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Red River Shoot-out: Can Texas Divert Its Compact Authorized Share of a River from an Oklahoma Location in Violation of an Oklahoma Statute?

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CASE AT A GLANCE

Texas has rights to Red River water pursuant to the Red River Compact, approved by all basin states and Congress. Texas wants to divert a portion of its allocation in Oklahoma, which has passed a statute banning the export of water. This case will decide (1) whether Texas's compact rights include the right to divert water in Oklahoma, and (2) whether Oklahoma's effort to prohibit that diversion violates the Dormant Commerce Clause.

Tarrant Regional Water District v. Herrmann
Docket No. 11-889

Argument Date: April 23, 2013
From: The Tenth Circuit

by Robert Abrams
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ISSUES

Does the plain language of the Red River Compact allow petitioner to divert water included in Texas's apportionment for Reach II, Subbasin 5 from within Oklahoma?

Does a congressionally approved multistate compact designed to ensure a share of water to each of the contracting states preempt state laws that obstruct co-compacting states from accessing their share of the allocated water from within the boundaries of another co-compacting state?

If there is no such preemption, does the compact instead serve as a congressional authorization of those same state laws and thereby immunize them from scrutiny under the Dormant Commerce Clause?

FACTS

Tarrant Regional Water District (Tarrant) is a Texas state agency that provides water to north central Texas. It is responsible for supplying water to nearly two million people in and near the Dallas-Fort Worth area, one of the fastest growing and most productive regions of the country. Tarrant anticipates that it will need an additional 466,000 acre-feet of water per year to meet its projected demand in 2060. This case arises from Tarrant's efforts to satisfy this need with water of the Red River system diverted from a location in Oklahoma, which Tarrant claims is the most practical reliable source for supplying its immediate and long-term water needs.

The Red River forms the boundary between southeastern Oklahoma and northeastern Texas. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning water in the Red River Basin. In 1978, the states signed the Red River Compact, and, in 1980, Congress ratified it. The compact divides the Basin into five reaches and further divides the reaches into Subbasins to allocate water. Critically, the mainstem of the Red River is highly saline, although the parties dispute the degree of water quality impairment. The extent of the salinity makes it far preferable for water users, such as Tarrant, to divert the higher-quality water of tributaries before they enter the river's mainstem and get mixed with the far more salty water flowing in the river's mainstem.

Tarrant sought to meet its water needs in several ways, each of which affected Oklahoma. In what has become the focus of this case, Tarrant seeks to export water to Texas from the Kiamichi River, an Oklahoma tributary of the Red River. That point of diversion is located in Reach II of Subbasin 5 as defined by the Red River Compact. In an attempt to ensure meeting its water needs, Tarrant sought additional water not subject to the compact. Tarrant entered into an agreement with owners of groundwater rights in Stephens County, Oklahoma, to export groundwater from their property to Texas. Tarrant also signed a Memorandum of Understanding (MOU) with the Apache Tribe. Under the MOU, the parties agreed to work cooperatively to further quantify the Apache Tribe's reserved water rights in Oklahoma and to develop mutually agreed terms for Tarrant's use of certain amounts of such water by purchase or long-term lease.

Oklahoma requires a permit to appropriate water within the state, and the Oklahoma Water Resources Board (OWRB) is authorized to rule on permit applications. In this case, Tarrant filed permit applications for appropriations from Beaver Creek and Cache Creek, two Oklahoma streams located in another Reach of the river as defined by the compact and from the Kiamichi itself. In a series of

enactments, each adding ever more arduous hurdles for out-of-state diversions, Oklahoma statutes establish criteria that the OWRB must follow in deciding on applications. Some of the statutory provisions under attack in this case were passed in 2009 after Tarrant had begun this litigation.

In November of 2007, Tarrant sued OWRB in the United States District Court for the Western District of Oklahoma. It sought (1) a declaratory judgment that certain Oklahoma statutes are unconstitutional and (2) an injunction to prevent the OWRB from applying the statutes to its Beaver Creek, Cache Creek, and Kiamichi River applications. The district court granted summary judgment for respondents in part and then dismissed the remaining claims on either standing or ripeness grounds. Tarrant appealed and the Tenth Circuit Court of Appeals affirmed the decision below. The Tenth Circuit concluded that Oklahoma may apply its laws to prevent Texas users such as Tarrant from acquiring any portion of Texas's share of Subbasin 5 water from within physical boundaries of Oklahoma even if that water cannot be accessed from inside Texas's border.

