XVII. Water

Rene Ruiz, Brian T. FitzGerald, and Richard D. Gary

A. Introduction

This report of the Water Committee begins with another dispute between states over transboundary water resources subject to a compact and highlights the limitations on resolving modern-day water disputes governed by decades-old agreements. In *Kansas v. Nebraska*, the original jurisdiction of the U.S. Supreme Court was invoked under Article III when Kansas complained that Nebraska substantially exceeded its allocation of water under the Republican River Basin Compact.[1] The Compact, which was found to apply to groundwater pumping in the basin, was developed among the States of Nebraska, Kansas, and Colorado after the drought during the 1930's Dust Bowl. The Court's decision is noteworthy because it awarded actual damages and disgorgement of profits to Kansas and revised the methods for measuring water consumption under the Compact. As with all compacts, the Court found that its jurisdiction was limited, and it could not order relief that was inconsistent with the Compact's express

Rene Ruiz is a shareholder in the San Antonio office of Dykema Cox Smith. Brian T. FitzGerald is a partner in the Albany, New York, office of Cullen and Dykman LLP. Richard D. Gary is a partner in the Richmond, Virginia, office of Hunton and Williams LLP. Mr. Ruiz, who edited this report, is chair of the Water Committee. Messrs. FitzGerald and Gary are vice chairs.

The Committee gratefully acknowledges the contributions of Gregory G. Nickson, a partner, and Terrence Regan, a law clerk, in the Albany office of Cullen and Dykman LLP; and Summer Bruington Greathouse and Emily A. Wurtenberger, associates in the San Antonio office of Dykema Cox Smith.

1. 2015 U.S. LEXIS 1501 (Feb. 24, 2015).

terms. However, the Court also found that it had "full authority to remedy violations of and promote compliance with" the Compact and, under this broad equitable jurisdiction, held that it has the power to "mould each decree to the necessities of the particular case and accord full justice to all parties."[2]

This year's report includes an update on *Aransas Project v. Shaw,*[3] which involved the death of twenty-three whooping cranes and claims by an environmental group that the deaths were due to insufficient flows of fresh water reaching the bays and estuaries that are occupied by the birds during part of the year. The environmental group sued the state agency in charge of issuing permits to divert river water, claiming a taking under the Endangered Species Act (ESA) and seeking to enjoin the agency from issuing more permits until a habitat conservation plan was approved to protect the birds. In a decision issued on March 11, 2013, the U.S. District Court of the Southern District of Texas found that the state agency committed a taking under the ESA and granted the request for an injunction. The state agency appealed, and the Fifth Circuit reversed on the grounds that the deaths were not proximately caused by the agency's permitting process and the district court erred in granting the injunction. The decision limits the potential far-reaching implications of the district court's holding.

The Supreme Court of Massachusetts addressed the authority of a state board to perform an independent assessment of the impacts of water usage by a proposed power generation facility on municipal water supplies when determining whether to issue the facility a building permit. The dispute arose when the power company sought a change in its building permit to use potable water from the municipal system in its cooling towers instead of reclaimed water as initially approved. Although the state's Department of Environmental Protection is charged with regulating the water supply of municipal water systems to ensure adequate and ample supplies to the localities, the court held that the siting board's charge was different and focused on minimizing the environmental impacts of new power generation facilities. Thus the board was required to perform its own assessment.

Finally, as part of a continuing effort to report on disputes involving the controversial and water-intensive practice of hydraulic fracturing, the report covers the decision of a New York appeals court to uphold the home rule authority of a city to adopt zoning laws banning oil and gas exploration, extraction, and storage activities within its city limits. New York has had a de facto ban on hydraulic fracturing since 2008, which was recently extended by the current governor. Even if the state ban is ever lifted, the decision means hydraulic fracturing may still be banned within certain cities.

Shortly after the deadline for the reports in this year's edition of *Recent Developments* reports, Governor Jerry Brown of California ordered mandatory water use reductions for the first time in the state's history, saying the state's four-year drought "had reached near-crisis proportions after a winter of record-low

2. *Id.* at *19–20 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).
3. 756 F.3d 801 (5th Cir. 2014).

snowfalls." A brief discussion of the executive order appears at the end of this article; the 2016 edition of *Recent Developments* will include a more detailed report.

