



Aerial view of the State Highway No. 78
Bridge at the Red River. Henley Quadling
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On Friday, the U.S. Supreme Court [agreed](#) to review ***Tarrant Regional Water District v. Herrmann*** ([No. 11-889](#)), an appeal from the 10th Circuit regarding apportionment of the [Red River](#), which forms the southeastern border between Oklahoma and Texas. At issue before the Court is whether it is “OK” for a Texas water supplier to obtain Texas’ allocation of a shared river from within Oklahoma. The Court may also evaluate the constitutionality of Oklahoma statutes that restrict out-of-state water exports. The High Court’s ruling could have consequences for urban metropolises seeking to satisfy their growing populations’ water demand as climate change impacts water supply reliability, as well as for states experimenting with protectionist policies to preserve natural resources within their borders.

Factual Background

Tarrant Regional Water District v. Herrmann concerns a Texas water supply agency’s applications for three surface water appropriation permits from the Oklahoma Water Resources Board. The three permit applications name diversion points in Oklahoma’s portion of the Red River Basin. The Tarrant Regional Water District seeks water to service the growing demand of the [Dallas-Fort Worth metropolitan area](#) in North Central Texas. Tarrant would use the water from Oklahoma [to satisfy Dallas-Fort Worth’s post-2030 water demand](#). Dallas-Fort Worth is the largest metro region in the South and the fourth-largest metro region in the nation. As one of the largest Texas water suppliers, Tarrant already serves over 2 million residents, and that population is expected to double over the next fifty years. Even with strict water conservation measures, Tarrant projects a mid-century water deficit unless it is able to supplement its existing supply.

Tarrant claims that importing Red River Basin water from Oklahoma is the best of its possible water supply augmentation options. [According to Wayne Owen, Planning Director for the Tarrant Regional Water District](#), alternatives to obtaining water from Oklahoma would be costly and energy-intensive. Tarrant could be forced to transport water either 200 miles from an undeveloped Texas reservoir or 250 miles from the Texas-Louisiana border. Obtaining water from Red River flows further downstream within Texas’ boundaries is no good either; by the time the Red River flows into Texas, it is so saline that treating the water for municipal use is prohibitively expensive.

Tarrant claims that the State of Oklahoma benefits from “surplus water supply,” but that claim is contested by some Oklahoma officials. According at an [Associated Press report](#),

[Tarrant Regional Water] District officials maintain that Oklahoma has more than 10 times the water it needs to meet its own needs and the district wants only about 6 percent of water flowing into the Red River . . . District officials have said it would pay between \$15 million and \$60 million a year to transport Oklahoma water to North Texas, money they say could be used to build reservoirs and pipelines to deliver water to parched western Oklahoma.

Although Oklahoma has [hundreds of millions of acre feet of groundwater and the greatest number of man-made lakes in the country](#), the bulk of the state’s water supplies are not located near its residential and agricultural centers. And despite the fact that Southeastern Oklahoma’s Red River Basin contains the most surface water of any region in the state, it is one of Oklahoma’s poorest regions. Consequently, some of the Red River Basin’s water-rich yet economically impoverished cities see water as a potentially valuable export resource, similar to oil or natural gas. Many Oklahoma legislators, however, are more [concerned](#) about protecting the state from its thirsty neighbors and safeguarding Oklahoma’s long-term water security.

The Red River Compact

The Red River Basin is governed by the *Red River Compact* (RRC), an interstate agreement between Texas, Oklahoma, Arkansas, and Louisiana, and ratified by Congress in 1980, that assures “equitable apportionment” of the basin waters ([Pub. L. No. 96-564](#)). The Compact grants seemingly broad powers to the signatory states to regulate their water apportionments. In particular, the Compact provides that “each signatory state may use the water allocated to it in any manner deemed beneficial by that state” and “freely administer water rights and uses in accordance with the laws of that state” (RRC § 2.01). The Compact further affirms that it does not “impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water . . .” (RRC § 2.10(a)).

The Compact divides the basin into five “reaches” and further divides those reaches into “subbasins.” Of particular importance to the *Tarrant* case is Section 5.05 of the Compact, which concerns “Reach II, Subbasin 5,” the main stem of the Red River and its tributaries. Significantly, reach II of the Red River does not flow into Texas. Section 5.05(b)(1) grants the four signatory states “equal rights” to any subbasin 5 water in excess of the stated

minimum flow guaranteed to Louisiana (3000 cfs):

The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second.

Under Tarrant's reading of this provision, Texas is allocated a portion of any excess water in reach II, subbasin 5, even though this portion of the river basin does not flow through Texas. In contrast, under the Oklahoma Water Resources Board's reading, this provision merely apportions water between the downstream state (Louisiana) and the upstream states (Arkansas, Texas, and Oklahoma), and dictates that upstream allocations must be released to Louisiana when flows are low.

Oklahoma's Anti-Export Water Laws

In order to protect its abundant water supplies from neighboring states, Oklahoma has enacted two sets of statutes that restrict water exports. The first set of statutes imposed a five-year moratorium on out-of-state water exports (Okla. Stat. tit. 82 § 1B(A); *Id.* 74 § 1221.A). The moratorium has since expired.