A full review of the Oklahoma statutes and the ways in which they attempt to thwart Texas withdrawals from Oklahoma territory can be found in the Tenth Circuit opinion, 656 F.3d 1222, 1129-30 (2011). These now include a required vote of approval by the Oklahoma legislature. Since the Tenth Circuit decision was based on the ground that the compact governed and limited Texas's right to acquire an Oklahoma point of diversion, the validity of those provisions, if they are subject to Dormant Commerce Clause attack, has not been addressed by any court and will almost certainly require remand to the district court for further proceedings. Although Tarrant also claimed that Oklahoma's laws interfered with the attempt to obtain noncompact water (the groundwater and the water of the Apache Tribe), the Tenth Circuit affirmed that those claims lacked ripeness, rulings that are not within the grant of certiorari. Thus, none of the rulings below ever reached the constitutional merits of the Dormant Commerce Clause issue, leaving only matters of the effect of the compact before the Court.

CASE ANALYSIS

In the absence of the Red River Compact, this case would be decided under the Court's "Dormant Commerce Clause" jurisprudence. To avoid balkanization of the United States as an economic unit, the Court throughout the twentieth century took on the role as a guardian against parochial and protectionist state or local regulation that impeded the free flow of commerce among the states. In *Philadelphia v. New Jersey,* 487 U.S. 617 (1978), the Court declared that statutes which on their face discriminate against the interstate movement of commerce are "virtually *per se* invalid." Then in *Sporhase v. Nebraska,* 458 U.S. 941 (1982), the Court expressly extended the Dormant Commerce Clause to bans on the export of water. *Sporhase* left the door ajar, granting a small amount of leeway: if a demonstrably arid state could show the state as a whole was suffering water shortages that could be alleviated by intrastate transportation of the water, then it might be possible to uphold a narrowly tailored export ban.

The complicating factor here is the Red River Compact, which each party claims favors its position. It is important to note that interstate compacts, which owe their genesis to Article I, § 10, cl. 3 of the United States Constitution, are formed by the passage of compact legislation in each of the compacting states and to take effect must be ratified by Congress. For that reason, compacts hold a status as federal law which, under the Supremacy Clause, trumps state law to the contrary. Both sides argue that the compact addresses the place from which Texas and Texas parties may divert water awarded to Texas under the Red River Compact. Not surprisingly, Tarrant argues that the compact expressly contemplates Oklahoma points of withdrawal in Reach II, Subbasin 5. Respondents claim the compact's history requires it be read as forbidding Texas withdrawals from Oklahoma's territory absent Oklahoma's permission, which has not been granted.

The compact adds a further wrinkle because as federal law, a compact can serve as congressional authorization allowing the compacting states to engage in conduct that otherwise would violate the Dormant Commerce Clause. The only previous case that has faced that issue squarely involved the Yellowstone River Compact, which included an express provision allowing export bans. In that case the district court upheld the export ban. *Intake Water Co. v. Yellowstone River Compact Commission,* 590 F. Supp. 293 (D. Mont. 1983). In the instant case, the parties again disagree, with Tarrant claiming that any intent to immunize the states from the Commerce Clause must be unmistakably clear on the face of the compact, and the Oklahoma water officials argue that the only fair inference regarding the compact's intent is that its goal was to protect Oklahoma against invasive drafts on its streams.