B. Court Decisions

1. U.S. Supreme Court Upholds Special Master Decision That Nebraska Knowingly Jeopardized Kansas's Water Resources

On February 24, 2015, the U.S. Supreme Court issued a decision resolving a dispute between the states over water rights in the Republican River Basin.[4] The Court adopted the recommendations of the Special Master, finding that Nebraska had knowingly failed to comply with the terms of the Republican River Basin Compact, and awarded actual damages and disgorgement of profits to Kansas. The Court also adopted the Special Master's recommendation to revise the methods for measuring water consumption under the Compact to exclude "imported water," i.e., water farmers bring into the area that eventually seeps into the Basin.

The Compact, an agreement among Nebraska, Kansas, and Colorado, governs the allocation of water in the Basin. The Compact was developed after an extended drought during the 1930s at the urging of the federal government. In 2000, when Kansas and Nebraska disputed whether groundwater pumping counted as consumption of the Basin's water supply, the Court agreed with Kansas that groundwater pumping was subject to the Compact.[5] Kansas and Nebraska subsequently entered into settlement negotiations, agreeing to a final settlement stipulation in 2002. The settlement established mechanisms to promote compliance and measure water consumption by the states, including accounting procedures and a groundwater model to measure groundwater pumping.

In 2007, Kansas complained that Nebraska had substantially exceeded its allocation of water for the 2005–2006 accounting period, giving rise to the instant case.[6] Nebraska conceded its overconsumption, but argued that disgorgement was inappropriate. Nebraska further argued that the accounting procedures and groundwater model needed to be revised so as to exclude its pumping of imported water from the Platte River in the calculation of the Basin's "virgin water supply."[7] The Special Master assigned to the case found that Nebraska had knowingly failed to comply with the Compact and recommended awarding $3.7 million in actual damages and $1.8 million in partial disgorgement of profits to Kansas, but denied Kansas's request for an injunction. The Special Master also recommended that the accounting procedures and groundwater model be reformed as requested by Nebraska. The Supreme Court adopted each of the Special Master's recommendations.

4. *Kansas,* 2015 LEXIS 1501, at *1.

5. See Kansas v. Nebraska, 530 U.S. 1272 (2000).

6. Under the settlement, water consumption is generally measured on a five-year running average. However, during "water short" periods, water consumption is measured on a two-year average. Because the states experienced a drought in 2006, the "water short" provision was put into effect, and the states' consumption was measured for 2005 and 2006.

7. "Virgin water supply" is "the water supply within the Basin (both the Republican River and its tributaries) undepleted by the activities of man." *Kansas*, 2015 U.S. LEXIS 1501, at *9.

Article III grants the Supreme Court original jurisdiction over disputes between states that are basically equitable in nature.[8] The Court found that this grant of original jurisdiction gave it inherent authority to apportion interstate waterways. Once a compact is in force, the Court is responsible for declaring rights under a compact and enforcing its terms, including providing the remedies necessary to prevent abuse.[9]

The Court found that the Compact's status as a federal law further distinguished this case from a suit between private parties.[10] The Court's jurisdiction was limited, and it could not order relief that was inconsistent with the Compact's express terms. Within this limit, however, the Court found that it has "full authority to remedy violations of and promote compliance with" the Compact.[11] Under this broad equitable jurisdiction, the Court held that it has the power to "mould each decree to the necessities of the particular case and accord full justice to all parties."[12]

The Court first held that Nebraska's delayed and insufficient action to remedy its prior overconsumption constituted a knowing violation of the Compact. In so holding, the Court noted that the legislation enacted by Nebraska to remedy its overconsumption did not become effective for two-and-a-half years after the settlement.[13] Further, the Court found that the legislation did not set sufficient goals for reducing water consumption and lacked any meaningful enforcement mechanisms.[14] Therefore, the Court held that Nebraska had "knowingly exposed Kansas to a substantial risk" and "recklessly gambled with Kansas's rights," which constituted a knowing failure to comply with the Compact.[15]

The Court found that Nebraska's culpability justified the Special Master's award of disgorgement of profits. Nebraska argued that under private contract law disgorgement of profits was only justified by a "deliberate" breach, not a "knowing" one. The Court disagreed, noting that in some areas of the law "the distinction between purposefully invading and recklessly disregarding another's rights makes no difference."[16] The Court found the case for disgorgement particularly strong "when one State gambles with another State's rights to a scarce natural resource."[17] The Court held that the disgorgement was appropriate as it "reminds Nebraska of its legal obligations, deters future violations and promotes the Compact's successful administration."[18]

8. U.S. CONST. art III, § 2; *Kansas*, 2015 U.S. LEXIS 1501, at *15 (citing Ohio v. Kentucky, 410 U.S. 641 (1973)).

9. *Id.* at *16–18.

