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A battle ends, but the fight for water in Oklahoma continues

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Abstract: As the lifeblood of land and communities, water will forever remain at the center of people's lives in the arid Southwestern United States and, given the scarcity of water resources, at the center of their disputes. In Oklahoma, disputes over water seem unending with entities in North Texas seeking access to desperately needed water supplies in the Red River Basin, and Indian Nations claiming tribal rights to water in southeastern Oklahoma. Given the recent decision in *Tarrant Regional Water District v. Herrmann*, Oklahoma seems to have at least settled, for the time being, one dispute, leaving North Texas entities looking to develop additional water supplies elsewhere. But, Oklahoma's battle with the Choctaw and Chickasaw Nations over rights to water in southeastern Oklahoma appears to just be heating up as drought conditions do the same.

Key words: water supply, constitutional law, interstate compacts, tribal water rights

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Terms used in paper

Short name or acronym	Descriptive name
TRWD	Tarrant Regional Water District
OWRB	Oklahoma Water Resources Board
OCWUT	Oklahoma City Water Utility Trust

VAST, UNTAPPED WATER SUPPLIES IN OKLAHOMA

Surface water supplies abound in Oklahoma with flowing streams and relatively full reservoirs. The State of Oklahoma recognizes the vast water supplies it has and that it is “blessed with an abundance of water.”¹ Of its prolific surface water supplies, Oklahoma taps only 1.87 million acre-feet and allows the remainder to be discharged to the Gulf of Mexico, unused and wasted.² This unused and wasted amount is a staggering 36 million acre-feet of stream water.³ By 2060, Oklahoma is only expected to use 2.48 million acre-feet, which means that water will continue to be unused as a public water supply for *decades* while other regions desperately needing such supply continue to suffer.⁴

Although Oklahoma has experienced drought conditions, such drought conditions pale in comparison to the devastating conditions experienced in Texas. The year 2011 marked the state of Texas’s worst recorded 1-year drought since rainfall data was first recorded in 1895.⁵ According to the U.S. Drought Monitor, a majority of Texas was rated as being in “exceptional drought,” the worst rating for drought conditions, and other areas of Texas were rated as at least “extreme” or “severe.”⁶ The drought caused streams to run low, if at all, and reservoirs to operate at 50% capacity.⁷ In August 2011, lake levels at Lakes Travis and Buchanan were so low that only one boat ramp remained open for both lakes—significantly impacting recreation on the lakes.⁸ Not surprisingly, the drought’s impact on agriculture was just as crippling and resulted in a record \$5.2 billion in agricultural losses, making it the most costly drought on record.⁹

¹ Oklahoma Water Resources Board, *2012 Oklahoma Comprehensive Water Plan Executive Report 3* (Feb. 2012), available at http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf.

² Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan*, Water Demand Forecast Report Table 27 (Dec. 2012), available at http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/WaterDemandForecastReport.pdf.

³ *Oklahoma Water Facts*, Oklahoma Water Resources Board, <http://www.owrb.ok.gov/util/waterfact.php/> (last updated Jan. 14, 2014).

⁴ *Id.*

⁵ Dan Huber, *The 2011 Texas Drought in a Historical Context*, CENTER FOR CLIMATE & ENERGY SOLUTIONS (August 26, 2011), <http://www.c2es.org/blog/huberd/2011-texas-drought-historical-context>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Blair Fannin, *Texas agricultural drought losses reach record \$5.2 billion*, AGRILIFE TODAY (Aug. 17, 2011), <http://today.agrilife.org/2011/08/17/texas-agricultural-drought-losses-reach-record-5-2-billion>.

In addition to these ongoing drought conditions, the State of Texas also faces a growing population that demands additional water supplies. The *Water for Texas 2012 State Water Plan* provides that Texas is the second most populated state in the United States, and it had a greater population growth than any other state between 2000 and 2010—increasing from 20.8 million to 25.1 million.¹⁰ And, from 2010 to 2060, this population is expected to grow approximately 80% to 46.3 million.¹¹ This estimated growth luckily does not have a corresponding percent increase in demand for water; water demand is only projected to increase by 22%, given the implementation of water conservation and water reuse.¹² Even so, based on the current inability to meet existing water demands due to ongoing drought conditions, additional water supplies must be developed to also meet this increased demand.

In North Texas, securing additional water supplies is extremely critical. The North Texas region that includes the Dallas-Fort Worth Metroplex contains approximately 26% of Texas’s population.¹³ By 2060, the population of the region is projected to grow 96% with water demands increasing 86%.¹⁴ To meet these demands, North Texas water suppliers, in addition to continuing water conservation efforts, must develop new supplies of water, and with the vast supplies of water in Oklahoma going unused, obtaining water supplies from Oklahoma seems the most logical source from which to obtain such water. Unfortunately, Oklahoma is fighting to keep every drop of its water supplies, even if keeping this water means wasting it by discharging it into the Gulf of Mexico.

TARRANT REGIONAL WATER DISTRICT’S FIGHT FOR WATER IN OKLAHOMA

The fight for water supplies along the Texas-Oklahoma border culminated in a legal battle before the highest court in the land in *Tarrant Regional Water District v. Herrmann*, 133 S.Ct. 2120 (2013). Tarrant Regional Water District (TRWD), a state water agency serving the populous North Texas region, ignited this fight when it sought to obtain water

¹⁰ Texas Water Development Board, *Water for Texas 2012 State Water Plan* at 129 (2012), available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/03.pdf.

¹¹ *Id.* at 132.

¹² *Id.* at 136.

¹³ Texas Water Development Board, *Water for Texas 2012 State Water Plan* at 46 (2012), available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/02.pdf.

¹⁴ *Id.*

rights in Oklahoma.¹⁵ In one of the water rights applications it filed with Oklahoma, TRWD proposed to take a portion of Texas's share of water from the Red River Basin within Reach II, subbasin 5 in the Kiamichi River.¹⁶ In anticipation of the Oklahoma Water Resources Board (OWRB) rejecting its water right application, TRWD filed suit in 2007 against the OWRB.¹⁷ Ultimately, the constitutional law arguments central to this legal battle would make their way through the justice system all the way to the U.S. Supreme Court.

