

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 OF NORTH TEXAS MUNICIPAL  
WATER DISTRICT AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

---

---

R. LAMBETH TOWNSEND  
*Counsel of Record*  
MARTIN C. ROCHELLE  
SARA R. THORNTON  
LLOYD GOSSELINK ROCHELLE  
& TOWNSEND, P.C.  
816 Congress Avenue  
Suite 1900  
Austin, Texas 78701  
(512) 322-5800  
ltownsend@lglawfirm.com

*Counsel for Amicus Curiae*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
I. The Petition Addresses an Issue With Wide-Reaching Socioeconomic Impacts De- manding this Court’s Review .....	5
II. The Court Should Reverse the Decision of the Tenth Circuit and Hold that the Plain Language of the Red River Compact Preempts Oklahoma Water Statutes .....	7
A. The Tenth Circuit Erroneously Inter- preted the Plain Language of the Com- pact .....	7
B. The Compact by its Explicit Terms Grants Texas an Equitable Apportion- ment of Water Regardless of State Boundaries.....	9
CONCLUSION.....	13

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Altus v. Carr</i> , 255 F. Supp. 828 (W.D. Tex. 1966), <i>aff'd</i> , 385 U.S. 35 (1966) .....	12
<i>Montana v. Wyoming</i> , 131 S.Ct. 1765 (2011) .....	7, 8, 9, 12
<i>New Jersey v. Delaware</i> , 552 U.S. 597 (2008) .....	8
<i>Rocca v. Thompson</i> , 223 U.S. 317 (1912) .....	8
<i>Sporhase v. Nebraska ex rel. Douglas</i> , 458 U.S. 941 (1982) .....	12
<i>Tarrant Reg'l Water Dist. v. Herrmann</i> , 656 F.3d 1222 (10th Cir. 2011), <i>petition for cert. filed</i> , (No. 11-889, 2011 Term) .....	11
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) .....	8, 9

## STATUTES

Okla. Stat. tit. 82, § 105.9 .....	3
§ 105.12 .....	3
§ 105.12A .....	3
§ 105.16(B) .....	3
§ 1085.2(2) .....	3
§ 1085.22 .....	3

## TABLE OF AUTHORITIES – Continued

	Page
§ 1086.1(A)(3) .....	3
§ 1086.2.....	3
Pub. L. No. 96-564, 84 Stat. 3305 (1980).....	7
Red River Compact (“Compact”)	
§ 2.01 .....	10, 11
§ 2.10(a) .....	10
§ 5.05(b)(1).....	<i>passim</i>
Tex. Civ. Rev. Stat. art. 8280-141, § 7(a).....	1

## OTHER AUTHORITIES

John W. Nielsen-Gammon, <i>The 2011 Texas Drought: A Briefing Packet for the Texas Legislature</i> , at 42 (2011), <a href="http://atmo.tamu.edu/osc/press_releases/2011_drought.pdf">http://atmo.tamu.edu/osc/press_releases/2011_drought.pdf</a> .....	5
Office of the Governor of Texas, <i>Gov. Perry Renews Proclamation Extending Wildfire Emergency</i> (2012), <a href="http://governor.state.tx.us/news/proclamation/16920/">http://governor.state.tx.us/news/proclamation/16920/</a> .....	5
Oklahoma Water Resources Board, <i>Oklahoma Comprehensive Water Plan, Physical Water Supply Availability Report</i> , Table 3-21 (Nov. 2011), <a href="http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/OCWP_PhysicalWaterSupplyAvailabilityReport.pdf">http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/OCWP_PhysicalWaterSupplyAvailabilityReport.pdf</a> .....	3

## TABLE OF AUTHORITIES – Continued

	Page
Oklahoma Water Resources Board, <i>Oklahoma Water Facts</i> (Jan. 13, 2010), <a href="http://www.owrb.ok.gov/util/waterfact.php">http://www.owrb.ok.gov/util/waterfact.php</a> .....	3
Region C Water Planning Group, <i>2011 Region C Water Plan</i> (“Region C Plan”), at ES.7 (2011), <a href="http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_RWP/RegionC/PDF's/Main%20Report/EXECUTIVE_SUMMARY_Final.pdf">http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_RWP/RegionC/PDF's/Main%20Report/EXECUTIVE_SUMMARY_Final.pdf</a> .....	5, 6
William S. Spears School of Business, <i>Multi-regional Input-Output Model for the Dallas and Oklahoma City Metro. Areas</i> , at 7 (2010), <a href="http://economy.okstate.edu/caer/files/OKCDFW_MRIO_Final.pdf">http://economy.okstate.edu/caer/files/OKCDFW_MRIO_Final.pdf</a> .....	6