10. The Constitution requires Congress to approve agreements between the states, giving the contracts the legal status of a federal law. U.S. CONST. art I, § 10 cl. 3.

11. *Kansas*, 2015 U.S. LEXIS 1501, at *19–20.

12. *Id.*, citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

13. *Id.* at *23–24. The legislation was not enacted for a year-and-a-half after the settlement and did not become effective until a year after that.

14. *Id.* at *25.

15. *Id.* at *27.

16. *Id.* at *29.

17. *Id.* at *30.

18. *Id.* at *32.

The Court rejected Kansas's argument that the $1.8 million disgorgement award was too low, noting that "disgorgement need not be all or nothing . . . if partial disgorgement will serve to stabilize a compact."[19] The Court held that the Special Master's disgorgement award was sufficient, as Nebraska had already begun taking significant remedial measures to bring its water consumption into compliance with the Compact. The Court found that the amount of the award was not arbitrary because the Special Master "took into account the appropriate considerations" in determining the amount, including "Nebraska's incentives, past behavior, and more recent compliance efforts."[20]

Finally, the Court adopted the Special Master's recommendation to reform the accounting procedures and groundwater model to ensure that imported Platte River water did not count against Nebraska's allotted consumption of the Basin's virgin water supply. The Court found that reformation was warranted here for two reasons. First, reformation was needed to prevent inaccurate allotment of water.[21] The Court held that, where the allocation of water was inconsistent with a compact, its "authority to devise 'fair and equitable solutions' to interstate water disputes encompasses modifying a technical agreement to address material errors . . . and thus align it with the [states' intent]."[22]

Second, the Court found that the modification was necessary to prevent the settlement from violating the provisions of the Compact, a federal law.[23] The Court held that the inaccuracies in the settlement's measuring mechanisms violated the Compact in two ways. First, by including Platte River water in its consumption calculations, the Court held that the settlement exceeded the Compact's scope, which pertains only to the Basin's virgin water supply.[24] Second, the settlement deprives Nebraska of its allotted Basin water supply. Because Platte River water is included in the calculation of Nebraska's water consumption, Nebraska is forced to consume less than its apportioned share of the Basin's water in order to remain in compliance with the Compact.[25] The Court noted that Kansas had neither provided a workable alternative nor shown that the proposed change will produce any other inaccuracy.[26] Therefore, the Court adopted the reformation recommended by the Special Master.

Justice Thomas, joined by Justices Scalia, Alito, and, in part, Chief Justice Roberts, dissented.[27] He disagreed with the majority's order of disgorgement of profits as well as its reformation of the accounting procedures and groundwater model. He argued that the Compact should be governed by the principles

19. *Id.* at *34.
20. *Id.* at *36.
21. *Id.* at *42.
22. *Id.* at *45 (citing Texas v. New Mexico, 482 U.S. 124, 134 (1987); Kansas v. Colorado, 543 U.S. 86, 102 (2004)).
23. *Id.* at *43.
24. *Id*. at *47.
25. *Id.* at *48.
26. *Id.* at *49.
27. Chief Justice Roberts joined Justice Thomas's opinion only insofar as it disagreed with the majority's reformation of the accounting procedures and groundwater model.

of contract law, not the "loose equitable powers" invoked by the majority.[28] Applying these principles, he argued that a deliberate breach, not a "knowing" or "reckless" breach, is required before disgorgement of profits may be ordered. He further argued that, even if disgorgement were appropriate, the award should equal the profits Nebraska received from its breach, not the arbitrary amount arrived at by the Special Master. He also disagreed with the majority's reformation of the Compact, arguing that reformation of a contract is only appropriate where "a written contract fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing."[29] He argued that no such mutual mistake was present here. Rather, the parties' mistake was in their belief in the accuracy of the models. In such circumstances, he argued that the appropriate equitable remedy, if any, was rescission.[30] Finally, Justice Thomas argued that the majority's reading requires water models to "accurately account for every drop of imported water" in order to comply with the Compact. As models are always approximations, Justice Thomas argued that any model implemented, including the majority's revised model, violates the Compact.

