No. 11-889

In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
E. SCOTT PRUIT
Attorney General

M. DANIEL WEITMAN
Assistant Attorney General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
Fax: (405) 521-4518
Dan.Weitman@oag.ok.gov

CHARLES T. DUMARS, ESQ.
Counsel of Record
STEPHEN CURTICE, ESQ.
LAW & RESOURCE PLANNING ASSOCIATES, P.C.
Albuquerque Plaza
201 3rd Street NW, Suite 1750
Albuquerque, NM 87102
Tel: (505) 346-0998
Fax: (505) 346-0997
ctd@lrpa-usa.com

Attorneys for Respondents Herrmann, Nichols, Lambert, Drummond, Taron, Fite, Keeley, Knowles, and Sevenoaks

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner Tarrant Regional Water District's ("Tarrant's") description of the questions presented is inherently contradictory and can only charitably be viewed as alternative arguments. On the one hand, Tarrant relies on the federal Red River Compact as a basis for arguing that it can go across the state borders of Oklahoma and take water allocated to Texas under the Compact. On the other hand, Tarrant also argues that if the Compact is not given the interpretation it seeks, then the exclusive Congressional apportionments of water to Oklahoma should be declared invalid because they are precluded by the judicially-created dormant Commerce Clause as described in *Sporhase v. Nebraska*, 458 U.S. 941 (1982). Respondents respectfully submit that the following issues more accurately reflect what is at stake in this Petition:

1. Can the judicially-created dormant Commerce Clause be used by water users in one state to overturn the express Congressional apportionment of water contained in an interstate water compact, particularly in a case where none of the signatory states are parties?

2. If the dormant Commerce Clause does not invalidate the Congressional apportionment in the Compact, can this Court infer – solely from provision in the Compact which allocates water to the "signatory states" by granting them equal rights to the use

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

of water within a subbasin – that the Compact was intended to: (a) contradict other provisions of the Compact recognizing the primacy of state law within state boundaries and the right of a signatory state to use all of the waters within its boundaries, subject to downstream delivery requirements, and (b) allow Tarrant to take water allocated to Texas from within Oklahoma before it flows beyond Oklahoma's borders and is made available to the other signatory states?

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STATEMENT OF THE CASE

Tarrant's Statement of the Case fails to capture how narrow the issues are by giving short shrift to the only three applications that are the subject of the suit, by failing to properly identify the Oklahoma state laws that actually impact those applications, and by giving insufficient attention to the Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980) (hereinafter "Compact").

A. Tarrant's Applications.

Tarrant filed three applications with the Oklahoma Water Resources Board ("OWRB") to appropriate water within Oklahoma and export it to end users in Texas. In the "Kiamichi River" Application, Tarrant sought a permit to appropriate water downstream of Hugo Lake on the Kiamichi River, a tributary of the Red River, in a stretch that is within Reach II, Subbasin 5 of the Compact. Court of Appeals Plaintiff's Appendix ("C.A. Pl. App.") 165-91. Under the "Cache Creek" and "Beaver Creek" Applications, Tarrant sought a permit to appropriate water from tributaries of the Red River within Reach I, Subbasin 2 of the Compact. C.A. Pl. App. 193-217.

Tarrant also filed an application with the Texas Commission on Environmental Quality for a permit to export the water contemplated by the Kiamichi Application and alleged to be apportioned to Texas. The TCEQ returned the application because its "Executive Director has determined that the [TCEQ]

does not have jurisdiction to process an application requesting a diversion of water from the Kiamichi River." C.A. Pl. App. 707; Court of Appeals Defendants' Appendix ("C.A. Defs. App.") 113.

B. The Red River Compact.

After more than twenty years of negotiation, the authorized representatives of the states agreed upon and adopted the Red River Compact. The transmittal letter from the Governor of Texas in support of the Compact's apportionment states: "We, in Texas, believe that adoption of the Red River Compact benefits our entire state. The Compact's equitable apportionment of water not only alleviates the possibility of interstate conflicts in the future, but also allows each state to *confidently anticipate the availability of water necessary for future municipal and industrial growth*." S. Rpt. 96-964 (96th Cong., 2d Sess. Sept. 18, 1980) (emphasis added). Congress reviewed the Compact, waived the United States' sovereign immunity so that its provisions could be reviewed in the federal courts, and adopted the Compact, making it federal law.

To accomplish the apportionment of water to each of the four states, the Compact separates the Red River and its tributaries into five reaches, and then into subbasins within each reach. Tarrant's Beaver and Cache Applications propose taking water from Reach I, Subbasin 2, which is allocated exclusively to Oklahoma: "The State of Oklahoma shall have free and unrestricted use of the water of this subbasin."

Compact, Art. IV, § 4.02(b). The bulk of Tarrant's Petition is devoted to its Kiamichi Application, which proposes to appropriate water from Reach II, Subbasin 5. Reach II is the only reach involving all four states. Although there are five subbasins within Reach II, there are two fundamentally different types of subbasins: those upstream of the last major downstream reservoirs on the tributaries (Subbasins 1-4), and the remaining subbasin downstream of the last major downstream reservoir (Subbasin 5). Water in the upstream subbasins is allocated between the states involved: Subbasin 1 is apportioned to Oklahoma; Subbasins 2 and 4 are apportioned to Texas; and Subbasin 3 is divided between Oklahoma and Arkansas. Compact, Art. V, § 5.01(b), 5.02(b), 5.03(b) & 5.04(b).