The second set of statutes establish different review processes for in-state water use applications versus out-of-state water use applications, including provisions that:

- prohibit the Water Resources Board from permitting out of state water use (*Id.* 82 § 1085.22);
- require legislative approval of water exports, out-of-state water sales, contracts for out-of-state water use, and out-of-state use of water subject to an interstate compact (*Id.* §§ 105.12A(D), 1085.2, 1324.10(B));
- prevent municipal water districts from including as members public agencies from other states (*Id.* § 1266(9));
- require the Board, in reviewing permit applications, to "evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages" within Oklahoma (*Id.* § 105.12(A)(5));
- declare that, "No permit issued by the [Board] to use water outside the boundaries of the State of Oklahoma shall . . . [i]mpair the ability of the State of Oklahoma to meet

its obligations under any interstate stream compact” (*Id.* § 105.12A(B));

- subject out-of-state water use permits to a post-approval review process every ten years (*Id.* § 105.12F); and
- declare that, “Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma . . . ” (*Id.* § 1086.1(A)(3)).

Altogether, the provisions favor in-state water appropriation permits and severely inhibit out-of-state water exports. In effect, according to Tarrant, Oklahoma’s permitting scheme “operates as an absolute embargo on the export of water from the State for out-of-state use” (Petition, p. 7).

The Claims

As stated above, in 2007, Tarrant filed three surface water appropriation permit applications with the Oklahoma Water Resources Board. One of the permit applications sought 310,000 acre feet of water per year from the Kiamichi River, located in reach II, subbasin 5 in Oklahoma. (Recall that within reach II, subbasin 5, the four signatory states have equal rights to water in excess of the stated minimum flow.) The other two permit applications sought water from reach I, over which Oklahoma exercises unrestricted use (RRC § 4.02(B)).

On the same day that Tarrant filed its permit applications, it also sued Board members in federal court in the Western District of Oklahoma seeking declaratory judgment that Oklahoma’s anti-export laws are unconstitutional. Tarrant claimed:

- 1) Oklahoma’s anti-export laws are preempted by the Red River Compact § 5.05(b)(1), which grants Texas “equal rights” to water in excess of the stated minimum flow and allows Texas to divert a portion of its rightful share from locations within Oklahoma. The U.S. Supreme Court has previously ruled that interstate water compacts ratified by Congress have the status of federal law and preempt conflicting state laws under the [Supremacy Clause](#), Art. VI, § 2 of the U.S. Constitution ([Texas v. New Mexico](#), 462 U.S. 554, 564 (1983)).
- 2) Oklahoma’s anti-export laws unlawfully restrict interstate commerce in violation of the [dormant Commerce Clause](#), a legal doctrine inferred from Art. I, § 8 of the U.S. Constitution that prevents states from “impos[ing] regulations that place an undue burden on interstate commerce” ([United States v. Lopez](#), 514 U.S. 549, 579 (1995)).

Procedural History

The procedural history of this case is fairly complicated. Following Tarrant's complaint in 2007, the district court denied the Oklahoma Water Resources Board's motion to dismiss the case. The Board appealed the denial to the 10th Circuit Court of Appeals, which upheld the district court and sent the case back down for trial (545 F.3d 906 (10th Cir. 2008)). In the meantime, during the 2009 legislative session, Oklahoma enacted H.B. 1483, which amended the state's restrictions on out-of-state water use. The court allowed Tarrant to file a supplemental complaint incorporating the new laws.

The Board again filed a motion to dismiss/motion for summary judgment. In November 2009, the district court granted the Board's motion, finding that the water at issue is subject to the Red River Compact, and rejecting Tarrant's Commerce Clause and Supremacy Clause claims as precluded by the Red River Compact (2009 WL 3922803 (W.D. Okla. 2009)). At that time, the district court granted Tarrant leave to file an amended complaint regarding any water *not* subject to the Red River Compact. Tarrant subsequently filed an amended complaint concerning an agreement it executed with private groundwater rights owners in Oklahoma and a memorandum of understanding with the Apache Tribe of Oklahoma to lease or purchase tribal water rights. In 2010, the district court dismissed the amended complaint as unripe (2010 WL 2817220 (W.D. Okla. 2010)).

Tarrant appealed the district court's dismissal to the 10th Circuit in August 2010. In September 2011, a three-judge panel of the 10th Circuit [affirmed](#) the district court rulings. The appellate court held that:

1. "[T]he Red River Compact insulates Oklahoma water statutes from dormant Commerce Clause challenge . . . " and " gives Oklahoma wide berth to protect its compacted water against out-of-state transfer and use. . . ." Through the Compact, Congress expressly and unmistakably granted Oklahoma broad authority to regulate its water apportionment in ways that would otherwise violate the Commerce Clause.
2. Section 5.05(b)(1) of the Compact, which grants states "equal rights" to reach II, subbasin 5 water in excess of the stated minimum flow, does not allow Texas to appropriate its share of water from within Oklahoma. Although Oklahoma cannot enact laws inconsistent with the Compact, the Red River Compact is "consistent and not in conflict with the Oklahoma statutes." In reaching this holding, the court applied a strong presumption against preemption and determined that "Congress did not intend to preempt state water laws."
3. Challenges to Oklahoma's anti-export statutes as they apply to water *not* governed by the Compact are unripe.