2. Fifth Circuit Reverses District Court Decision That Texas State Agency Permit Process Violated Endangered Species Act

Aransas Project v. Shaw involved claims by an environmental group that the death of twenty-three whooping cranes, an endangered species, was due to insufficient flows of fresh water reaching the bays and estuaries that are occupied by the birds during part of the year.[31] In a decision filed on June 30, 2014, the Fifth Circuit reversed the holding of the U.S. District Court of the Southern District of Texas and held that the Texas Commission on Environmental Quality (TCEQ) did not violate Section 9 of the Endangered Species Act (ESA). The court declared that the TCEQ's permitting process was not the proximate cause of the whooping crane deaths and the injunction granted by the district court was an abuse of discretion.

The whooping crane is a five-foot tall bird that migrates every winter from Wood Buffalo National Park in Canada to Aransas National Wildlife Refuge in South Texas. Whooping cranes subsist on the freshwater blue crabs and wolfberries found in the Refuge. During the winter of 2008–2009, when Texas experienced a severe drought, twenty-three of the estimated 300 cranes that exist in the wild died due to diminished freshwater inflows, increased salinity, and lack of blue crabs and wolfberries in the Refuge.

When the crane mortalities became known, the Aransas Project (TAP) sued the TCEQ, alleging that the TCEQ violated Section 9 of the ESA, which prohibits "takes" of endangered species.[32] The term "take" includes actions that "harass,

28. *Id.* at *54 (Thomas, J. dissenting).
29. *Id.* at *69 (Thomas, J. dissenting) (internal quotation marks omitted).
30. *Id.* at *72 (Thomas, J. dissenting).
31. 756 F.3d 801 (5th Cir. 2014).
32. 16 U.S.C. § 1538(a)(1)(B).

harm, . . . [or] kill" protected species.[33] "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[34] This ESA prohibition on "takes" governs both acts and failures to act by all "persons," defined as "any officer, employee, [or] agent, . . . of any State."[35]

The district court held on March 11, 2013, that the TCEQ violated the ESA. First, the court held that TAP had standing to sue. Second, the court refused to abstain from adjudicating the case under the *Burford* abstention doctrine. Third, the court enjoined the TCEQ from approving or granting new water permits until the TCEQ could prove that the permits would not constitute a taking under the ESA. Finally, the court required the TCEQ to seek an incidental take permit, which allows incidental taking of an endangered species and is issued by the U.S. Fish and Wildlife Service after development of a habitat conservation plan.

The TCEQ appealed, and the Fifth Circuit reversed the district court decision. While the Fifth Circuit agreed that the TCEQ permitting process was a potential cause-in-fact of the whooping crane deaths, the court held that the permitting process was not the proximate cause under the clearly erroneous standard. To be a proximate cause, the actions of the TCEQ must have foreseeably caused the crane deaths; there must be a direct and specific link. If the deaths are remotely, tenuously, or fortuitously related to the permit process, the permit process is not the proximate cause.

The Fifth Circuit held that the TCEQ was not the proximate cause, noting the long chain of causation between the permit process and the crane deaths: the permits caused a decrease in freshwater, which caused an increase in salinity, which caused a decrease in blue crabs and wolfberries, which caused the cranes to engage in stress behavior, which caused the cranes to be emaciated, which caused twenty-three crane deaths. This long chain distinguished the TAP argument from prior cases in which there was a close connection between the liable actor's conduct and the killing of endangered species.[36] The court indicated in a footnote that equating proximate cause with government authorization of an activity could lead to a slippery slope of government liability.[37]

Secondly, the TCEQ did not have control over a number of contingencies affecting this chain of causation. The TCEQ does not have control over all surface water usage. The TCEQ issues permits, but does not compel usage; and some users are not required to obtain a permit to use water. Furthermore, the forces of nature affect salinity and water flows; a severe, extended drought cannot be foreseen. As the court states, proximate cause cannot be found when "a

33. *Id.* at § 1532(19).
34. 50 C.F.R. § 17.3(c).
35. 16 U.S.C. § 1532(13).
36. Sierra Club v. Yeutter, 926 F.2d 429, 432–33 (5th Cir. 1991); Strahan v. Coxe, 127 F.3d 155, 165 (1st Cir. 1997); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 148 F.3d 1231 (11th Cir. 1998).
37. *Aransas Project*, 756 F.3d at 801, n.11.

fortuitous confluence of adverse factors caused the unexpected 2008–2009 die-off found by the district court."[38]

Finally, the TCEQ was not on notice of potential crane deaths due to a report published in 2007 that explained in general terms the possibility of drought and attendant risks to cranes. The report was nonspecific and conditional and predicted long-term effects, not immediate impacts. In summary, the Fifth Circuit held that the deaths of twenty-three whooping cranes were not a foreseeable effect of the TCEQ's permit process.