The Compact allocates water in Subbasin 5 in an entirely different manner in order to provide for a certain flow of the Red River at the Arkansas-Louisiana border while reserving rights of individual states to use a portion of that water under certain conditions. In Subbasin 5, each state is allocated the use of water downstream of the last major downstream damsite provided that such use does not prevent the Red River from passing 3,000 cfs past the Arkansas-Louisiana border. If the flow falls below 3,000 cfs, each state agrees to curtail its use and allow a certain percentage of the flow within its border to pass to Louisiana.

As Tarrant argued extensively and repeatedly below, *see* C.A. Pl. App. 569, 1299, water from Reach II, Subbasin 5 does not flow from Oklahoma to Texas.

Thus, the Compact does not attempt to apportion water in this reach between just those two states. Instead, it apportions water in this subbasin between the predominately upstream states (Oklahoma, Texas and Arkansas) and the predominantly downstream state, Louisiana. The allocations in Reach II require that water in Subbasin 5 be released to Louisiana and Arkansas when flows are low, but allow each state to divert water for its own use in its state subject to that flow regime. More importantly, the Compact allows the upstream states to retain water in their reservoirs which define the boundaries of Subbasin 5, regardless of the amount of water Louisiana receives from the Red River.

To avoid doubts about the bargain struck by the States, the Legal Advisory Committee to the Red River Compact Commission prepared "Supplemental Interpretive Comments" to the Red River Compact "so that members of the respective legislatures, Congressional committees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." C.A. Pl. App. 419. The Interpretive Comments note:

> Although this compact will be state law in each of the four Signatory States, it is not intended to interfere with any state's internal administration of water and/or water rights. Subject to the general constraints of water availability and the apportionment of the Compact, each state is free to continue its

> existing internal water administration, or to modify it in any manner it deems appropriate. *Even during periods of water shortage when the Compact may require an upstream state to take affirmative steps to assure water deliveries, no attempt is made to specify the steps that will be taken*; it is left to the state's internal water administration. Sections 2.01, 2.05, 2.10 and 2.14 each, at least in part, are intended to insure that the states' internal autonomy is not displaced by the Compact.

C.A. Pl. App. 422 (emphasis added). The language of the remainder of the Red River Compact provides further context for the parties' intent when they "allocated" water to a state. The following Compact provisions are explicit:

- "The principal purposes of this compact are: . . . (e) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01.
- "Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." Art. II, § 2.01.

- "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04.
- "Nothing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." Art. II, § 2.10.

Tarrant mischaracterizes as waste the water Oklahoma allows to flow into Subbasin 5 and then downstream into Arkansas and Louisiana to maintain adequate flows for navigation, and protect water quality in the mainstem and estuaries. Certainly, it is unlikely that Arkansas and Louisiana consider it so, as Oklahoma's abundant flows downstream help ensure the minimum flows to Louisiana as required by the Compact. This benefits Texas by helping to augment the minimum flow at the Louisiana border, allowing Texas to divert water within its portion of Subbasin 5. In fact, Texas has not complained of any shortage of water allocated to it by the Compact. Herman Settlemeyer, the engineering advisor to the Texas State Red River Compact Commission, testified in his deposition that Texas has received its full compact allotment for at least the years 2005-2009. C.A. Defs. App. 29-34; 56-63.

C. Relevant Oklahoma State Law.

Tarrant attacks a mass of legislation and other materials of Oklahoma law, without regard for the effect (if any) that legislation actually has on its pending applications. Although Tarrant identified a "public policy" from Okla. Stat. tit. 82, § 1086.1(A)(3), it did not seek any actual relief from this non-coercive declaration of public policy. As Tarrant now concedes, the two statutes making up the alleged moratorium have expired of their own accord and cannot apply to Tarrant's three pending applications or allegedly planned future attempts to export water. *See* Okla. Stat. tit. 82, § 1B (expired Nov. 1, 2009); Okla. Stat. tit. 74, § 1221.A (expired June 6, 2007, prior to the filing of this lawsuit).

Tarrant has apparently abandoned its objections to some laws (*e.g.,* Okla. Stat. tit. 82, § 1266.9), and several others do not apply on their face to any of Tarrant's pending applications. For example, Okla. Stat. tit. 82, § 1085.2(2), does nothing more than grant the OWRB authority to make contracts to carry out its functions. Tarrant has not alleged that it seeks a "contract" from the OWRB to export water to Texas. Similarly, Okla. Stat. tit. 82, § 1324.10(B) precludes a Rural Water, Sewer, Gas and Solid Waste Management District from selling or exporting water or gas outside the state without legislative consent. Tarrant has not even alleged that it attempted to negotiate the purchase of water from such a district. Okla. Stat. tit. 82, § 1085.22 applies to the Oklahoma Water Conservation Commission and governs only "acquired

storage facilities" owned or operated by the Commission. Tarrant does not propose taking *any* water from any reservoir, much less from an "acquired storage facility" subject to this provision.

Tarrant asks this Court to speculate that Okla. Stat. tit. 82, § 105.16(A) might apply to its Applications. That section requires that the full amount of water under a permit be put to beneficial use within seven years, but allows a different schedule if the OWRB concludes the proposed project "will promote the optimal beneficial use of water in the state." Tarrant has not, however, alleged or demonstrated that it is unable to place the water it seeks to export to beneficial use within seven years. Further, this section would not apply to the decision whether to grant Tarrant's three applications, the factual predicate to this litigation.

The final category of legislation targeted by Tarrant are the various components that make up HB 1483, enacted during the pendency of this litigation and constituting the only provisions of Oklahoma state law relevant to any of Tarrant's applications. C.A. Pl. App. 534-38. The Act created a new provision, Okla. Stat. tit. 82, § 105.12A, and amended the existing section codified at Okla. Stat. tit. 82, § 105.12.