Proceedings before the Supreme Court

Tarrant filed a [petition](#) for U.S. Supreme Court review on January 19, 2012. The yearlong period between the filing of the petition and the Court's ultimate grant of review is due to the fact that the Court invited the Solicitor General's opinion. The Solicitor General filed a brief on November 30, 2012, [opining](#) that the Court should grant certiorari, noting "the important interests at stake and the practical impact that the court of appeals' decision apparently would have on water planning in a major urban area in Texas." The Solicitor General argued that the 10th Circuit improperly applied a presumption against preemption, and instead should have found that the Red River Compact allows a signatory state to acquire a portion of its rightful share of water from another state in some circumstances. Accordingly, the Solicitor General contends, the appellate court should never have reached the dormant Commerce Clause question.

Additional amicus briefs were filed in support of the Petition by the [Upper Trinity Regional Water District \(TX\)](#); [State of Texas](#); [North Texas Municipal Water District](#); and jointly by the [City of Irving, TX, City of Hugo, OK, and Hugo Municipal Authority](#) (interestingly, in March, the U.S. Supreme Court denied appeal of a 10th Circuit ruling that rejected the City of Hugo's attempt to sell 200,000 acre feet of water to Irving, TX).

Oral arguments are scheduled for March/April 2013.

Potential Significance of the Case

Multiple interstate water compacts have language similar to that of the Red River Compact in declaring that the compact shall not interfere with signatory states' use and control of a water appropriation. According to Tarrant, the Court's ruling here potentially could affect the interpretation of other interstate compacts around the country, as well as the ability of other states to enact anti-export laws like Oklahoma's. Tarrant declares in its Petition that upholding the 10th Circuit ruling could encourage additional states to enact laws that restrict out-of-state water use and create management uncertainty in the [38 U.S. river basins governed by interstate agreements](#). In contrast, however, the High Court could render a ruling that is very narrow in scope. The Board has characterized the dispute at issue much more narrowly than Tarrant. The Board also noted in its [Opposition Brief](#) that the Red River Compact signatory states are not parties to the *Tarrant* litigation, and therefore, a decision in *Tarrant* about apportionment could not bind the Compacting States. It should be noted that the Solicitor General advocated for the Court to confine its analysis to interpretation of the Red River Compact. The Supreme Court simply could reject the appellate court's misreading of the Compact and remand the case to the district court. Even this limited ruling, though, would likely trigger subsequent proceedings to decide questions regarding the availability of water in Texas and the environmental and social

impacts of particular diversions.

Regardless of how the Court decides *Tarrant*, the case provides an opportunity to reflect on the water challenges facing American cities in the coming decades. Whether or not Tarrant can obtain its required water from Oklahoma will be crucial to urban planning in Dallas-Fort Worth, particularly considering the [extreme drought that has plagued Texas](#) since 2010. Recall that [2011 was Texas' worst single-year drought in history](#), linked to devastating wildfires, failed crops, factory closures, and crippling electricity demand. Some areas of Texas officially ran out of water, forcing residents to rely on tanker trucks for their personal water needs. Although the instant litigation arose before the onset of the Texas Drought, the state's recent water shortage certainly paints a striking context for the case—particularly when one considers that the [Texas population continues to grow twice as fast as the country as a whole](#) even as [the majority of the state experiences a water shortage](#).

And Texas is just one piece of a bigger picture. Climate change is projected to increase the risk of water shortage throughout the United States. NRDC [reports](#) that one-third of all counties in the contiguous United States will face higher risk of water shortage by 2050, and more than 400 counties—a good number of which are located in Texas—will face extreme water shortage risk. In the face of climate change, integrated, interstate water planning that takes the [water energy nexus](#) into consideration is essential. The *water energy nexus* describes the interrelationship of water and energy infrastructure: water transport, pumping, purification, and irrigation require significant amounts of energy, while electric power plant cooling, hydropower facilities, mineral extraction, and fuel production require large volumes of water. Optimizing our nation's changing water supplies will require states to cooperate and exchange resources on a regional level.

Consider also that the United States population grows increasingly concentrated in major urban megalopolises. A [map of the United States by population distribution](#) communicates the practical irrelevance of state borders at a time when mega urban regions reign supreme; Chicago, for instance, has a larger population than 21 states. As *Tarrant* demonstrates, thinking in an interstate way about servicing the water demand of major urban areas can save both money and energy—both of which are important to conserve in an era of climate change mitigation and adaptation. Protectionist laws that restrict export of natural resources can obstruct this kind of integrated, rational planning.

I think it is unlikely that the Supreme Court will reach a Commerce Clause analysis, but let us nonetheless take *Tarrant* as an opportunity to evaluate whether anti-export laws like Oklahoma's hold water. Efficiently managing scarce resources in the face of climate change

requires an interstate market; the kind of retaliation-bating, “what’s mine is mine” mentality that Oklahoma displays in its anti-export water laws is not productive.