Furthermore, the Fifth Circuit held that enjoining the TCEQ from approving or granting permits was an abuse of discretion. Injunctive relief is proper only when there is a real and immediate threat of future or continuing injury; past injuries alone are insufficient. "Injunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication."[39] In this case, the district court erred in finding a real and immediate threat of future injury to the whooping cranes. The cranes steadily increased their flock size after the winter of 2008–2009, and there was no evidence of dangerous deficiencies of freshwater, blue crab, or wolfberries in subsequent years. Also, although whooping cranes have been endangered for many decades and the TCEQ had been issuing permits continuously until 2010, TAP did not allege "takes" in any year before or after 2008–2009.

As did the district court, the Fifth Circuit held that it was not required to abstain under the *Burford* doctrine.[40] The court reviewed the five factors of the doctrine: (1) whether the cause of action arises under federal or state law, (2) whether the case requires inquiry into unsettled issues of state law or into local facts, (3) the importance of the state interest involved, (4) the state's need for a coherent policy in that area, and (5) the presence of a special state forum for judicial review. Although the court acknowledged Texas's need for coherent policy in water regulation, the court also held that the action arises under federal law; the action is not sufficiently entangled in state law or policy to abstain; there are strong state and federal interests involved; and Texas had an inadequate review process for the relief TAP sought because the Texas Water Code forbids granting water rights for environmental needs and suspends environmental permits during emergencies, which includes droughts.[41] Therefore, the factors weighed in favor of not abstaining.

3. Supreme Court of Massachusetts Upholds State Agency Authority to Analyze Environmental Impacts of Water Usage

The Supreme Court of Massachusetts upheld the state's Energy Facilities Siting Board's authority to include its own assessment of the environmental impacts that water usage of a proposed power generating facility will have on

38. *Id.* at 823.
39. *Id.* at 824.
40. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943).
41. TEX. WATER CODE § 11.0235(d)(1).

the city's municipal water systems in its determination of whether to approve the facility's building permit.

In *Brockton Power Co. LLC v. Energy Facilities Siting Board*, Brockton Power argued that the Board's environmental assessment of its power facility's proposed water use "intruded on the authority of the Department of Environmental Protection (DEP)" to regulate the water supply of municipal water systems.[42] Brockton Power had sought a change in its building permit to use potable water from the city's municipal water supply in its cooling tower after the city had denied its use of recycled water from the city's advanced wastewater reclamation facility. When the Board rejected Brockton's proposal to use water from the municipal water supply due to potential environmental impacts, Brockton appealed, asserting that while the Board must evaluate the overall environmental impacts of a proposed plant, the DEP is specifically in charge of regulating water use and the amount of water supplies in the state. Brockton argued that since the DEP balanced environmental concerns when it imposed the "safe yield" limit from the city's existing water supply and Brockton Power's proposed water use was within the DEP's safe yield, the Board must defer to the DEP's finding that the water usage was environmentally sound.

The court, however, recognized that the roles of the Board and the DEP are similar but not identical in their aims and that the Board has the statutory authority to determine the environmental impacts of a specific generation facility. Thus, the DEP's findings on the amount of water available for use in a municipal water system are not entitled to outright deference by the Board. To approve a building permit under Massachusetts law, the Board must find that the proposed plans "minimize the environmental impacts consistent with the minimization of costs associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility."[43] The DEP is statutorily directed to consider environmental impacts and water conservation when setting its safe yield limits. However, the court noted that the goals of the two agencies are markedly different. The Board is concerned with permitting new facilities that will contribute to the "energy supply with minimal environmental impacts."[44] DEP's main focus is setting safe yield limits to ensure adequate and ample water supply to localities.[45] Therefore, the Board was not only permitted, but statutorily required, to conduct an independent evaluation of the environmental impacts of the facility.