TRWD's efforts to export water from Oklahoma and the Red River Compact

In light of the current and future population growth in its service area, TRWD has an ongoing obligation to secure additional water supplies to serve its customers.¹⁸ In an effort to fulfill this obligation, in early 2007 TRWD submitted 3 applications to the OWRB¹⁹ seeking authority to export water from Oklahoma to serve its customers in North Texas.²⁰ One of these applications sought a permit to appropriate and export 310,000 acre-feet of water from the Kiamichi River in southeastern Oklahoma.²¹ At the time TRWD filed its application, Oklahoma state statutes required OWRB to treat in-state applicants more favorably than out-of-state applicants.²² For

¹⁵ See Danny DeBelius, et al., *Water Fight*, NATIONAL PUBLIC RADIO, <http://stateimpact.npr.org/oklahoma/tarrant-regional-water-district-v-herrmann/> (last visited January 17, 2014) (providing an overview of the water battle before the U.S. Supreme Court case); Janice Francis-Smith, *Water Wars: Can Oklahoma quench Texas' thirst without getting parched?*, OKLAHOMA CITY JOURNAL RECORD, Apr. 29, 2008, <http://www.questia.com/newspaper/1P2-16431729/water-wars-can-oklahoma-quench-texas-thirst-without>; Tim Talley, *North Texas Eyes Oklahoma Water*, FORT WORTH STAR-TELEGRAM, Feb. 11, 2011, <http://newsok.com/north-texas-eyes-oklahoma-water/article/3540133>.

¹⁶ Linda Christie, *Interstate Water Compacts: A License to Hoard?*, 1 TEXAS A&M JOURNAL OF REAL PROPERTY LAW, 15, 26 (2013).

¹⁷ *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, at *1 (W.D. Okla. Nov. 18, 2009).

¹⁸ The North Texas area encompassing Dallas and Fort Worth increased from 5.1 million residents in 2000 to nearly 6.4 million in 2010, a spike of over 23% and among the most substantial in the United States during this period. See *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S.Ct. 2120 (2013) (citing Dep't of Commerce, Census Bureau, P. Mackun & S. Wilson, *Population Distribution and Change: 2000 to 2010* (Mar. 2011)).

¹⁹ Oklahoma created the OWRB to regulate water and issue permits to appropriate water in the state. See Okla. Stat. tit. 82, § 105.9.

²⁰ *Tarrant Reg'l Water Dist.*, 2009 WL 3922803, at *1; Leslie Wimmer, *TRWD Working to Revise Suit in Oklahoma Water Battle*, FORT WORTH BUSINESS PRESS, Dec. 7, 2009.

²¹ *Tarrant Reg'l Water Dist.*, 2009 WL 3922803, at *1.

²² See Okla. Stat. tit. 82, § 105; *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1228 (10th Cir. 2011).

example, one set of statutes placed a 5-year moratorium on the export of water outside the state,²³ another applied the moratorium to state, tribal, or intergovernmental cooperative agreements regarding the export of Oklahoma water,²⁴ and a third provision required legislative approval for out-of-state water use.²⁵ Collectively, these statutes effectively prohibit the issuance of any permit appropriating Oklahoma surface water for use in another state.

The Kiamichi River—from which TRWD sought to appropriate and export water—is located within the Red River Basin. Water within the Red River Basin is apportioned by the Red River Compact—an interstate compact that was entered into by the states of Oklahoma, Texas, Arkansas, and Louisiana in 1978 after 20 years of negotiations.²⁶ The U.S. Congress approved the Compact in 1980.²⁷ The Compact's purpose was to “provide an equitable apportionment” of water within the Red River Basin in an effort to “promote interstate comity and remove causes of controversy” among the signatory states.²⁸ The Compact divided the river into 5 distinct subdivisions called reaches, each of which was further divided into smaller subbasins.²⁹

Ultimately, the Supreme Court's interpretation of the Compact foreclosed TRWD's ability to obtain a water right permit from Oklahoma so long as Oklahoma statutes continue to effectively prohibit out-of-state use of water. The section of the Compact most central to the dispute in *Tarrant Regional Water District v. Herrmann* was Section 5.05(b)(1) that sets forth: “Signatory States... have equal rights to the use of runoff originating in subbasin 5 . . . provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.”³⁰ This section governs Reach II, subbasin 5 and was the subject of major tension during the Compact's negotiation because it requires the upstream states of Oklahoma and Texas to release water from storage to the downstream states of Arkansas and Louisiana. Another section of the Compact that OWRB relied heavily upon during the lawsuit explicitly provides that the signatory states are free to regulate water within their boundaries so long as those regulations are “not

²³ Okla. Stat. tit. 82 § 1B(A).

²⁴ *Id.* tit. 74, § 1221.A.

²⁵ *Id.* tit. 82, § 1085.2(2).

²⁶ Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980).

²⁷ *Id.*

²⁸ Red River Compact §1.01(a)-(b). Other purposes of the Compact were to promote a program to reduce pollution in the river, provide a means for enforcement for anti-pollution and anti-deterioration efforts, conserve water, and provide a system for state and joint state planning in allocating the river water. *Id.* §1.01(c)-(e).

²⁹ Red River Compact §§ 2.12, 4.01.

³⁰ Red River Compact § 5.05(b)(1).

inconsistent with its obligations under the Compact.”³¹

In its efforts to obtain water in Oklahoma, TRWD sought to export both surface water and groundwater from within Oklahoma.³² TRWD sought to appropriate water from Beaver Creek and Cache Creek, both located in Reach I, subbasin 2 of the Red River Basin, and from the Kiamichi River located in Reach II, subbasin 5 of the Red River Basin—with all such water being governed by the Compact.³³ Additionally, TRWD sought to export groundwater by entering into an agreement with private landowners in Stephens County, Oklahoma and through a memorandum of understanding with the Apache Tribe.³⁴

