supp. 828, 830-32 (W.D. Tex 1966), *aff'd* 385 U.S. 35 (1966).

147. *Id.* at 838.

148. *Id.* at 839 (citing Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)) (holding that a statute's stated purpose does not bind plaintiffs because plaintiffs may show a burden on interstate commerce through a statute's practical application).

149. *Id.* (quoting West v. Kan. Natural Gas Co., 221 U.S. 229, 255 (1911)).

the commerce clause analysis because the statute directly governed the interstate transfer of water:

> Moreover, on the facts of this case it appears to us that [the Texas Statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of *West v. Kansas Natural Gas Co.*[150]

In *City of Altus,* note that Oklahoma claimed water was an article of commerce subject to the Dormant Commerce Clause.[151]

In another case, *Sporhase v. Nebraska,* Nebraska passed a statute granting a permit to transfer groundwater from the state only where the purchasing state agreed to a reciprocity agreement for water rights.[152] The state claimed the reciprocity agreement was necessary for conservation because water, unlike other natural resources, is necessary for human survival and therefore not an article of commerce.[153] However, the court considered that over 80 percent of water use is for agricultural purposes rather than for human consumption, and thus the bulk of water usage is in a commerce sense: it is a necessary raw material of the agricultural industry.[154] The Framers intended federal regulation for exactly this type of commerce among the several States.[155] In addition, aquifers and rivers commonly traverse state lines, thereby confirming the view that a significant federal interest exists in regulation designed for conservation and fair allocation of water.[156]

After holding water is an article of interstate commerce, the *Sporhase* court moved to the Commerce Clause analysis. The court imposed the burden of evidence on the state, because the statute operated as an explicit barrier to commerce between two states and was thus facially discriminatory against interstate commerce.[157] Therefore, the court required the state to show a narrowly tailored correlation between the offending statute and its asserted local purpose.[158] The state failed this requirement because it presented insufficient evidence.[159] Note this court called this requirement "strictest scrutiny," implying a heightened standard of review.[160] Although states manage natural resources, this right does not permit withholding resources to

150. *Id.* at 839-40.
151. *Id.* at 837.
152. Sporhase v. Nebraska, 458 U.S. 941, 944 (1982).
153. *Id.* at 948, 952.
154. *Id.* at 953.
155. *Id.*
156. *Id.*
157. *Id.* at 957.
158. *Id.*
159. *Id.* at 957-58.
160. *Id.* at 958 (citing Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)).

another state's detriment.[161] The court noted only one exception to a water ban: "[a] demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water."[162] This statement implies that if a state first shows it is arid, then it may pass strict scrutiny if the statute has a close relationship with water conservation. However, as previously stated, to date only one statute survived strict scrutiny review under the Dormant Commerce Clause.[163]

In summary, both *City of Altus* and *Sporhase* held that water is an article of commerce, and courts evaluate restrictions placed on it with the highest level of judicial scrutiny. Here, the moratorium will likely meet the same fate as the Texas statute in *City of Altus* and the groundwater provisions in *Sporhase.* As in both cases, Oklahoma banned the exportation of water in the name of conservation, and the moratorium governs the interstate transfer of water. Furthermore, the only exception outlined in *Sporhase* does not apply to Oklahoma. As stated above, Oklahoma has an abundance of water and the complete ban on its sale does not hold a close relationship to conservation because less restrictive alternatives for conserving water are available to the state.[164] Accordingly, the moratorium is likely facially discriminatory and subject to strict scrutiny review; moreover, if the *Sporhase* and *City of Altus* cases are any indication as to the fate of facially discriminatory water statutes, then a court will find the moratorium is unconstitutional.

IV. CONCLUSIONS/CURRENT STATE OF THE MORATORIUM

The Tarrant Regional Water District filed suit in Federal Court in the Western District of Oklahoma on January 11, 2007;[165] in response, Oklahoma filed a motion to dismiss in March.[166] The state based the motion to dismiss on ripeness and Eleventh Amendment sovereign immunity.[167] The court denied the motion to dismiss, and the state appealed.[168]

In October of 2008, the Tenth Circuit Court of Appeals ruled the case was ripe for trial and the OWRB did not have sovereign immunity

161. *Hughes,* 441 U.S. at 336-37 (holding that the state could not ban the exportation of natural resources without facing strict scrutiny). In *Hughes,* the resource at issue was minnows. *Id.* at 322.

162. *Sporhase,* 458 U.S. at 958.

163. Maine v. Taylor, 477 U.S. 131, 151-52 (1986).

164. *See supra* text accompanying notes 8-11, 137-138.

165. Tarrant Complaint, *supra* note 7.

166. Motion to Dismiss, Tarrant Reg'l Water Dist. v. Herrmann, No. 5:07-CV-0045-HE (W.D.Okla. Mar. 20, 2007).

167. Order Denying Motion to Dismiss, *supra* note 75, at 6-7.

168. Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906, 906 (10th Cir. 2008).

under the Eleventh Amendment.[169] The court held that Tarrant County showed an appreciable threat of injury flowing from the water sale moratorium in its inability to purchase Oklahoma's water; therefore, an actual case or controversy existed.[170] As to the Eleventh Amendment defense, the OWRB contended that if the court denied immunity, then the decision would allow Tarrant County to encroach on Oklahoma's ownership interest in its natural resources.[171] However, the court held that Tarrant County's interest in Oklahoma's water is prospective because, even if the moratorium were not in place, it would simply put Tarrant County on the same footing as an instate applicant for a water appropriation permit.[172] Tarrant County must still conform to the statutory and regulatory standards required for all permit applicants.[173] Furthermore, the court stated that under *Sporhase,* Oklahoma did not have an ownership interest in its water, thus extending the *Sporhase* decision to include surface water as well as groundwater.[174] With the procedural and jurisdictional questions addressed, Tarrant County's case can now proceed to the merits, specifically to the issue of the moratorium's constitutionality.

Some Oklahoma legislators refuse to acknowledge the law's likely end despite the Tenth Circuit decision and the forthcoming hearing on the merits, which will likely result in the moratorium's demise. In the first legislative session of 2009, Jerry Ellis, now a state senator,[175] proposed an extension of the moratorium to January of 2012.[176] Given the reasons stated above, however, the moratorium is likely unconstitutional and negotiations with Texas will resume for the purchase of Oklahoma water.

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169. *Id.* at 910, 914.
170. *Id.* at 910.
171. *Id.* at 913.
172. *Id.*
173. *Id.*
174. *Id.* (citing Sporhase v. Nebraska, 458 U.S. 941, 950-52 (1982)).
175. Mr. Ellis won his bid for the Oklahoma Senate in the November 2008 elections, making the water sale moratorium a key theme in his campaign. *See, e.g.,* Max B. Baker, *Legislator Wants to Talk About Water Sale,* FORT WORTH STAR-TELEGRAM, July 2, 2007, at B1, *available at* 2007 WLNR 12455281.
176. S.B. 55, 52nd Leg., 1st Sess. (Okla. 2009).