**BRIEF OF NORTH TEXAS MUNICIPAL  
WATER DISTRICT AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER  
INTEREST OF THE *AMICUS CURIAE***

The North Texas Municipal Water District (“NTMWD”) supplies drinking water to over 1.5 million people in North Texas.<sup>1</sup> NTMWD’s service area includes all or parts of Collin, Dallas, Denton, Fannin, Hopkins, Hunt, Kaufman, and Rockwall counties. NTMWD’s enabling legislation authorizes it to acquire any rights in, and to storage and storage capacity in, any reservoir or other water source. Tex. Civ. Rev. Stat. art. 8280-141, § 7(a). NTMWD is also empowered to construct or otherwise acquire all works, plants, and other facilities necessary or useful for the purpose of storing, impounding, retaining, diverting, or processing this water and transporting it to cities and other areas for municipal, domestic, and industrial purposes. *Id.*

---

<sup>1</sup> Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

With recent severe drought conditions, and predictions of future drought conditions, NTMWD, the petitioner, Tarrant Regional Water District (“Tarrant”), and other North Texas water providers must seek additional water supplies to meet the needs of their customers, whose population continues to grow. NTMWD has taken significant efforts to combat drought conditions by implementing extensive water conservation and drought contingency measures, in accordance with its state-approved 2009 Water Conservation and Drought Contingency Plan (“Drought Plan”). NTMWD has spent almost \$10 million in the last 7 years on water conservation-related public education programs, and it has developed and given away these programs for use by other public water suppliers across Texas. Because of its dwindling water resources, on November 1, 2011, NTMWD entered Stage 3 of the Drought Plan, which allows outdoor watering only once every two weeks until March 31, 2012. NTMWD expects it may be required to enter Stage 4 of the Drought Plan – which prohibits all commercial and residential outdoor watering – possibly by fall of 2012. Even with these measures, however, NTMWD requires additional water supplies to meet its customers’ increasing demands for water.

In stark contrast, the State of Oklahoma is practically giving away water – discharging on average 36 million acre-feet of unused stream water into various tributaries bound for the Gulf of Mexico each year. Oklahoma uses only a drop in the bucket of the available water – just 1.87 million acre-feet of surface

water – each year. Oklahoma Water Resources Board, *Oklahoma Water Facts* (Jan. 13, 2010), <http://www.owrb.ok.gov/util/waterfact.php>; Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan, Physical Water Supply Availability Report*, Table 3-21 (Nov. 2011), [http://www.owrb.ok.gov/supply/ocwp/pdf\\_ocwp/WaterPlanUpdate/OCWP\\_PhysicalWaterSupplyAvailabilityReport.pdf](http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/OCWP_PhysicalWaterSupplyAvailabilityReport.pdf). Even with this vast supply of unused water, Oklahoma has actively sought to prevent any use of this water outside its borders by enacting a series of laws that effectively create an embargo on the exportation of water from Oklahoma for use in any other state (“Oklahoma Water Statutes”). See, e.g., Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, 1086.1(A)(3), 1086.2.

In its efforts to secure additional water supplies for its 1.5 million customers, NTMWD, like Tarrant, has filed water rights applications with the Oklahoma Water Resources Board (“OWRB”). One of NTMWD’s applications seeks to appropriate water within the Kiamichi River, which is located in reach II, subbasin 5 of the Red River Basin. Consequently, NTMWD has a direct interest in this case not only because it generally seeks to secure water from Oklahoma, but because it has an existing application seeking water that is directly affected by the Tenth Circuit’s decision below. Further, NTMWD is extremely concerned about the broader impacts of this decision – essentially eliminating a vast, unused supply of water from a region of Texas in desperate need



of such water for not only economic development, but to maintain the existing economy.



### **SUMMARY OF ARGUMENT**

Water is essential to the vitality and growth of communities. In North Texas, drought conditions and an ever-growing population have created a demand for water supplies that cannot be met in the future without additional supplies. Wholesale water providers like NTMWD and Tarrant seek to meet these water demands by securing additional water – water that is available to Texas under the Red River Compact but is only accessible in Oklahoma.

The Tenth Circuit's erroneous interpretation of the plain language of the Red River Compact prevents either NTMWD or Tarrant from using those additional water supplies. If the Tenth Circuit had employed a plain language reading of the Compact, the court would have determined that the Oklahoma Water Statutes are preempted by the Compact. The plain language of the Compact, by its express terms, grants Tarrant, on behalf of Texas, an equitable apportionment of water within reach II, subbasin 5 of the Red River Basin – and that right to an equal portion is not conditioned upon such water being located within Texas.