District Court’s opinion

Concurrent with the filing of its water right applications for water from the Red River Basin, TRWD filed suit in federal district court against the board members of OWRB and the Oklahoma Water Conservation Storage Commission (collectively referred to herein as “OWRB”), seeking a declaratory judgment that “Oklahoma laws unconstitutionally prevented it from appropriating or purchasing water in Oklahoma.”³⁵ Specifically, TRWD argued that Oklahoma’s statutes that prevent out-of-state water sales are barred by the Dormant Commerce Clause and Supremacy Clause of the U.S. Constitution.³⁶ Defendant OWRB filed a motion to dismiss, or in the alternative for summary judgment as to both of TRWD’s claims.³⁷ OWRB argued that the district court lacked subject matter jurisdiction because Oklahoma repealed its restrictions on out-of-state water sales (even though there was no explicit repeal of the statutes), that the Compact controls the issues such that the Red River Compact Commission has primary jurisdiction over resolution of the dispute, and that the Compact constitutes congressional approval precluding TRWD’s Dormant Commerce Clause and Supremacy Clause claims.³⁸ The Commerce Clause, Art. I, § 8, cl. 3 of the U.S. Constitution, grants Congress the exclusive power to regulate the flow of interstate commerce.³⁹ Interstate commerce has been defined and explained in common law and specifi-

cally includes the interstate movement of water.⁴⁰ Congress’s enumerated grant of power to regulate commerce includes an implicit restriction on state interference with interstate commerce that is referred to as the Dormant Commerce Clause.⁴¹ Congress may, however, approve of state interference with interstate commerce such that it precludes any Commerce Clause violation.⁴² In other words, a state will not run afoul of the Commerce Clause if Congress has expressed intent to allow the states to regulate interstate commerce in some way.

The Supremacy Clause of the U.S. Constitution provides that, if Congress exercises authority over a field or “occupies the field,” state law within that field’s purview is preempted.⁴³ If Congress has not occupied the field, state law will be preempted only to the extent that it is inconsistent with federal law.⁴⁴

In November 2009, the district court denied OWRB’s motion to dismiss on mootness and primary jurisdiction claim, while granting its motion for summary judgment with regard to the Dormant Commerce Clause and Supremacy Clause claims.⁴⁵ In addition, the court granted TRWD leave to amend its complaint to address claims not covered by the Compact.⁴⁶ In granting OWRB’s motion for summary judgment, the court held that Congress’s approval of the Compact constituted “a sufficiently clear expression” of intent to authorize Oklahoma’s regulatory scheme that would otherwise be contrary to Commerce Clause and Supremacy Clause principles.⁴⁷ The court also found that Oklahoma’s restriction on out-of-state sales was consistent with the Compact’s purpose and language.⁴⁸

TRWD’s amended complaint alleged that Oklahoma state law prohibiting the export of water was unconstitutional

⁴⁰ See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (The Commerce Clause “precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders . . .”); *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982) (stating that water is an “article of commerce” under the Commerce Clause).

⁴¹ *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

⁴² *Northeast Bancorp, Inc. v. Bd. of Gov. of Fed. Reserve Sys.*, 472 U.S. 159, 174, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”).

⁴³ U.S. CONSTITUTION article VI, cl. 2; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 263, 372 (2000).

⁴⁴ *Cal. Coastal Comm’n. v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

⁴⁵ *Tarrant Reg’l Water Dist.*, 2009 WL 3922803, at *8.

⁴⁶ *Id.*

⁴⁷ *Id.* at *4 -7.

⁴⁸ *Id.* at *6.

³¹ *Id.* § 2.10.

³² *Tarrant Reg’l Water Dist.*, 656 F.3d at 1228.

³³ *Id.*

³⁴ *Id.*

³⁵ *Tarrant Reg’l Water Dist.*, 2009 WL 3922803, at *1.

³⁶ *Id.* at *3.

³⁷ *Id.* at *1.

³⁸ *Id.* at *1.

³⁹ U.S. CONSTITUTION article I, § 8, cl. 3.

because it barred TRWD's purchase of water from private persons in Stephens County, Oklahoma and from the Apache Tribe.⁴⁹ OWRB again moved to dismiss, arguing that no justiciable controversy exists and that the amended complaint failed to state a claim.⁵⁰ The court granted OWRB's motion to dismiss and rendered judgment for OWRB for a second time.⁵¹ The court explained that no justiciable claim existed because TRWD's Stephens County agreement was just that, an agreement, and TRWD had not yet filed a permit application for the exportation of groundwater.⁵² Similarly, the court explained that TRWD's memorandum of understanding with the Apache Tribe was "far too speculative and subject to too many contingencies to set out a controversy ripe for judicial resolution."⁵³ TRWD appealed the district court's decisions to the U.S. Court of Appeals for the Tenth Circuit on August 12, 2010.⁵⁴

Tenth Circuit's opinion

On appeal, the Tenth Circuit addressed the Dormant Commerce Clause and Supremacy Clause claims originally decided by the district court. Specifically, the court considered (1) whether the Compact allows signatory states to safeguard their water supply through means that would otherwise violate the Dormant Commerce Clause, and (2) whether the Compact preempts Oklahoma laws to the extent the laws interfere with TRWD's alleged right to apportion water located in the Oklahoma section of Reach II, subbasin 5 for exporting to, and for use in, Texas.⁵⁵ Reviewing each of the district court's decisions *de novo*,⁵⁶ the court ultimately affirmed the district court's decision on the same grounds as the district court and expounded upon the district court's reasoning.⁵⁷

Dormant commerce clause

The court examined Dormant Commerce Clause jurisprudence in detail, first explaining the Commerce Clause and the implied restriction on state regulation of interstate commerce.⁵⁸ In general, a court will strike down as unconstitutional state discrimination against interstate commerce "unless the state can show a strong public purpose" for such discrimination.⁵⁹ A state law that facially discriminates against interstate commerce must be examined with the strictest scrutiny to determine if the state is promoting a legitimate local purpose and that there are no nondiscriminatory alternatives.⁶⁰ And, nondiscriminatory state statutes may be invalid if they impose an undue burden on interstate commerce.⁶¹ On the other hand, if the statute's effects on interstate commerce are inconsequential and the statute regulates a legitimate local interest, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁶²

In addressing TRWD's Dormant Commerce Clause claim, the court explained that Congress can approve a discriminatory state action that would normally be a violation of the Commerce Clause.⁶³ Citing a line of cases, the court provided that whether Congress has consented to state regulation of interstate commerce, thus shielding a Dormant Commerce Clause challenge, "depends upon the language of the particular federal statute."⁶⁴ The court also concluded that under the *Sporhase v. Nebraska, ex. rel Douglas* and *South-Central Timber Development, Inc. v. Wunnicke* cases, congressional consent should be determined based on whether Congress "affirmatively contemplate[d]" its intent to allow a state to engage in economic protectionism with "unmistakable" clarity.⁶⁵

The court then presented a detailed examination of the Compact and determined that the Compact explicitly defers

⁴⁹ *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2010 WL 2817220, at *1 (W.D. Okla. July 16, 2010).