The new Section 105.12A reiterates Oklahoma's commitment to "the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public

welfare of its citizens" and notes that Oklahoma "entered into interstate compacts for that purpose." Okla. Stat. tit. 82, § 105.12A(A). It also prohibits the OWRB from issuing a permit that would "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact," Okla. Stat. tit. 82, § 105.12A(B)(1), and prohibits any permit "for the use of water out of state" if that water was "apportioned to the State of Oklahoma under an interstate compact" unless that use was authorized by an act of the Oklahoma Legislature. Okla. Stat. tit. 82, § 105.12A(D). Thus, this legislation itself refutes Tarrant's allegation that "[t]here is no dispute that the practical upshot of Oklahoma's restrictive permitting scheme is categorically to prevent out-of-state applicants from obtaining a license to receive water located in Oklahoma for out-of-state use." Petition at 9. Instead, it recognizes the possibility of such a permit.

The existing Section 105.12 was revised to allow the exportation of water under certain conditions. First, the revision added a new requirement for the evaluation of any application to export water: "whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma." Okla. Stat. tit. 82, § 105.12(A)(5). The revision also includes certain procedural prerequisites for exported water applications. Okla. Stat. tit. 82, § 105.12(D), (E) & (F).

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO ISSUES THAT REQUIRE FINAL RESOLUTION BY THIS COURT.

Tarrant, in an attempt to compel access to water allocated to Oklahoma under the Compact for export to Texas, would have this Court address two lines of result-oriented and alternative argument. On the one hand, Tarrant argues that the Congressionally-approved Compact affords it the right to go into Oklahoma and divert Texas water from within rivers located in Oklahoma. On the other hand, Tarrant argues that if its interpretation of the Compact is not correct, then the Compact is invalid because it is inconsistent with the dormant Commerce Clause as interpreted in *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Starting with an argument based on the validity of the Compact (as opposed to its invalidity), Tarrant asks the Court to grant Certiorari in order to interpret a single phrase appearing in one subsection of the Red River Compact. Tarrant argues that the phrase "equal rights" vitiates all other purposes of the Compact and allows Tarrant to divert water compacted to Texas from a point of diversion within the state borders of Oklahoma. As discussed below, the interpretation of this singularly unique phrase found in no other interstate compact cannot form the basis for review on Certiorari. However, Tarrant argues that if its interpretation is not correct, then the express Congressional purposes of the Compact to allocate

water exclusively among the States should be held to violate the principles imbedded in the so-called "dormant Commerce Clause." Certainly, this latter proposition does not form the basis for Certiorari review, in that it is frivolous on its face and if accepted would undercut every extant interstate compact allocating water among States.

This case is not a controversy among States over the meaning of an interstate compact. Rather, it involves a controversy between a state water permitting authority – OWRB – and a water utility in Texas. Remarkably, the four signatories to the Compact – the States of Oklahoma, Texas, Arkansas and Louisiana – are not parties to the litigation, even though all would have a direct interest in an interpretation of the Compact, and would like to weigh in on Tarrant's arguments that the dormant Commerce Clause precludes exclusive allocations of water among states. *Cf. South Carolina v. North Carolina*, 130 S. Ct. 854 (2010); *Hood v. Memphis*, 570 F.3d 625 (5th Cir. 2009).

The absence of the Compacting States is striking. Tarrant now argues that the interpretation of two words in the Red River Compact is a case of great significance to all States with interstate compacts, but, it made the exact opposite argument in all of the other forums. Indeed, Tarrant had the opportunity to join the Compacting States, but it resisted doing so. *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D. Okla. 2007). Tarrant had the opportunity to allow the matter, as one implicating the

affected Compacting States, to be resolved before the Red River Compact Commission, but resisted doing so. App. 59a-61a. The Compact has a unique jurisdictional provision that would have permitted joinder of the States. Compact, Art. XIII, Sec. 13.03.

But Tarrant insisted throughout that no compact interpretation issues were raised that would affect the Compacting States or other comparable states with compacts. Rather, the issue was whether the Compact, as a federal law, preempted an Oklahoma statute that would preclude Tarrant from diverting water within Oklahoma that was allegedly allocated to Texas. Now, having persuaded the District Court and the Tenth Circuit Court of Appeals that the case was a narrow one, was of no national significance, did not implicate the Compacting States, and that it could be resolved locally as a *sui generis* dispute between two competing non-state entities, Tarrant finds itself dissatisfied with the result. In this Court, Tarrant reverses ground entirely, and proclaims that the Tenth Circuit opinion, if left intact, would implicate relationships among Compacting States nationwide and would undercut the policies of *Sporhase* that it argues somehow deny Congress the power to allocate water exclusively among states. The former basis for Certiorari is insufficient on its face because of the narrow nature of the dispute. The second argument, that the dormant Commerce Clause controls over Congressionally-approved compacts, is frivolous.

Tarrant is incorrect when it argues that the legal proposition adopted by the Court of Appeals – that

compacts apportion and allocate water among states in perpetuity – is a novel one and would disrupt the national body politic. The exact opposite is true. Every case from this Court apportioning water among states does so in order to finally determine the quantity of water that can be maintained by each state for each future use. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 99-100 (1907) (Arkansas River); *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957) (Laramie River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered*, *Nebraska v. Wyoming and Colorado*, 534 U.S. 40 (2001) (North Platte River); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River), *appeal after remand*, 467 U.S. 310 (1984). Every case from this Court interpreting interstate compacts has done so as to clarify the quantity of water apportioned to each Compacting State and to determine whether another state has illegally attempted to take water apportioned to another state. *Kansas v. Colorado*, 514 U.S. 673 (1995) (Arkansas River); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991) (Canadian River); *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (Yellowstone River); *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938). This Court has enforced compacts' water allocations to States' exclusive use and regulation to the point of ordering that money damages be paid to compensate a State for short deliveries. *Texas v. New Mexico*, 482 U.S. 124, 128-33 (1987) (Pecos River Compact); *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (Arkansas River Compact of 1949).