Looking at some of the specifics, according to Tarrant and amici on its side, the plain language of the Red River Compact grants Texas a right to a portion of the water flowing into Reach II, Subbasin 5. Under § 5.05(b)(1), signatory states are granted "equal rights" to undesignated water flow in Subbasin 5 "so long as the flow of the Red River at the Arkansas–Louisiana boundary is 3,000 cubic feet per second (cfs)." They contend that the Tenth Circuit erroneously misapplied the presumption against preemption (of state law by federal law) and failed to adhere to a plain language reading of the compact. Tarrant points to the fact that in reference to some Reaches and Subbasins, the compact expressly indicated when water allocations were to be restricted to locations within each state's boundaries, for example in regard to water use of Reach II, Subbasin 3 and Reach III, Subbasin 3. In contrast, § 5.05(b)(1) does not include restrictive language, which Tarrant claims requires the court to interpret § 5.05(b)(1) to permit Texas to obtain 25 percent of the water in excess of 3,000 cfs in Reach II, Subbasin 5 irrespective of state borders. Further supporting this position is the claim that Texas, due to the salinity of the flow in the mainstem and the comparatively lesser amount of tributary water on the Texas side of the river in that Subbasin, cannot satisfy its compact rights without making diversions from points located in Oklahoma.

Respondents disagree with Tarrant's interpretation of § 5.05(b)(1). Respondents argue that "equal rights" means signatory states have only "an equal right to use no more than 25 percent of excess water." Respondents allege that 25 percent is a cap on potential removal and not an entitlement to a fixed 25 percent of undesignated water by every signatory to the compact. Respondents further criticize Tarrant's proposed methodology as cost prohibitive and difficult to quantify. To divide the excess flow equally, the signatory

states would have to determine the amount of excess flow and divide it by what share each state is owed. Respondents argue that such calculations are contrary to the compliance scheme of the compact, which does not include a fixed allocation scheme.

Focusing on the specific language, respondents assert that "Section 5.05(b)(1) does not confer a cross-border right by omitting in express terms the obvious notion that States divert water within their borders." They term the drafters inclusion and omission of border limitations in § 5.05 as "arbitrary" and not in derogation of the negotiating history that the respondents claim confirms that the states did not intend cross-border rights.

The United States, as amicus, limits its attention to the compact interpretation issue and suggests that an interstate compact is "a contract … that must be construed and applied in accordance with its terms." Based on the text of the Red River Compact and the record developed in this case, the United States urges that the better interpretation is that Oklahoma may not categorically foreclose Texas from diverting water in Reach II, Subbasin 5 of the Red River in Oklahoma, at least where such a prohibition would prevent Texas from exercising its "equal right" under § 5.05(b)(1) of the compact to use excess water in that Subbasin.

SIGNIFICANCE

The Court is faced with an issue of interstate water compact interpretation. Historically, the Court has been very careful to consider such compacts on their own terms, much like a matter of contract interpretation because compacts are state agreements ratified by Congress, and to do otherwise would raise separation of powers concerns. For that reason, the Court may treat this as a Red-River-Compact-only matter, in which case the precedential value would be somewhat limited (despite the parties' claims that no less than 3 percent of the nation's economy, the future of northeast Texas, and the ecology of the entire state of Oklahoma, hang in the balance). If the Court takes that path, a great deal of effort will be made to parse the compact and the understandings it was meant to embody. By engaging in that detailed compact-specific inquiry, the breadth of the precedent is more limited; there will be less likelihood that the case will affect the interpretations given, or rights created, by other interstate water compacts. An affirmance will force Tarrant and Texas to figure out another way to develop a larger portion of their share of Red River water. The Court could reverse in one of two ways. First and resulting in an immediate victory for Tarrant, the Court could find both that the compact permits cross-border diversions in Reach II Subbasin 5 and that the compact preempts export-restrictive state laws. Alternatively, the Court could limit its ruling to the compact cross-border diversion issue and rule that the compact neither preempts nor immunizes the Oklahoma state laws in relation to Dormant Commerce Clause challenges. In that event, the case would be remanded with instructions to consider the Dormant Commerce Clause attacks on the restrictive Oklahoma measures.