⁵⁰ *Id.* at *1.

⁵¹ *Id.* at *3.

⁵² *Id.* at *2.

⁵³ *Id.* at *3.

⁵⁴ Linda C. Martin, *Oklahoma v. Texas: Water Wars*, AMERICAN COLLEGE OF ENVIRONMENTAL LAW, (Aug. 24, 2010), available at <http://www.acoel.org/post/2010/08/24/Oklahoma-v-Texas-Water-Wars-.aspx/>.

⁵⁵ *Tarrant Reg'l Water Dist.*, 656 F.3d at 1227.

⁵⁶ *Id.* at 1233.

⁵⁷ The Tenth Circuit also affirmed the district court's dismissal of TRWD's claims associated with its agreement for groundwater in Stephens County, Oklahoma and its MOU with the Apache Tribe. See *Tarrant Reg'l Water Dist.*, 656 F.3d at 1247-50.

⁵⁸ *Id.* (stating that the Commerce Clause "is both an enumerated grant of power to Congress and an implicit restriction on state interference with interstate commerce.").

⁵⁹ *Id.* (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978)).

⁶⁰ *Id.* (citing *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

⁶¹ *Id.* (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959)).

⁶² *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

⁶³ *Id.* at 1233-34 ("Congressional consent can transform otherwise unconstitutional state action into permissible state action").

⁶⁴ *Id.* at 1237 (citing *Ne. Bancorp, Inc. v. Bd. Of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985), *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946)).

⁶⁵ *Id.* at 1235 (citing *South-Central Timber Devel. Inc v. Wunnicke*, 467 U.S. 82, 91 (1984) and *Sporhase v. Nebraska, ex. rel Douglas*, 458 U.S. 941, 960 (1982)).

to and recognizes plenary state authority over water use.⁶⁶ In making this determination, the court noted that the interpretive comments of the Compact also provide that “each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.”⁶⁷ Accordingly, the court held in Oklahoma’s favor, stating that the Compact’s language “contains the clear statement of congressional authorization of state regulation [of interstate commerce] that *Sporhase* and *Wunnicke* require.”⁶⁸ The court concluded that the Compact gives Oklahoma wide authority to protect its water against out-of-state transfer and use.⁶⁹

Preemption

The court also affirmed the district court’s decision that the Compact does not preempt the Oklahoma water statutes pursuant to the Supremacy Clause.⁷⁰ The court began by examining TRWD’s standing, the preemption doctrine derived from the Supremacy Clause, and the Compact’s deference to state water regulation.⁷¹ The court stated that TRWD had standing to raise the claim because if Oklahoma’s statutes are invalid, then TRWD would suffer injury through the substantial burdens imposed upon it as an out-of-state water right applicant.⁷² Additionally, the court stated that TRWD has standing because its grievance is specific to its application to appropriate Oklahoma water in Reach II, subbasin 5 for use in Texas, and therefore is not a generalized grievance outside the area protected by law.⁷³

With regard to the preemption doctrine, the court emphasized that the presumption against preemption is especially strong in areas of longstanding state policy such as water regulation.⁷⁴ The court explained the standards applicable to express preemption and implied preemption, but ultimately rested its decision on the presumption against preemption regarding

when a state has historically policed a subject area.⁷⁵ The court stated that “the presumption against preemption is particularly strong in this case because history reveals ‘the consistent thread of purposeful and continued deference of state water law by Congress.’”⁷⁶

The court explained that the Compact’s key provisions indicate that Congress did not intend to preempt state water laws.⁷⁷ The court looked to the Compact’s statement that “[e]ach state may freely administer water rights and uses in accordance with the laws of that state” and that the Compact must not be interpreted to “interfere . . . within [a signatory state’s] boundaries the appropriation, use, and control of water . . . not inconsistent with its obligations under the Compact.”⁷⁸

Having been denied any relief from the Tenth Circuit, TRWD made one final appeal to the U.S. Supreme Court. The Supreme Court granted TRWD’s petition for certiorari on January 4, 2013.⁷⁹

U.S. Supreme Court’s opinion

Before the Supreme Court, TRWD argued that Section 5.05(b)(1) of the Compact allows each signatory state the right to obtain up to 25% of excess water within Reach II, subbasin 5 from any part of the river, even if such water is within the boundary of another state, because the Compact does not expressly prohibit cross-border water rights—meaning cross-border rights were intended.⁸⁰ As such, TRWD claimed that the Compact preempts Oklahoma statutes that prohibit TRWD’s ability to export its apportionment of Compact water pursuant to Section 5.05(b)(1) from Oklahoma. In the alternative, TRWD argued that the Oklahoma statutes constituted an unconstitutional restraint on interstate commerce in violation of the Dormant Commerce Clause.⁸¹ Oklahoma argued that the Compact drafters’ silence on cross-border rights, on the other hand, meant that cross-border rights were *not* intended.⁸² Oklahoma claimed victory again when the Court affirmed the judgment of the Tenth Circuit.⁸³ The Court held that (1) the Compact does not preempt Oklahoma statutes because the

⁶⁶ *Id.* at 1237.

⁶⁷ *Id.* at 1238.

⁶⁸ *Id.* at 1237.

⁶⁹ *Id.* at 1239.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1240 (citing *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1234 (10th Cir. 2004)) (“a party seeking a license from a governmental agency generally has standing to challenge an allegedly invalid law that either imposes substantial burdens upon the applicant or flatly prohibits the activity in question”).

⁷³ *Id.* at 1241 (citing *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011) (explaining prudential standing factors).

⁷⁴ *Id.* at 1242.

⁷⁵ *Id.* at 1241-42.

⁷⁶ *Id.* at 1242 (citing *California v. United States*, 438 U.S. 645, 653 (1978)).