The literature discussing the importance of interstate compacts has concluded that the primary purpose – indeed the sole purpose – of an interstate water compact is to allow each state to know how much water of an interstate stream is allocated to it. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 718 (1925); Julius M. Friedrich, *The Settlement of Disputes between States Concerning Rights to the Waters of Interstate Streams*, 32 Iowa L. Rev. 244, 278 (1947); J. David Pringe, *State Control of Great Lakes Water Diversion*, 16 Wm. Mitchell L. Rev. 107, 158 (1990). Typical is the view of Professor Trelease:

> Economic protectionism is the very purpose of the compact. The split of unappropriated water is intended to free the states from the need to race for the water under the usually applied (though recently questioned) rule of *Wyoming v. Colorado*: 'priority is equity' between two states that apply the law of prior appropriation internally, and the same law will fix their shares in an equitable apportionment. A compact halts the race. Each state is given a fund of water free from the priorities of the other, each can develop at its own pace, and the slower state is protected from a complete takeover of the joint resource by the faster. To allow the faster state to overreach its allotment and eat into the other's in the name of interstate commerce would drain of all force the 'legal expectation' given by the compact.

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

In short, there is no unsettled proposition that needs to be resolved by this Court. It is settled beyond question that compacting States intend to apportion water among themselves in perpetuity by compacts. When Congress approves these water compacts, it exercises its affirmative power under the Compacts Clause and the Commerce Clause to approve this permanent allocation. Because this case raises no unsettled question of federal law, the granting of a Writ of Certiorari would not be appropriate.

Moreover, Tarrant's burden for invoking this Court's review of the Red River Compact's allocation and affirmation of State control of water resources is extraordinary. This Court will not rewrite interstate compacts, *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), and "will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931) (citing *New York v. New Jersey*, 256 U.S. 296, 309 (1921)); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906). *See also Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983). While Tarrant invokes its ardent desire for "new sources of water" for north-central Texas, the State of Texas – the actual Compact signatory – has not complained of any shortage of water allocated to it by the Compact. If the Court would not review the

matter for Texas, *a fortiori*, it should not do so for a political subdivision of a state.

Even if it were unsettled whether interstate water compacts in general, and the Red River Compact in particular, apportion and allocate water among Compacting States in perpetuity, Certiorari would not be appropriate. Resolution of this case would not bind the Compacting States. Certainly a decision among two non-state parties should not be the forum for re-opening almost one hundred years of case law regarding interstate compacts. And whatever the result, in this case, it is clear that the matter would come back before the Court in a controversy where the Compacting States consider the matter to be of such significance that it requires resolution by this Court. Only in the context of such a controversy between states, were there an open question of the character of the Compact's apportionment, could it properly be resolved.

Tarrant's citation to *Sporhase* to support the alleged "dormant Commerce Clause" infirmity of Oklahoma statutes promulgated under the express authority of the Compact likewise provides no basis for review by this Court. As discussed *infra*, that argument is specious. The *Sporhase* facts are unique, in that there was no interstate compact governing the water at issue because it was not part of any interstate stream or river. Rather, it involved an attempt to transport un-compacted groundwater from Nebraska into Colorado under a complex of Nebraska statutes that precluded transport of that groundwater.

Contrary to Petitioners' Questions Presented, this Court has not "held on numerous occasions that a State may not discriminate against interstate commerce in water absent an 'expressly stated' or 'unmistakably clear' congressional intent to immunize the relevant state laws from dormant Commerce Clause scrutiny."

In fact, this Court's only decision involving interstate commerce in water and the effect of the dormant Commerce Clause is *Sporhase*. Furthermore, as noted above, every case considering the matter has held the States, with the approval of Congress, have the authority to allocate water among themselves, free from the strictures of any judicially-created doctrine that would apply had Congress not acted. In no case interpreting an interstate compact, or assessing damages against one state for taking the other's water in violation of a compact, has the Court cited the dormant Commerce Clause as a barrier. Opening up this uninterrupted line of cases at the behest of Tarrant would not be appropriate and would certainly be unwise.

The only other alleged error in the Court of Appeals' opinion for which Certiorari is sought is its interpretation of the phrase "equal rights." But, this language occurs in no other compact in the United States. Leaving intact the Tenth Circuit's careful preemption analysis of the Compact's Section 5.05 will not create any uncertainty regarding other compacts' similar provisions – there being none – nor affect their construction. Furthermore, reading into such a

phrase the right of one state to go into another state and divert compacted water would have tremendous policy significance and would, at a minimum, require that this be done when the affected states can weigh in on the question.

Rather than rely on vague language of "equal rights," when Compacting States and Congress have intended to allow appropriators of one signatory state to establish points of diversion in another signatory state, the states have inserted explicit cross-boundary provisions in the compact, including detailed provisions governing the means for establishment of the diversion, the application of local law, and the compact accounting for measuring water so diverted. The Upper Colorado River Basin Compact, 63 Stat. 31 (April 6, 1949), seems to have served as a model for such provisions.[1] Similar language appears in the Yellowstone River Compact, 63 Stat. 152; 65 Stat. 663 (Oct. 30, 1951),[2] in the Snake River Compact, 62 Stat. 294; *amended* 64 Stat. 29 (Mar. 21, 1950),[3] and in the Bear River Compact, 72 Stat. 38; 94 Stat. 4 (Mar. 17, 1958).[4]

Many other compacts, including several wherein Texas is a signatory state, expressly establish the

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[1] *See* Article IX; Article XI(a)(iv) (apportioning the Little Snake River); Article XII (apportioning Henry's Fork of the Green River).