The practical implication of this ruling is that an applicant to build a power generation facility in Massachusetts has the burden to show that any adverse environmental impacts of water use caused by the facility will be addressed and minimized even if the increased water needs of the facility will not cause the city to exceed its safe yield level set by the DEP.

42. 469 Mass. 215, 220 (2014).
43. MASS. GEN. LAWS ch. 164, § 69J.
44. *Id.*
45. *Brockton Power*, 469 Mass. at 223–24.

4. New York Court Upholds "Home Rule" City Authority to Adopt Zoning Laws Prohibiting Oil and Gas Activities

On June 30, 2014, the New York State Court of Appeals issued its decision in the *Matter of Wallach v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*,[46] which affirmed lower court decisions that municipal zoning laws banning natural gas development, including hydraulic fracturing, were valid exercises of the municipality's home rule authority. These cases centered on the issue of whether, under the supersession clause in the New York State Oil, Gas and Solution Mining Law (OGSML), municipalities were preempted from enacting zoning laws that prohibited oil and gas production activities. The court held that such zoning laws were not preempted, thus upholding the two zoning laws at issue. As a result, even if New York State's de facto moratorium on hydraulic fracturing is ultimately lifted, local laws may still prevent hydraulic fracturing from occurring in certain municipalities.

The cases involved the Town of Dryden and the Town of Middlefield, rural municipalities located in the Marcellus Shale region of New York State. Although oil and gas exploration had not historically taken place in the towns, energy companies, including Norse Energy Corp. USA[47] and Cooperstown Holstein Corp. (CHC) (collectively, the companies), began obtaining oil and gas leases from the landowners in both towns in order to explore and develop the natural gas resources in the Marcellus Shale formation. Before Norse and CHC could commence any exploration or drilling activities, both towns, after determining that gas drilling would permanently alter and adversely affect the small town character of their communities, enacted zoning laws banning all oil and gas exploration, extraction, and storage activities.

Norse and CHC, respectively, challenged Dryden's and Middlefield's zoning laws, arguing that the supersession clause of the OGSML[48] preempted the zoning law bans. The towns responded that the zoning regulations were valid exercises of their home rule authority. Article IX of the New York State Constitution grants municipalities home rule authority by providing every local government with the "power to adopt and amend local laws not inconsistent with the provisions of [the New York State Constitution] or any general law . . . except to the extent that the legislature shall restrict the adoption of such local law."[49] The Legislature implemented this constitutional mandate through the New York Municipal Home Rule Law, which empowers local governments to pass laws both for the "protection and enhancement of [their] physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein."[50] However, a municipality may

46. 23 N.Y.3d 728 (2014).

47. Norse was the petitioner in *Dryden*. After the case began, Norse initiated bankruptcy proceedings and Mark Wallach was substituted as petitioner, as the company's bankruptcy trustee.

48. N.Y. Envtl. Conserv. Law § 23-0303(2).

49. N.Y. Const. art IX, § 2(c)(ii).

50. N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11), (12).

not enact ordinances that conflict with the New York State Constitution or any general law. Under the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law.[51]

In holding that the OGSML's supersession clause did not preempt the towns' zoning laws, the court applied the three-prong analytical framework established in *Frew Run Gravel Products v. Town of Carroll*: (1) the plain language of the supersession clause, (2) the statutory scheme as a whole, and (3) the relevant legislative history.[52]

Regarding the first factor, the court found that the language of the OGSML supersession clause, which preempted local laws "relating to the regulation of the oil, gas and solution mining industries," was "naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries."[53] The court held that while the towns' zoning laws would "undeniably have an impact" on the energy industry, " 'this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute.' "[54]

Turning to the second factor, the court determined that the entire framework of the OGSML[55] was designed to allow the New York State Department of Environmental Conservation (DEC) to (1) regulate the oil and natural gas industry to prevent waste; (2) authorize and provide for the development of oil and gas properties to create a greater ultimate recovery of the commodities; (3) protect the rights of all owners and all persons, including landowners and the public; and (4) regulate the underground storage of the commodities. Thus, the court found that the OGSML is concerned with "the safety, technical and operational aspects of oil and gas activities across the State"; the OGSML's supersession clause fits within this framework by prohibiting local intrusion into the DEC's oversight of the industry's operations.[56] The court rejected the companies' argument that the OGSML's goals of preventing "waste" and promoting a "greater ultimate recovery" are inconsistent with the towns' zoning laws prohibiting exploration and excavation.[57]