⁷⁷ *Id.* at 1242-43.

⁷⁸ *Id.* at 1242 (citing *Red River Compact*, at § 12.10).

⁷⁹ *Tarrant Reg’l Water Dist.*, 656 F.3d 1222, cert. granted, 2013 WL 49810 (U.S. Jan. 4, 2013).

⁸⁰ *Tarrant Reg’l Water Dist.*, 133 S.Ct. at 2129.

⁸¹ *Id.* at 2136.

⁸² *Id.* at 2130.

⁸³ *Id.* at 2129.

Compact does not grant cross-border rights to water; and (2) Oklahoma statutes do not violate the Dormant Commerce Clause.⁸⁴

First, the Court addressed TRWD's argument that Section 5.05(b)(1) of the Compact provided TRWD with the right to cross state lines to obtain water and that Oklahoma's water laws interfered with its ability to exercise that right.⁸⁵ The Court reiterated that properly construing Section 5.05(b)(1)'s silence is "the key to resolving whether the Compact preempts the Oklahoma water statutes."⁸⁶

Statutory interpretation of the Compact

The Court began its analysis by noting that interstate compacts are to be interpreted as contracts using the principles of common law.⁸⁷ Relying on this, the Court examined the express terms of the Compact as the best indication of the parties' intent to determine whether cross-border rights were intended.⁸⁸ In its argument that cross-border rights are granted by Section 5.05(b)(1), TRWD noted that this section does not specifically restrict the allocation of water to within each state's respective borders.⁸⁹ TRWD compared this to other sections of the Compact, like Section 5.03(b) of the Compact that provides: "[t]he States of Oklahoma and Arkansas shall have free unrestricted use of the water of [Reach II, subbasin 3] within their respective states."⁹⁰

To evaluate TRWD's *expressio unius* canon of construction argument⁹¹—the argument that when the drafter includes language in 1 portion of a statute and excludes the language in another, then the drafter intended the inclusion or exclusion—the Court looked to other sections of the Compact.⁹² The Court found that TRWD's argument was not persuasive because it ignores other sections of the Compact that cut squarely against its interpretation and would result in "absurd results."⁹³ The Court stated that "at the very least, the problems that arise"

from TRWD's interpretation suggest the section's "silence is ambiguous regarding cross-border rights."⁹⁴ However, the Court went on to say it is not convinced by TRWD's interpretation because of the well-established principle that states do not easily cede their sovereign powers, the fact that other interstate water compacts have treated cross-border rights explicitly, and the parties' course of dealing.⁹⁵

The Court then echoed the Tenth Circuit's finding regarding a state's sovereign powers, specifically its power over its navigable waters.⁹⁶ In finding that the Compact should not be interpreted as the signatory states expressing intent to cede their powers, the Court stated:

States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence. We think that the better understanding of § 5.05(b)(1)'s silence is that the parties drafted the Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the Compact.⁹⁷

The Court further examined the language of the Compact using the contract interpretation method of looking to "usage of trade."⁹⁸ The Court reviewed several interstate compacts and found that those compacts generally included clear and unambiguous language if cross-border rights were granted.⁹⁹ The Court stated that the absence of clear language in the Compact counts heavily against TRWD's interpretation of it.¹⁰⁰ Furthermore, the Court stated that if it were to accept TRWD's interpretation, monitoring cross-border rights under the Compact "would be a herculean task because the Compact does not require ongoing monitoring or accounting . . . and not all of the water in subbasin 5 is located or originates in Oklahoma."¹⁰¹ The Court subsequently looked to the conduct of the signatory states to the Compact. The Court determined the fact that neither TRWD nor any of the signatory states have pressed for cross-border diversion rights prior to the filing

⁸⁴ *Id.* at 2137.

⁸⁵ *Id.* at 2129.

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)).

⁸⁸ *Id.* (citing *Montana v. Wyoming*, 131 S.Ct. 1765, 1771-72 & n.4 and Restatement (Second) of Contracts § 203(b)(1979)).

⁸⁹ *Id.* at 2130.

⁹⁰ *Id.* at 2130-31; Red River Compact § 5.03(b) (emphasis added).

⁹¹ *Expressio unius est exclusio alterius* stands for the maxim that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997).

⁹² *Tarrant Reg'l Water Dist.*, 133 S.Ct. at 2131.

⁹³ *Id.*

⁹⁴ *Id.* at 2132.

⁹⁵ *Id.* at 2132 (citing *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991)).

⁹⁶ *Id.* at 2132-33.

⁹⁷ *Id.* at 2133.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2133-2136 ("Tellingly, many of these compacts provide for the terms and mechanics of how such cross-border relationships will operate, including who can assert such cross-border rights, . . . who should bear the costs of any cross-border diversions, . . . and how such diversions should be administered.")

¹⁰⁰ *Id.* at 2134.

¹⁰¹ *Id.* (referencing section 2.11 of the Compact).

of the suit further undermined TRWD's position that Section 5.05(b)(1) grants cross-border rights.¹⁰²

Dormant commerce clause

Lastly, the Court addressed TRWD's Dormant Commerce Clause argument. TRWD argued that Oklahoma's statutes impermissibly discriminate against interstate commerce so as to favor local interests by erecting barriers to the distribution of water left unallocated under the Compact.¹⁰³ TRWD's argument was based on the idea that if the Supreme Court were to "adopt the Tenth Circuit's or respondent's interpretation . . . a substantial amount of Reach II, Subbasin 5 water located in Oklahoma [will not be] apportioned to any State and therefore is available" to any permit applicant.¹⁰⁴

The Court rejected TRWD's argument and asserted that TRWD's assumption that the Compact leaves some water "unallocated" is erroneous because the Compact clearly provides that all signatory states are free to use as much water as they can put to beneficial use, up to the 25% cap or until another state calls for an accounting.¹⁰⁵ Therefore, the Court concluded, "[t]he Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated."¹⁰⁶

No cross-border rights to the Red River?

The holding of the Court that no cross-border rights to water in the Red River exist between Oklahoma and Texas likely came as quite a shock to a number of Texas water rights holders currently permitted to use water from the Red River. In its argument before the Supreme Court, TRWD unfortunately failed to point out that virtually all Texas water rights granting permittees the authority to divert water from the Red River constitute cross-border rights because the boundary between Texas and Oklahoma is the south bank of the Red River.