[2] *See* Article VII; Article VIII.

[3] *See* Article VIII(A).

[4] *See* Article VIII(A); Article VIII(B).

prerogative of a downstream state to construct diversions or storage within an upstream state, and provide the regulatory mechanism and procedures according to which such a cross-boundary diversion should be approved and administered. The Rio Grande Compact, 53 Stat. 785 (May 31, 1939), between Texas, New Mexico and Colorado, for example, establishes New Mexico's delivery point to Texas within the State of New Mexico,[5] and it further provides that if the State of New Mexico "decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River [within Colorado] . . . provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected."[6] The Pecos River Compact, 63 Stat. 159 (June 9, 1949), between Texas and New Mexico similarly provides, "No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine."[7] The Sabine River Compact between Texas and Louisiana empowers the Compact Administration "[t]o record and approve all points of diversion at

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[5] *See* Article IV, originally at San Marcial, later changed to Elephant Butte Reservoir by Compact Commission Resolution (Feb. 22-24, 1948).

[6] Article IX.

[7] Article IV(f).

which water is to be removed from the Sabine River or its tributaries below the Stateline; provided that, in any case, the State agency charged with the administration of the water laws for the State in which such point of diversion is located shall first have approved such point for removal or diversion."[8]

Other compacts entered into by Oklahoma and another Red River Compact signatory contain provisions accommodating downstream states' interests in the future election to seek points of diversion within an upstream state. Article VII of the Arkansas River Compact of 1965, 89 Stat. 1409 (Nov. 7, 1966) between Kansas and Oklahoma directs the Compact Commission to "determine the conditions under which one state may construct and operate for its needs new conservation storage capacity in the other state," further providing this new capacity is to be "charged against the state in which the use is made." Article VI of the later Arkansas River Basin Compact, 87 Stat. 569 (Nov. 13, 1973) between Oklahoma and Arkansas allows each State to "construct, own and operate for its needs water storage reservoirs in the other State" and grants to each State "the free and unrestricted right to utilize the natural channel of any stream within the Arkansas River Basin for conveyance through the other State of waters released from any water storage reservoir for an intended downstream point of diversion or use." Still other interstate water

[8] Article VII(g)(5).

compacts contain more extensive provisions detailing regulatory, physical, financial and water accounting specifications and procedures in the event one compacting State seeks a cross-boundary diversion or storage to accomplish the apportionment directed elsewhere in the compact.[9]

Because the Compacting States were not parties to this case, it is simply a contracts case regarding specific language. This Court has correctly held that in addition to being federal law, interstate compacts are contracts. *Montana v. Wyoming*, 131 S. Ct. 1765, 1772 n.4 (2011). Based upon the entire record from the District Court, the Tenth Circuit was asked to interpret the singular and unique phrase – "equal rights" – to determine its intended purpose within the Compact's scheme of apportionment. It did so thoroughly and thoughtfully and bound the parties that came before it. It is not the role of this Court to grant

[9] These include the South Platte River Compact, Art. V(1)-(3), Art. VI(1)-(6), 44 Stat. 195 (March 8, 1926), between Colorado and Nebraska, the Republican River Compact, Art. VI-VII, 57 Stat. 86 (May 26, 1943), between Kansas, Nebraska and Colorado, the Belle Fourche River Compact, Art. VI, 58 Stat. 94 (Feb. 26, 1944), between South Dakota and Wyoming, the Costilla Creek Compact, Art. III(2), 60 Stat. 246 (1963); 77 Stat. 350, between Colorado and New Mexico, the Snake River Compact, Art. VII, VIII, XI, 62 Stat. 294; 64 Stat. 29, between Idaho and Wyoming, the Yellowstone River Compact, Art. VII-IX, 63 Stat. 152; 65 Stat. 663 (Oct. 30, 1951) between Montana, North Dakota, and Wyoming, and the Klamath River Compact, Art. V(A), VI(A), 69 Stat. 613; 71 Stat. 497 (Aug. 30, 1957), between California and Oregon.

Certiorari to review every disagreement by a party with an interpretation of a contract rendered by a district court familiar with the record or by a Circuit Court of Appeals affirming a district court. It clearly should not do so here.

II. CONGRESSIONAL APPROVAL OF THE RED RIVER COMPACT PRECLUDES APPLICATION OF THE DORMANT COMMERCE CLAUSE DOCTRINE.

In passing the Compact, Congress approved a perpetual allocation to Oklahoma of water from the Red River. Tarrant argues that it is an open question whether a federal court could undo that allocation relying on the judicially-created dormant Commerce Clause. That doctrine should never be held to displace express legislation taking action regulating commerce among the States. Such a holding would create a separation of powers dispute beyond the wildest conception of the framers.

There is no question that compacts are federal law, and "congressional consent transforms an interstate compact within [the Compact Clause of the federal constitution] into a law of the United States" such that the construction of such an agreement "presents a federal question." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *see also NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission*, 732 F.2d 292, 298 (2d Cir. 1984). As the *Cuyler* Court noted, "The requirement of congressional consent is at the heart

of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler*, 449 U.S. at 439-40. The "full and free exercise of federal authority" is particularly relevant to interstate compacts apportioning water among the states.