## ARGUMENT

### **I. The Petition Addresses an Issue With Wide-Reaching Socioeconomic Impacts Demanding this Court's Review.**

Since December 21, 2010, the Governor of the State of Texas has issued an emergency proclamation every month regarding the severity of drought conditions in Texas with the most recent proclamation issued on January 26, 2012. Office of the Governor of Texas, *Gov. Perry Renews Proclamation Extending Wildfire Emergency* (2012), <http://governor.state.tx.us/news/proclamation/16920/>. The Texas State Climatologist paints a bleak picture of the drought in Texas, predicting that these drought conditions may continue for several years. John W. Nielsen-Gammon, *The 2011 Texas Drought: A Briefing Packet for the Texas Legislature*, at 42 (2011), [http://atmo.tamu.edu/osc/press\\_releases/2011\\_drought.pdf](http://atmo.tamu.edu/osc/press_releases/2011_drought.pdf). In North Texas, these drought conditions coupled with growing populations create a demand for water that existing water supplies cannot meet in the near future. Without adequate water supplies, the impact to North Texas's economy could be catastrophic – by stifling, if not completely halting, further economic growth and development.

During a single year in which a severe drought occurs, and water demands of the North Texas region cannot be met, the region could lose a quarter of a million residents and nearly 550,000 jobs, at a cost to the regional economy of over \$61 billion. Region C Water Planning Group, *2011 Region C Water Plan*

(“Region C Plan”), at ES.7 (2011), [http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011\\_RWP/RegionC/PDFs/Main%20Report/EXECUTIVE\\_SUMMARY\\_Final.pdf](http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_RWP/RegionC/PDFs/Main%20Report/EXECUTIVE_SUMMARY_Final.pdf). This negative economic impact felt by North Texas would likely also cause repercussions in southern Oklahoma given the connectivity between the two regions’ economies. William S. Spears School of Business, *Multi-regional Input-Output Model for the Dallas and Oklahoma City Metro. Areas*, at 7 (2010), [http://economy.okstate.edu/caer/files/OKCDFW\\_MRIO\\_Final.pdf](http://economy.okstate.edu/caer/files/OKCDFW_MRIO_Final.pdf).

In an effort to ensure water supplies are available, even during drought conditions, the State of Texas develops a State Water Plan and Regional Water Plans. The regional water plan for North Texas, which includes NTMWD and Tarrant, is the Region C Water Plan. According to this regional plan, in 2060 the region will have demand of 3.3 million acre-feet of water per year – meaning it will have a shortage of 1.5 million acre-feet of water per year by 2060. Region C Plan at ES.6.

To combat this projected shortage, wholesale water providers like NTMWD and Tarrant actively seek to develop new water supplies. In fact, the Region C Water Plan identifies potential water supplies to be developed by wholesale water providers to meet the needs of the growing populations in this region. One such water supply identified for both NTMWD and Tarrant is water from the Red River Basin in Oklahoma. Region C Plan at ES.10.

State agencies like NTMWD and Tarrant must be allowed equal right to use of water that the Compact declares to be apportioned to Texas. This water will not only be used in North Texas, but the return flows will be discharged into the Trinity River Basin and subsequently reused by downstream interests, including the City of Houston. In contrast, if the water remains in Oklahoma, it will only be wasted, flowing into the Gulf of Mexico without ever being used – meaning Oklahoma can claim no harm from allowing Texas the use of water rightly apportioned to it under the Red River Compact (the “Compact”). Pub. L. No. 96-564, 84 Stat. 3305 (1980).

## **II. The Court Should Reverse the Decision of the Tenth Circuit and Hold that the Plain Language of the Red River Compact Preempts Oklahoma Water Statutes.**

### **A. The Tenth Circuit Erroneously Interpreted the Plain Language of the Compact.**

In failing to read the plain language of the Red River Compact, the Tenth Circuit determined in error that the Compact did not preempt the Oklahoma Water Statutes. This error resulted from the Tenth Circuit’s failure to use a plain language reading of the Compact as recently employed by this Court in *Montana v. Wyoming*, 131 S.Ct. 1765 (2011).

The language agreed upon and negotiated by states in interstate compacts must be given deference

because such language is presumed to be “the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.” *New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). This Court has consistently recognized the importance of the plain language in compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), this Court was faced with the question as to whether a federal representative could act as a tie-breaker on a compact commission over a disputed issue. In looking to the plain language of the Pecos River Compact, the Court held that because the language of the compact clearly did not provide for such a tie-breaker in a compact commission, the Court was “not free to rewrite [the compact].” *Id.* at 565.