In 1999, the states of Texas and Oklahoma entered into the Red River Boundary Compact to definitively locate the state boundary along the Red River. The compact defined the Oklahoma-Texas state boundary as the vegetation line along the south bank of the Red River.¹⁰⁷ Consequently, Texas diversions of water from the Red River are diversions of water from Oklahoma because such diversions are clearly north of the Oklahoma-Texas state boundary—the vegetation line along

the south bank of the Red River. So what does the Court's opinion mean for Texas water rights holders diverting water from the Red River? Although this opinion calls into question the validity of the rights of these Texas water rights holders, these rights remain protected based upon the Adams-Onís Treaty of 1819 between the United States and Spain (8 Stat. 252).¹⁰⁸ This Treaty guarantees the people of Texas a right of reasonable access to the waters of the Red River along the state boundary to enable them to reach the waters at all stages and to use the same for beneficial purposes in common with the inhabitants of the State of Oklahoma.¹⁰⁹ The U.S. Supreme Court recognized Texas's right of reasonable access granted by the Adams-Onís Treaty of 1819 in *Oklahoma v. Texas*, 261 U.S. 340 (1923).¹¹⁰

Impact of *Tarrant* decision on other interstate compacts

Given that more than 2 dozen interstate compacts exist in the United States governing allocation of water, what impact will *Tarrant* have on these other compacts, and any disputes arising from these compacts? The decision in *Tarrant*, although it appears to be of limited applicability, shows the Supreme Court's clear support for allowing compacting states to maintain exclusive control over water resources within their boundaries unless the interstate compact includes express language to the contrary. The Supreme Court recognized a state's ability to control water within its boundaries as a "core state prerogative."¹¹¹ *Tarrant* also indicates that when the language of a compact is deemed ambiguous, the Court will look to interpretive tools with a presumption that each state has a sovereign prerogative to control its water resources that it must expressly relinquish.¹¹² Regarding the Dormant Commerce Clause, the Court side-stepped addressing whether Oklahoma statutes placed an undue burden on interstate commerce by disposing of this claim in 2 simple paragraphs explaining, "[t]he Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves

¹⁰² *Id.* at 2135.

¹⁰³ *Id.* at 2136 (quoting TRWD's brief).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2137.

¹⁰⁶ *Id.*

¹⁰⁷ Texas Natural Resources Code Ann. § 12.002, Art. II(b).

¹⁰⁸ *Oklahoma v. Texas*, 261 U.S. 340, 342-43 (1923).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Tarrant Reg'l Water Dist.*, 133 S.Ct. at 2133.

¹¹² Holly Taylor, *Tarrant Regional Water District v. Herrmann: Interpreting Silence in Interstate Water Compacts with Respect to State Boundaries and the Right to Access Water*, 17 UNIVERSITY OF DENVER WATER LAW REVIEW 138, 154-55 (2013).

no waters unallocated.”¹¹³ This side-step leaves open the possibility that the Dormant Commerce Clause might have future applications in interstate compact disputes if statutes place an undue burden on interstate commerce with respect to waters that remain unallocated.

The Supreme Court’s method for interpreting the Red River Compact in *Tarrant*—examining the express terms of the compact, and then if such terms are ambiguous, deferring to the sovereign power of states, looking to customary practices in other interstate compacts, and examining the conduct of the parties—will likely be employed in future compact disputes.¹¹⁴ In fact, this method may soon be employed in a dispute involving the State of Texas over the Rio Grande Compact. On January 27, 2014, Texas was granted leave to file a complaint with the Supreme Court regarding Texas’s allegation that the State of New Mexico is violating the Rio Grande Compact by allowing New Mexico water users to use Rio Grande surface water, tributary flow, and return flows below Elephant Butte Reservoir beyond what is authorized in the compact.¹¹⁵ New Mexico alleges that the compact only requires it to deliver a certain quantity of water to the Elephant Butte Reservoir and that it is not required to deliver any specific quantity to the Texas state line.¹¹⁶ A clear dispute between Texas and New Mexico over what the Rio Grande Compact requires appears to exist, meaning the Supreme Court, if it hears Texas’s complaint, will likely employ the interpretive tools used in *Tarrant* to also resolve this dispute.

Tarrant could have more specific implications for other interstate compacts, such as the Upper Niobrara Compact to which the State of Wyoming is a signatory.¹¹⁷ Only a small portion of the Upper Niobrara River is located within the boundaries of Wyoming with the majority of the river flowing within Nebraska.¹¹⁸ The compact provides “no restrictions on the use of the surface waters of the Upper Niobrara River by

Wyoming.”¹¹⁹ The language of the compact does not expressly grant Wyoming rights to divert water in Nebraska, but only limits the use to Wyoming laws and certain limitations within Nebraska.¹²⁰ *Tarrant* could give Nebraska the authority to set further limitations on Wyoming diverting water from within Nebraska since the compact fails to expressly grant cross-border rights to Wyoming.¹²¹ Like Oklahoma, Nebraska could enact protectionist statutes prohibiting out-of-state applicants from obtaining rights to divert water, thereby preventing Wyoming residents from accessing their share of water from the Upper Niobrara River under the compact.¹²²

Future water supplies for North Texas

Following *Tarrant*, it would appear that the ability of an individual or entity within Texas to obtain water within Oklahoma is foreclosed—and for the time being, that may be true. But hopefully, a day will come when Oklahoma realizes that it is wasting a valuable resource that currently just flows wasted into the Gulf of Mexico—a valuable resource for which North Texas entities would be willing to pay significant sums. But that day is no time soon, and until then, TRWD and other entities in the rapidly expanding North Texas region must identify other sources of water supplies to meet growing demands for water. Water supplies from Oklahoma were expected to annually provide 165,000 acre-feet of water or more for North Texas¹²³—so additional supplies must be identified and developed to replace this substantial water supply. It typically takes about 5 years to build a reservoir—but that doesn’t occur until after 10-15 years of going through the permitting for such reservoir.¹²⁴ Another potential water supply option for North Texas is the proposed Marvin Nichols Reservoir that could cost upwards of \$3.3 billion to build and require permitting to flood more than 70,000 acres—no guarantee when federal regulators and environmentalists weigh in on the project.¹²⁵ A second option is moving water from the Toledo Bend Reservoir, but with the reservoir being more than 200 miles from the Dallas/Fort Worth Metroplex, and

¹¹³ Christine Klein, *The Lesson of Tarrant Regional Water District v. Herrmann: Water Conservation, not Water Commerce*, CENTER FOR PROGRESSIVE REFORM BLOG, <http://www.progressivereform.org/CPRblog.cfm?idBlog=-5CA2075E-9126-E28C-666D65E902073C68> (June 19, 2013); *Tarrant Reg’l Water Dist.*, 133 S.Ct. at 2137.