Because the Red River Compact is federal law, as a matter of logic and law it cannot itself violate the dormant Commerce Clause. *Intake Water Company v. Yellowstone River Compact Commission*, 590 F. Supp. 293 (D. Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985); *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1249 n.8 (Colo. 1996). The dormant Commerce Clause was said to fill in the "great silences" in the commerce clause. *Hood and Sons v. DuMond*, 336 U.S. 525 (1949). When Congress allows the clause to remain dormant, action is required by this Court. When Congress approves a compact, however, it breaks its silence, and replaces dormancy with action. In that case, the dormant Commerce Clause has no purpose. *Cf. New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 198 F.3d 1, 9 (1st Cir. 1999).

Moreover, since at least 1891, the United States Supreme Court has recognized that Congress has plenary authority to enact legislation that authorizes the states to burden interstate commerce in a way

that would otherwise violate the dormant Commerce Clause. *See In re Rahrer*, 140 U.S. 545, 561 (1891). The cases following this basic rule are legion. *See*, *e.g.*, *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917); *Whitfield v. Ohio*, 297 U.S. 431, 438 (1936); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946); *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 652-53 (1981) (citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1981); *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985); *Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1177 (10th Cir. 2001).

Congress can preclude the application of the dormant Commerce Clause indirectly, by authorizing the states to forge their own discriminatory regulation, or it can do so directly, by mandating that states take certain actions with respect to movement of goods in commerce. In the latter case, once Congress has acted, it is of no importance whether such state action might have been prohibited in absence of the Congressional mandate. An example of the indirect approach is explored in *Prudential Ins. Co.*, 328 U.S. at 434. The McCarran Act at issue in that case provided: "The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that

silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The best example of a direct Congressionally-mandated approach is the Congressionally-approved interstate compact. The Red River Compact, for example, expressly allocates water to Oklahoma that is not available in commerce to Texas, and allocates water to Texas that is not available in commerce to Oklahoma.

Litigation arises when Congress has not legislated directly on the issue and states attempt to argue, solely by inference, that Congress displaced the dormant Commerce Clause as to that subject matter. *Sporhase v. Nebraska*, 458 U.S. 941 (1982), and *South-Central Timber v. Wunnicke*, 467 U.S. 82 (1984), both represent failed attempts by States to make such an inferential leap. In each, Congress had not legislated on the specific subject at issue. Unlike *Prudential Ins. Co.*, there was no federal disclaimer of interest that purported to authorize the challenged state regulation of the relevant segment of commerce. Unlike this case, there was no federal adoption of a compact allocating the resources at issue. In the absence of express legislation, the defenders of the discriminatory state laws were forced to *infer* that Congress *would have* authorized the challenged state regulation.

In *Wunnicke*, the party looked to federal regulations and policy governing timber resources on *federal* lands to support an inference of consent to Alaska's similar regulation of timber on *state* lands. In

Sporhase, the state looked, *inter alia*, to the Reclamation Act, the Desert Lands Act, and to interstate water compacts *in general* to support an inference that Congress would have deferred to state regulation of the groundwater at issue were it to pass legislation on the subject. In both cases, the issue was what Congress would do if it chose to act in the future, not what Congress had done when it enacted specific legislation such as an interstate compact. Because there was no federal law directly addressing the alleged local preference for a resource, this Court required that the evidence be "expressly stated" or "unmistakably clear" before it would infer the intent of Congress to allow protectionist legislation. Neither *Sporhase* nor *Wunnicke* held or even suggested that a Congressionally-approved interstate water compact itself, the essential provisions of which *apportion* water and affirm State regulation thereof, must meet a talismanic "unmistakably clear" requirement in order for the State regulation to escape invalidation. Rather, because Congress has acted, the seminal test articulated in *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate. . . ."), remaining viable to this day, forms the basis for review. All reliance on *Sporhase* or *Wunnicke* as controlling precedent is misplaced, because neither interpreted an express mandate regulating interstate commerce.

Indeed, to the degree this Court addressed in *Sporhase* what might have happened had there been an interstate compact allocating Nebraska exclusive ownership over a portion of its groundwater, it made

it clear that there would have been an opposite result. *Sporhase*, 458 U.S. at 956 (noting that the "legal expectation" that States may restrict water within their borders has been advanced "by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources.").

Congress unquestionably had the authority to adopt the Red River Compact as federal law, and the express purpose of the Compact was to allocate water among the states outside the interstate water market. Even were *Sporhase* and *Wunnicke* considered relevant, the Compact makes it "unmistakably clear" that one of its "principal purposes" is to "provide a basis for state or joint state planning and action by ascertaining and identifying *each state's share* in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01(e). It explicitly provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." Art. II, § 2.01. Even a state's non-use of water allocated to it is protected by the Compact: "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04. If these provisions were not clear enough, the Compact further provides: "Nothing

in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." Art. II, § 2.10. Given the clarity of the Compact, *Sporhase* and *Wunnicke* are inapposite in every respect.

III. TARRANT'S ARGUMENT THAT THE COMPACT NEGOTIATORS AND CONGRESS INTENDED THAT TEXAS COULD TAKE ITS SHARE OF COMPACTED WATER WITHIN OKLAHOMA IS UNSUPPORTED BY ANY RATIONAL READING OF THE COMPACT.