An alternative possibility is that the Court decides the case on a broader ground that addresses the presumptions applied to all interstate water compacts, of which there are roughly 50, slightly more than half of which play a major role in interstate water allocation or management. A broad answer favoring respondents might declare that absent express provisions in the compact, water allocated to a state may be diverted in another state's territory only with permission. A broad answer favoring petitioner might be that, absent express provisions in the compact, a state is entitled to divert its allocated share from whatever point of diversion is most efficacious, consistent with reasonable nondiscriminatory regulation of the state in which the diversion is effectuated. Even if great emphasis is placed on the compact's text, but little on its history and the parties' intent, the ruling might have broader significance. An amicus counted as many as nine water allocation compacts having similar language to that of the Red River Compact (although none have language quite like § 5.05(b)(1)).

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PREVIEW of United States Supreme Court Cases, pages 296–299.

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In March, the Court heard a number of interesting cases. Below, we highlight some of the more engaging comments between the justices and the advocate during *United States v. Windsor* (Docket No. 12-307). *Windsor* asks whether the federal Defense of Marriage Act (DOMA), which for federal benefit purposes defines marriage as being between a man and a woman, violates the Equal Protection Clause; there were also standing issues before the Court given that the petition was brought to the Court not by the executive branch but rather by a bipartisan group of House of Representative leaders.

CHIEF JUSTICE JOHN ROBERTS: I would have thought your answer would be that the Executive's obligation to execute the law includes the obligation to execute the law consistent with the Constitution. And if he has made a determination that executing the law by enforcing the terms is unconstitutional, I don't see why he doesn't have the courage of his convictions and execute not only the statute, but do it consistent with his view of the Constitution, rather than saying, oh, we'll wait till the Supreme Court tells us we have no choice.

MS. VICKI JACKSON (court-appointed amicus): Mr. Chief Justice, I think that's a hard question under Article II. But I think the Article III questions that this Court is facing turn on what the parties in the case have alleged, what relief they're seeking, and what the posture is.

JUSTICE ANTHONY KENNEDY: In Federal court's jurisprudence, are you saying there's a lack of adversity here?

MS. JACKSON: I am saying primarily …

JUSTICE KENNEDY: Can you give us a pigeonhole?

MS. JACKSON: I—it's a little difficult because the circumstance is unusual, Justice Kennedy, but I think the most apt of the doctrines, although they are overlapping and reinforce each other, the most apt is standing. This Court has made clear that a party on appeal has to meet the same Article III standing requirements of injury caused by the action complained of and redressable by the relief requested by the parties.

JUSTICE KENNEDY: But it seems to me there—there's injury here.

MS. JACKSON: Well, Your Honor, I do not agree that the injuries alleged by the United States should be cognizable by the Article III courts because those injuries are exactly what it asked the courts below to—to produce.

* * * *

JUSTICE KENNEDY: Well, it [DOMA] applies to over what, 1,100 Federal laws, I think we are saying. So it's not—it's—it's—I think there is quite a bit to your argument that if the tax deduction case, which is specific, whether or not if Congress has the power it can exercise it for the reason that it wants, that it likes some marriage it does like, I suppose it can do that. But when it has 1,100 laws, which in our society means that the Federal government is intertwined with the citizens' day-to-day life, you are at—at real risk of running in conflict with what has always been thought to be the essence of the State police power, which is to regulate marriage, divorce, custody.

MR. PAUL CLEMENT (on behalf of respondent Bipartisan Legal Advisory Group): Well, Justice Kennedy, two points. First of all, the very fact that there are 1,100 provisions of Federal law that define the terms "marriage" and "spouse" goes a long way to showing that Federal law has not just stayed completely out of these issues. It's gotten involved in them in a variety of contexts where there is an independent Federal power that supported that. Now, the second thing is the fact that DOMA affects all 1,100 statutes at once is not really a sign of its irrationality. It is a sign that what it is, and all it has ever purported to be, is a definitional provision. And like every other provision in the Dictionary Act, what it does is it defines the term wherever it appears in Federal law in a consistent way. And that was part and parcel of what Congress was trying to accomplish with DOMA in 1996.

JUSTICE KENNEDY: Well, but it's not really uniformity because it regulates only one aspect of marriage. It doesn't regulate all of marriage.

MR. CLEMENT: Well, that's true but I don't think that's a mark against it for federalism purposes. And it—it addressed a particular issue at a point, remember in 1996, Congress is addressing this issue because they are thinking that the State of Hawaii,

(continued on page 303)