¹¹⁴ See Taylor, *supra* note 112, at 154-55.

¹¹⁵ *Texas v. New Mexico and Colorado*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/texas-v-new-mexico-and-colorado/> (last visited April 27, 2014); Brief for United States as Amicus Curiae at 12, *Texas v. New Mexico*, No. 220141 (Dec. 10, 2013).

¹¹⁶ Brief for United States as Amicus Curiae at 13-14, *Texas v. New Mexico*, No. 220141 (Dec. 10, 2013).

¹¹⁷ Brian A. Annes, *Water Law—Cooperation Abandoned to Allow Hoarding of Water: The Supreme Court Denies Right to Divert Waters Across State Borders Under the Red River Compact; Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013), 14 WYOMING LAW REVIEW 105, 131 (2014).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting Upper Niobrara River Compact, art. V, 83 Stat. 86 (1969)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Region C Water Planning Group, *2011 Region C Water Plan* at 4C.7 (2011), available at http://www.regioncwater.org/Documents/2011Region-CWaterPlan/Chapter%204C_final.pdf.

¹²⁴ Jeremy P. Jacobs, *Water: Supreme Court wades into bitter Texas-Oklahoma feud ahead of expected flood of litigation*, GREENWIRE (March 12, 2013), <http://www.eenews.net/stories/1059977696>.

¹²⁵ *Id.*

downhill, the costs for such a water supply option would be significant.¹²⁶

Although the obstacles seem insurmountable, the future development of water supplies in Texas isn't completely bleak. The State of Texas, recognizing that its communities desperately need to develop new water supplies, enacted legislation in 2013 that enables the state to create 2 funds—the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas—that will set aside \$2 billion to help finance projects in the Texas state water plan.¹²⁷ The funding available will assist communities ranging from small rural towns to large metropolitan areas to develop drought-proof water supplies.¹²⁸ Projects for which funding is available include, but are not limited to, conservation and reuse projects, desalination projects, infrastructure projects, and reservoir projects.¹²⁹ It may be but a small step, given that one large water supply project can easily cost \$2 billion, but it is a *significant* small step nonetheless.

TRIBAL FIGHT FOR RIGHTS TO WATER IN OKLAHOMA

TRWD's efforts to secure water in southeastern Oklahoma previously included attempts to secure water, along with other North Texas entities, jointly from Indian Tribes in Oklahoma and the State of Oklahoma.¹³⁰ Presently, the ability to purchase Oklahoma water directly from these Indian Tribes depends on the outcome of an ongoing dispute between Oklahoma and the Chickasaw Nation and Choctaw Nation of Oklahoma ("Indian Nations") that could tie up Oklahoma water supplies for years. On August 18, 2011, the Indian Nations filed a lawsuit in the U.S. District Court for the Western District of Oklahoma to protect the Indian Nations' alleged rights to water in Oklahoma.¹³¹ The lawsuit names as defendants Governor Mary Fallin, the members and Executive Director of the OWRB, the city of Oklahoma City, and the Oklahoma City Water Utility Trust

(OCWUT).¹³² The lawsuit claims the Indian Nations have federally protected rights to the water within a 22-county territory in southeastern Oklahoma that are "prior and paramount" to any water rights granted by Oklahoma.¹³³

The capstone case *Winters v. United States* first recognized federally reserved Indian water rights in 1908.¹³⁴ The U.S. Supreme Court's ruling in *Winters*, referred to as the "Winters doctrine," provided that when the federal government reserved lands for Indian Tribes, this land reservation included by implication a reservation of water appurtenant to such lands to the extent the water was necessary to achieve the purposes intended by the land reservation.¹³⁵ The U.S. Supreme Court expanded the *Winters* doctrine in *Arizona v. California* almost 50 years after the *Winters* decision and held that Indian reserved water rights are not only for the present needs of the reservation, but also to satisfy the future needs of the reservation.¹³⁶ In reserving water for future needs, the Court held that "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations" because this appeared to be the only feasible and fair way to determine the quantity of water reserved.¹³⁷

The Indian Nations claim that federal rights to water in Oklahoma are guaranteed to them by the Treaty of Dancing Rabbit Creek, Act of September 30, 1830, 7 Stat. 333, that was later modified by the 1866 Treaty of Washington, Act of April 28, 1866, 14 Stat. 769.¹³⁸ The Indian Nations' lawsuit generally seeks (1) declaratory judgments against any action by OWRB on a pending application by Oklahoma City and OCWUT for a permit to use stream water from Sardis Reservoir in southeastern Oklahoma, or any other withdrawal or export of water from the area at issue, unless and until there is initiated a general stream adjudication that satisfies the requirements of the federal law known as the McCarran Amendment;¹³⁹ and (2) permanent injunctions against any such action unless and until a general stream adjudication that satisfies the McCarran Amendment is completed.¹⁴⁰

¹³² Seconded Amended Complaint at 8-9, *Chickasaw Nation v. Fallin*, No. CIV-11-927-W (W.D. Okla. Jan. 26, 2012).

¹³³ *Id.* at 19-21.

¹³⁴ 207 U.S. 564 (1908).

¹³⁵ *Id.*

¹³⁶ 373 U.S. 546, 600 (1963).

¹³⁷ *Id.*

¹³⁸ Seconded Amended Complaint, *supra* note 133, at 2.

¹³⁹ The McCarran Amendment authorizes the adjudication of federal water rights, including Indian water rights held in trust by the United States, and grants consent to join the United States as a defendant in such adjudication. See 43 U.S.C. § 666; *Co. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-13 (1976).