Tarrant vehemently argued that the Compact apportioned no water to any Compacting State. But, correctly anticipating this argument would be rejected out of hand, Tarrant pivots. Tarrant now argues that not only did the Compact exclusively apportion water to Texas, it intended that Texas could come into Oklahoma and take its apportionment within Oklahoma. This argument makes little sense, and the resolution of this simple question of statutory intent surely cannot form the basis for Certiorari review by this Court. The parties negotiated for twenty years. In all compacts, almost unanimously, the purpose is to allow one state to divert its water within its state and the other to do so within the other state. Accordingly, had it been the intent for Texas to be allowed to go into Oklahoma and take its share of compacted

water, the Compact would have specifically allowed for this. To suggest, as Tarrant does, that the right to cross the state boundary and divert water can be inferred flies in the face of history and is inconsistent with the language of virtually every other interstate water compact. As discussed *supra*, when it is intended that one state can take its share from within another state, the operative language is explicit. Compacting States intending to establish exceptions to the rule and allow cross-boundary diversions have without fail set out the right to take water in another state in compact provisions with great specificity and precision. Certainly, in no compact is a cross-boundary diversion prerogative created with the bare phrase, "equal rights to the use of runoff." Compact, Section 5.05(b)(1). Such a right should not be inferred here.

Tarrant argued that this bare phrase preempts Signatory States' exercise of regulatory control within their boundaries and authorizes Texas users to access Texas's share of excess runoff within Oklahoma, despite the contrary reaffirmation of State control within the same Compact Section and the general "call for pronounced deference to, not displacement of, state water laws" expressed throughout the Compact. App. 41a.[10] The Tenth Circuit conducted a meticulous

[10] In particular, Section 2.01 provides, "Each state may freely administer water rights and uses in accordance with the laws of that state," and Section 2.10 affirms that "Nothing in this Compact shall be deemed . . . to . . . [i]nterfere . . . within its boundaries the appropriation, use, and control of water . . . not

(Continued on following page)

interpretation and preemption analysis of Section 5.05(b)(1)'s "equal rights" provision in the context of the policy and purpose expressed throughout the Compact, and in Section 5.05 and its Interpretive Comment in particular. The court held that, taken together, Section 5.05's provisions "stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." App. 39a. Tarrant's proffered interpretation "attempts to read more into § 5.05(b)(1) than this provision was meant to or can support." App. 42a.

This is clearly right. In Reach II, Subbasin 5, the Compact "*allocate*[*s*]" the water by giving the "Signatory *States*" (emphasis added) "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." Art. V, § 5.05(b)(1). Tarrant reads this section not to allocate and reserve water for the individual states (despite the express use of the word "allocated" in the text) but rather to give the states, and particularly Texas, the right to disregard state boundaries and access their respectives shares of Subbasin 5 water within other Compact states. However, there can be no other meaning when the Compact "allocate[s]" the use of water to a particular "state" than that it is for that state's

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inconsistent with its obligations under this Compact." The court read the latter "to caution against reading preemption into the Compact's other provisions." App. 35a.

exclusive in-state use. Had it been the intent of the Compact drafters to allocate the water located within Oklahoma to Texas, after twenty years of negotiations, surely they would have said so, and the Interpretative Comments would have highlighted this dramatic shift of sovereignty to Texas.

Instead, this section compacts to each individual state the authority to retain and use water in Subbasin 5 within its borders when flow conditions downstream are met. The phrase "equal rights" simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states. To decide otherwise effectively deprives the phrase "[w]ater in this subbasin is *allocated* as follows" (emphasis added) of any meaning. The waters of the subbasin within Oklahoma, for example, are not "allocated" to Oklahoma, if Texas can simply come into Oklahoma and take its share from the Oklahoma portion of the subbasin. Such an interpretation would also ignore the plain language of the Compact that allocates the "equal rights to the use of [water]" to the signatory states *qua* states.

The Compact states that when the flows at the Arkansas-Louisiana border fall below the 3,000 cfs target, the "states" of Oklahoma, Texas and Arkansas – i.e., the same entities allocated the "equal rights to the use of water" – must then "*allow to flow* into the Red River for delivery to the State of Louisiana" (emphasis added) water necessary to meet the flow

targets of the downstream state, Louisiana. Each state determines how to meet this requirement based on its own water policies. Those states, of course, can only "allow to flow" water within their boundaries and over which they have regulatory control. When the flows at the Arkansas-Louisiana boundary are below 1,000 cfs those states must allow all runoff and undesignated flows "within their respective states" to flow into the Red River. If Texas were allowed to take Oklahoma and Arkansas water from the parts of the subbasin within those states, then some mechanism to relieve the exporting state from its obligations would have been included. No such mechanism is present.

If there were any doubt that the allocation of equal rights to the use of water to the various states only extended to that water found within their respective state boundaries, it is removed by the Interpretative Comments. As the Interpretative Comments relating to Reach II note, "[t]his reach, involving all four states, was the most difficult portion of the Compact to negotiate." C.A. Pl. App. 432. The upstream states (Oklahoma, Texas and Arkansas) agreed that Louisiana needed water from the mainstem, but "the problem was to make provision for this flow without release from upstream storage" because "[u]nder no circumstance would upstream states agree to release water stored in upstream reservoirs for the benefit of downstream states[;] therefore there could be no guaranteed flows to downstream states." C.A. Pl. App. 432. Using the last downstream major dam on the

tributaries as a boundary, the Compact divided this Reach into five subbasins: four "upstream" subbasins (Subbasins 1-4), and one "mainstem" subbasin (Subbasin 5). "Within the upstream subbasins, flows were divided between the concerned states; below the last downstream dams, i.e., in subbasin 5, the *upstream states agree to cooperate* in assuring a reliable flow to Louisiana." C.A. Pl. App. 433 (emphasis added). As the Comments thus note, the allocation accomplished by the Compact for Subbasin 5 is different:

> In subbasin 5, as previously noted, the upstream *states* cooperate in assuring reliable flows to Arkansas and Louisiana. This is accomplished by keying *the upstream states' obligation* to the flow at the Arkansas-Louisiana boundary. When the flow is high, above 3,000 cfs, all *states* are free to use whatever amount of water they can put to beneficial use. If the *states* have competing uses and the amount of water available in excess of 3,000 cfs cannot satisfy all such uses, each *state* will honor the other's *right* to 25% of the excess flow.