Likewise, in *Montana*, this Court again deferred to the plain language of the interstate compact at issue and refrained from rewriting the language. 131 S.Ct. at 1778-79. Montana claimed that Wyoming breached the Yellowstone River Compact by increasing their net water consumption through more efficient irrigation systems. *Id.* at 1769. Montana’s claim hinged on the definition of “beneficial use,” which it asserted required Wyoming to not deplete its water rights beyond pre-1950 depletion levels. *Id.* at 1778. This Court rejected Montana’s assertion because “Montana’s reading . . . does not follow the text [of the compact] and would drastically redefine the term

'beneficial use' from its longstanding meaning." *Id.* at 1778.

In accordance with *Montana*, the Tenth Circuit should have applied a plain language reading to the Red River Boundary Compact.

**B. The Compact by its Explicit Terms Grants Texas an Equitable Apportionment of Water Regardless of State Boundaries.**

Just as this Court refused to rewrite the plain language of the compacts in *Texas* and *Montana*, it should reverse the decision of the Tenth Circuit and refuse to rewrite the plain language of the Red River Boundary Compact.

Under the Compact, the Red River Basin is divided into five stream "reaches" that are in turn divided into subbasins. Within reach II, subbasin 5, the apportionment of which is at issue in this case, the Compact provides the signatory States "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 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). Of significant note, reach II, subbasin 5 of the Red River does not flow into or through Texas, meaning Texas can only

acquire its water allocation in this reach by securing such water from Oklahoma.

In addition to this specific language regarding allocation of water, the Compact also includes general provisions that set forth how the signatory States are to use these water allocations. Under Section 2.01, the Compact provides that “[e]ach state may freely administer water rights and uses in accordance with the laws of that state, *but* such uses shall be subject to availability of water in accordance with the apportionments made by this Compact.” Compact § 2.01 (emphasis added). Another general provision used in virtually every interstate water compact also provides that “[n]othing in this Compact shall be deemed” to “interfere with or impair the right . . . of any Signatory State to regulate within its boundaries the appropriation, use, and control of water” as long as that right is “not inconsistent with its obligation under this Compact.” *Id.* § 2.10(a).

In reading the Compact, particularly the above-discussed provisions, the Tenth Circuit failed to grasp its plain language. The Compact sets forth that signatory states are granted “equal rights to the use of” the water within reach II, subbasin 5. Compact § 5.05(b)(1). Instead of holding that Texas, specifically Tarrant, has equal rights to that water, the Tenth Circuit instead read Section 2.01 as granting signatory states “broad discretion to regulate the use of their water apportionments,” meaning Oklahoma Water Statutes were not preempted by the Compact and could effectively prevent Texas from securing its

share of water that is only accessible in Oklahoma. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1242 (10th Cir. 2011), *petition for cert. filed*, (No. 11-889, 2011 Term). But the Tenth Circuit's reading ignores the plain language in the Compact that makes a signatory state's free administration of water rights expressly subject to "the availability of water in accordance with the apportionments made by this Compact." Compact § 2.01. Moreover, the Compact's plain language apportions to each signatory State "equal rights to the use of" the water in reach II, subbasin 5, and each State is entitled to not "more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). A plain reading of this language can only result in a determination that Tarrant, on behalf of Texas, has a right to its equal apportionment of water in the reach even though such reach is in Oklahoma. No further interpretation of the Compact is necessary to make this determination because the plain language is clear as to the Compact's meaning.

Making every effort to avoid preemption of the Oklahoma Water Statutes, even though that effort is contrary to law, the Tenth Circuit is saying essentially that a signatory State's equal right to use of water is in fact *unequal* if that State is unable to secure such water within its own borders. In fact, the Tenth Circuit in essence has rewritten Section 5.05(b)(1) to read that "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into



subbasin 5 *if and only if such water is accessible within the borders of such State.*” But, that is not what the plain language of the Compact provides.

This Court has made clear that it cannot re-write the terms of a Compact. The Compact contains no provision prohibiting Texas from accessing its equal share of water in Oklahoma, and thus, Texas is free to enter Oklahoma to access such water as an article of commerce. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *Altus v. Carr*, 255 F. Supp. 828, 839-40 (W.D. Tex. 1966), *aff’d*, 385 U.S. 35 (1966). The Tenth Circuit should have followed the decision in *Montana* and should have interpreted the plain language of the Compact as requiring that Tarrant be given an equal right to use of water within the reach II, subbasin 5 even if such water is only accessible in the State of Oklahoma.



**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

R. LAMBETH TOWNSEND

*Counsel of Record*

MARTIN C. ROCHELLE

SARA R. THORNTON

LLOYD GOSSELINK ROCHELLE

& TOWNSEND, P.C.

816 Congress Avenue

Suite 1900

Austin, Texas 78701

(512) 322-5800

ltownsend@lglawfirm.com

*Counsel for Amicus Curiae*

February 2012