¹⁴⁰ *Legal Matters*, OKLAHOMA WATER RESOURCES BOARD, <http://www.owrb.ok.gov/util/legal.php/> (last updated December 2, 2013).

¹²⁶ *Id.*

¹²⁷ *SWIFT: What's in the legislation?*, TEXAS WATER DEVELOPMENT BOARD, <http://www.twdb.state.tx.us/swift/hb4/index.asp> (last visited April 27, 2014).

¹²⁸ *SWIFT: What will SWIFT fund?*, TEXAS WATER DEVELOPMENT BOARD, <http://www.twdb.state.tx.us/swift/projects/index.asp> (last visited April 27, 2014).

¹²⁹ *Id.*

¹³⁰ Oklahoma Water Resources Board, *Joint State/Tribal Water Compact & Water Marketing Proposals* 25 (March 2002), available at https://www.owrb.ok.gov/studies/legislative/southeast/southeast_pdf/Status%20Report_Part%201.pdf.

¹³¹ *Legal Matters*, OKLAHOMA WATER RESOURCES BOARD, <http://www.owrb.ok.gov/util/legal.php/> (last updated December 2, 2013).

In response to the Indian Nations' lawsuit, on February 10, 2012, the Oklahoma Attorney General filed on behalf of OWRB to initiate such McCarran Amendment adjudication proceedings to protect and accurately determine all rights to the use of water in the Kiamichi, Clear Boggy, and Muddy Boggy stream systems and moved to dismiss the Indian Nations' federal lawsuit as "a premature effort to have federal courts usurp Oklahoma's management of waters of its state."¹⁴¹ At the time of this filing, the Oklahoma Attorney General transmitted a letter to "Oklahomans and Others with water rights to protect" regarding the Indian Nations' lawsuit and how it threatens the security of the water resources in southeastern Oklahoma.¹⁴² Of particular note, the Attorney General discounted the Indian Nations' claim that they are "protectors of waters and natural resources" because the Indian Nations have, on multiple occasions, expressed interest in selling water to Texas.¹⁴³

OWRB's stream adjudication was subsequently removed by the United States to the U.S. District Court for the Western District of Oklahoma on March 12, 2012, in part, because removal of the case would facilitate resolution of the common federal questions underlying the Oklahoma stream adjudication and the Indian Nations' lawsuit.¹⁴⁴ After removal to federal court, the federal judge assigned to both cases requested briefing regarding whether the 2 suits should be consolidated.¹⁴⁵ The request for briefing on consolidation was subsequently withdrawn and both cases were stayed so that the parties could continue mediation that began in January 2012.¹⁴⁶ Mediation ended in January 2013, and with the foundation of a full year of mediation, the parties began direct negotiations. As of June 2014, both lawsuits continue to be stayed as negotiations continue.¹⁴⁷ In July 2013, the Chickasaw Nation Governor and a spokesman for the Governor of Oklahoma both felt that the negotiations were moving in the right direction and appeared

hopeful that a settlement could be reached.¹⁴⁸

If a settlement cannot be reached between Oklahoma and the Indian Nations, the U.S. District Court for the Western District of Oklahoma will likely have to interpret the Treaty of Dancing Rabbit Creek to determine whether it grants the Indian Nations reserved rights to water.¹⁴⁹ Although the Treaty of Dancing Rabbit Creek does not expressly provide for reserved water rights, the court could hold in accordance with U.S. Supreme Court jurisprudence that the Indian Nations have implied reserved water rights.¹⁵⁰ But, the quantity of water that may be granted to the Indian Nations by those implied rights is completely uncertain. What is certain is that if the lawsuit between Oklahoma and the Indian Nations is not settled, this legal battle will likely drag out for years, if not decades,¹⁵¹ meaning any future rights to use water in southeastern Oklahoma will be on hold and water will continue to be wasted and inaccessible to those entities that really need it in North Texas.

THE FIGHT FOR WATER CONTINUES

As populations continue to grow and drought conditions persist, there is no doubt that additional water supplies must be developed to meet these needs. In an ideal world, the States of Texas and Oklahoma and the Chickasaw and Choctaw Nations would work together to ensure that sufficient water supplies are developed for the good of all. Sadly, we do not live in an ideal world—meaning as water resources become scarcer, the legal battles for these water supplies will continue.

¹⁴⁸ Sean Murphy, *Chickasaw governor hopeful on water lawsuit talks*, NATIVE AMERICAN TIMES (July 21, 2013), <http://www.nativetimes.com/index.php/news/environment/8987-chickasaw-governor-hopeful-on-water-lawsuit-talks459>.

¹⁴⁹ Wyatt M. Cox, *A Reserved Right Does Not Make A Wrong*, 48 TULSA LAW REVIEW 373, 395-96 (2012).

¹⁵⁰ *Id.* at 396.

¹⁵¹ See Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 NORTH DAKOTA LAW REVIEW 1, 49 (2009) (identifying other state water rights adjudications involving Indian water rights that often took decades to complete and typically cost in the millions of dollars).

¹⁴¹ *Id.*

¹⁴² Letter from Attorney General of Oklahoma E. Scott Pruitt to Oklahomans (Feb. 10, 2012), available at http://www.owrb.ok.gov/util/pdf_util/lawsuitdocs/CoverLetter_OWRB-App.pdf.

¹⁴³ *Id.*

¹⁴⁴ Notice of Removal, *Okla. Water Res. Bd. v. United States*, No. CIV-12-275-W (W.D. Okla. March 12, 2012).

¹⁴⁵ Order, *Okla. Water Res. Bd. v. United States*, No. CIV-12-275-W (W.D. Okla. March 13, 2012).

¹⁴⁶ Order, *Okla. Water Res. Bd. v. United States*, No. CIV-12-275-W (W.D. Okla. March 27, 2012).

¹⁴⁷ *Frequently asked questions: Water Control*, CITY OF OKLAHOMA CITY, <https://www.okc.gov/waterrights/faq.html> (last visited February 13, 2014); Order, *Okla. Water Res. Bd. v. United States*, No. CIV-12-275-W (W.D. Okla. May 13, 2014).