C.A. Pl. App. 434-35 (emphasis added).

Not only were the flows of the upstream basins "divided" among the States, "upstream states are not required to make releases from storage or to pass water from other subbasins in order to maintain the flow at the Arkansas-Louisiana boundary – although, an upstream state could do either *in order to allow its diverters* in subbasin 5 to use equivalent quantities

during low flow periods." C.A. Pl. App. 435 (emphasis added). Significantly, then, the Compact distinguishes between the role of the "state" – the entity to which the water is allocated and upon whom the obligation to deliver water is imposed – and "its diverters," i.e., the persons or entities within the state that can partake of that state's allocated share of the interstate waters. In all cases, however, the Compact assumes that the state to whom the water is allocated will partake of that allocation through the beneficial (or riparian, in the case of Arkansas and Louisiana) use of "its diverters."

The Compact, like virtually all comparable compacts, allocates water to each state for that state's internal use. Indeed, one of the "principal purposes" of the Compact is to "provide a basis for state or joint state planning and action by ascertaining and identifying *each state's share* in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01(e) (emphasis added). Most importantly, in order to allow for that planning and protect against the demands of a faster-growing neighboring state, the Compact contains an anti-forfeiture provision: "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04.

Tying these purposes of the Compact with the express use of the word "allocate[ ]" to describe the effect of the provisions governing Reach II, Subbasin 5, it is clear that Tarrant's interpretation is at odds

with the text and purpose of the Compact. How could the Compact determine "each state's share" and protect that share from claims of other states through the anti-forfeiture provision if it is read to allow Texas to take a portion of its share in Oklahoma from a river that never flows into Texas? Texas did not bargain for a provision that would allow it to take Oklahoma water simply because its population has grown faster than Oklahoma's and because its needs now exceeds the allocation it negotiated for in the Compact. When Texas agreed to the anti-forfeiture provision, it gave up to Oklahoma the right to decide whether to take water in the stream, send it down to meet the needs of Louisiana, support in-stream flows within Oklahoma, or sell it to Texas. But in no case did the drafters intend that Texas could use its growth as a sword to go into Oklahoma and without Oklahoma's consent take Oklahoma's water before it arrives at the border. Texas asks this Court to rewrite the Compact because, in its view, this would be a good policy result. This Court cannot rewrite the Compact to supply provisions that do not exist, whatever the alleged equities in favor of the Dallas/Fort Worth metroplex. *Texas v. New Mexico*, 462 U.S. at 564.

Moreover, Tarrant's argument only makes any sense by focusing exclusively on the supply in Subbasin 5 and ignoring the water Texas received in the remainder of Reach II. In fact, Texas struck a very good bargain relating to the flows originating in Texas in Reach II as a whole. Again, the Interpretative Comments note that the solution to meeting both the

demands of the upstream states (Oklahoma, Texas and to some extent Arkansas) and the flow needs of the downstream state, Louisiana, was to divide the entire Reach into subbasins using the criteria of the last downstream major reservoir. As a result, Texas received free and unrestricted use of all waters in Reach II, Subbasins 2 and 4 and is able to retain all water that flows into the damsites that separate these subbasins from Subbasin 5. That water cannot be taken by another Compacting State, and Texas cannot be forced to release water from those reservoirs even when the flows at the Arkansas-Louisiana border fall below the prescribed amounts. Texas bargained for and received virtually all of the significant water originating in Texas. It is disingenuous at best for Tarrant to now assert the right to take the water from other states in Subbasin 5 in addition to all of the water originating in Texas.

The hydrologic facts are not complicated. Tarrant has no authority to require Oklahoma to release water from Hugo reservoir and allow it to flow outside Oklahoma borders so that it is available to Texas. Texas also cannot prevent Oklahoma from using water before it reaches the Oklahoma border or determine what is the best use of that water when it is within Oklahoma's borders. More importantly, while that water is within Oklahoma, it forms the basis for Oklahoma's water planning efforts. The Dallas/Fort Worth megalopolis of six million people is not part of the Oklahoma water planning region and never will be. Yet, Tarrant argues that the intent of

the compacting parties was to make Tarrant part of Oklahoma's water planning region. This is inconceivable. Understandably, Tarrant is in a bind because Texas did not negotiate a downstream delivery requirement that would make Oklahoma's water available to Tarrant outside Oklahoma's borders. Dissatisfied with Texas' efforts in the negotiations, Tarrant wants to "jump the line" and take the water before it leaves Oklahoma. Nothing in the text or history of the Compact supports this result.

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CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

OKLAHOMA OFFICE OF
THE ATTORNEY GENERAL
E. SCOTT PRUIT
Attorney General

M. DANIEL WEITMAN
Assistant Attorney General
OKLAHOMA ATTORNEY
GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
Fax: (405) 521-4518
Dan.Weitman@oag.ok.gov

CHARLES T. DUMARS, ESQ.
Counsel of Record
STEPHEN CURTICE, ESQ.
LAW & RESOURCE PLANNING
ASSOCIATES, P.C.
Albuquerque Plaza
201 3rd Street NW, Suite 1750
Albuquerque, NM 87102
Tel: (505) 346-0998
Fax: (505) 346-0997
ctd@lrpa-usa.com

Attorneys for Respondents
Herrmann, Nichols, Lambert,
Drummond, Taron, Fite, Keeley,
Knowles, and Sevenoaks