Finally, with respect to the legislative history of the OGSML, the court noted that the supersession clause at issue in this case was added to the OGSML in 1981 as part of legislation amending various parts of the Finance Law, the Environmental Conservation Law, and the Real Property Tax Law. These amendments were created in response to the DEC's concern that it was unable to

51. *Dryden*, 23 N.Y.3d at 743.
52. 71 N.Y.2d 126 (1987).
53. *Dryden*, 23 N.Y.3d at 746.
54. *Id.* (citing *Frew Run*, 71 N.Y.2d at 131).
55. N.Y. Envtl. Conserv. Law § 23.
56. *Dryden*, 23 N.Y.3d at 750.
57. *Id.*

perform its regulatory responsibilities effectively because of increased drilling activities. The amendments provided funds for updated regulatory programs as well as additional enforcement powers. The court found nothing in the legislative history, however, that shed additional light on the supersession clause, which was referenced only once with no elaboration. Additionally, the court noted that there was no mention of zoning regulations anywhere in the legislative history, "much less . . . an intent to take away local land use powers."[58] As such, nothing in the legislative history undermined the court's conclusion that the supersession clause was consistent with the towns' zoning regulations. The court concluded its *Frew Run* analysis by stating that all three factors supported the validity of the towns' zoning laws.

The court also rejected the companies' argument that, even if the OGSML supersession clause does not preempt all zoning laws, it should be interpreted to preempt zoning laws that prohibit gas and oil excavation in an entire municipality, like those at issue here. The court found that this argument was foreclosed by its decision in *Matter of Gernatt Asphalt Products v. Town of Sardinia*.[59] The court concluded that both Dryden and Middlefield reasonably exercised their zoning authority in amending their zoning laws to prohibit exploration and extraction activities in all areas of the towns. Therefore, the zoning laws were valid exercises of their home rule authority.

Acknowledging the ongoing debate in New York about the potential environmental and safety risks associated with shale gas production, the court made it clear that these cases were not about whether hydraulic fracturing is beneficial or detrimental to the economy, environment, or energy needs. The court stated that these "major policy questions" should be resolved by the coordinate branches of government.[60] The "discrete issue" resolved by the court was "whether the State Legislature eliminated the home rule capacity of municipalities to pass zoning laws that exclude oil, gas and hydrofracking activities in order to preserve the existing character of their communities."[61] As noted above, the court held that, while the Legislature had the right to eliminate such a municipal power, the supersession clause of the OGSML did not evince a clear intent to do so.

C. Governor Jerry Brown Orders Mandatory Water Use Restrictions for the First Time in California's History

Following what he called "the lowest snowpack ever recorded with no end to [California's] drought in sight," Governor Edmund G. Brown, Jr. issued an

58. *Id.* at 753.

59. 87 N.Y.2d 668 (1996) (rejecting the argument that *Frew Run* granted "municipalities . . . the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts").

60. *Dryden*, 23 N.Y.3d at 754.

61. *Id.* at 754-55.

executive order on April 1, 2015, that severely restricts the use of water in the state.[62]

The governor directed the State Water Resources Control Board to implement mandatory water reductions in cities and towns to reduce water consumption by 25 percent. In addition, the Board was directed to:

- Replace 50 million square feet of lawns through the state with drought tolerant landscaping in partnership with local governments;
- Direct the creation of a temporary, statewide consumer rebate program to replace old appliances with more water and energy efficient models;
- Require campuses, golf courses, cemeteries, and other large landscapes to make significant cuts in water use; and
- Prohibit new homes and developments from irrigating with potable water unless water-efficient drip irrigation systems are used;
- Ban watering of ornamental grass on public street medians.[63]

The order also directed local water agencies to adjust their rate structures to "implement conservation pricing. Agricultural water users will be required to "report more water use information to state regulators, increasing the state's ability to enforce against illegal diversions and waste and unreasonable use of water."[64]

62. Exec. Order No. B-29-15, State of Calif., Apr. 1, 2015, *available at* http://gov.ca.gov/docs/4.1.15_Executive_Order.pdf

63. Press Release, Office of the Governor, Governor Brown Directs First Ever Statewide Mandatory Water Reductions (Apr. 1, 2015), *available at* http://gov.ca.gov/news.php?id=18910.

64. *Id.*