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BUSTED PIPES: A REVIEW OF TARRANT REGIONAL WATER DISTRICT V. HERRMANN AND THE LACK OF DIRECTION FOR OKLAHOMA AND TEXAS MOVING FORWARD IN A DRY ENVIRONMENT

*Jordan LePage**

*When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court-room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, Courts must here cease to be pedantic and endeavor to be practical.*¹

I. Introduction

Oklahoma and Texas have had their disagreements, to say the least, over the Red River and its abundant water resources. For example, in July of 1931, a dispute concerning a free bridge constructed near a toll bridge connecting Durant, Oklahoma, and Denison, Texas, caused Oklahoma governor “Alfalfa Bill” Murray to declare martial law and call upon the National Guard to enforce his executive order opening the public bridge.² Texas responded with a detachment of Texas Rangers tasked with maintaining the barricades until the Texas-court injunction against the free bridge was dismissed.³ This “near miss” reportedly prompted Adolf Hitler to believe the United States was not so united after all during the events

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1. Johnson v. Lutz, 253 N.Y. 124, 129 (1930) (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1530, at 278 (1923), taken out of context solely for its analogous relationship to the current actions of the judiciary with respect to water preservation.)

2. Lonn W. Taylor, *Red River Bridge Controversy*, TEXAS STATE HIST. ASS'N (Dec. 18, 2013), <http://www.tshaonline.org/handbook/online/articles/mgr02>.

3. *The Strains of Depression and War*, OKLA. DEP'T OF TRANSP. (Dec. 18, 2013), <http://www.okladot.state.ok.us/hqdiv/p-r-div/spansoftime/strains.htm>.

leading up to the Second World War.⁴ However, even in the course of such seemingly-serious scenarios neither state has applied for foreign aid. Until now.

Nearly eighty years later, but less than seventy miles downstream from the Durant-Denison Bridge, Texas and Oklahoma appeal to the courts again. However, this time Texans want to cross the Red River to take something back: water. In the same Reach and Subbasin⁵ that spawned the bridge controversy a Texas state agency asserted its right to appropriate water from a source located entirely within Oklahoma, the Kiamichi River.⁶ In the face of rapidly growing demand, and a rigid Oklahoma public policy disfavoring out-of-state applicants for water resources, Texas state agencies in charge of providing water to millions of Texans turned first to the tribal nations within Oklahoma for support. These tribal nations—notably the Apache Tribe of Oklahoma, the Chickasaw Tribe of Oklahoma, and the Choctaw Tribe of Oklahoma, and the Comanche and Kiowa Tribes of Oklahoma—hold reserved water rights, which, once quantified, could hold the keys to both the north Texas water shortage and immediate economic development for the tribes. However, these rights have not yet been quantified, and as such, hold only speculative value for the water districts facing ever-growing demand.

Tarrant Regional Water District (“TRWD”) is a Texas governmental agency responsible for providing water to more than 1.6 million people in north-central Texas, including Fort Worth, Arlington, and Mansfield.⁷

4. *Id.*

5. “Reach” and “Subbasin” are generic terms for non-uniform measurements of rivers and waterways, herein, they are used as specifically defined by the Red River Compact. *See* 82 OKLA. STAT. § 1431 (2013). *Tarrant* concerns a section of the Kiamichi River south of Hugo Lake located in Reach II, defined as “the Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana state boundary and all tributaries, which contribute to the flow of the River within this reach.” *Id.* § 1431, at 1847 (section 2.12(b) of the Compact); *see id.* § 1431, at 1850 (section 5.05(a)-(d) of the Compact, defining Subbasin 5).

6. In 2007 Tarrant Regional Water District filed three applications for appropriation, two in Reach I, Subbasin 2—at Cache Creek and Beaver Creek—an area under the Red River Compact allocated solely to the State of Oklahoma; the third at the Kiamichi River in Reach II, Subbasin 5, an area under the Compact allocated to each signatory state equally. By the Supreme Court hearing in 2013 only the Kiamichi River application was under review and discussion, thus, for the purposes of this Note it will be referred to as the specific point in controversy. [NOTE TO AUTHOR: DO YOU MEAN “BY THE TIME” OF THE SUPREME COURT HEARING, OR SOMETHING ELSE?]

7. *See* Amended Complaint at 1, *Tarrant Reg’l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 U.S. Dist. Ct. Pleadings LEXIS 51994 (W.D. Okla. Dec. 18, 2009); *see also*

Following a well-documented shortage of water in northern Texas coupled with substantial population growth, TRWD conducted studies, which revealed that its population base is expected to double by 2060.⁸ Moreover, this population increase would cause the area to face a water deficit of 400,000 acre-feet per year.⁹ Starting in late 2000, TRWD attempted to negotiate with the state of Oklahoma and with tribal nations within the state of Oklahoma to purchase and divert water.¹⁰ Initially, TRWD joined other Texas water districts and municipalities to form the North Texas Water Alliance, which sought to negotiate a water-purchase contract with the State of Oklahoma and the Chickasaw and Choctaw Nations.¹¹ TRWD later entered into written agreements with the Apache Tribe of Oklahoma—including a memorandum of understanding—indicating that the two entities would work cooperatively to quantify the Apache Tribe's reserved water rights and develop terms for the purchase or lease of such water.¹² Despite these efforts, the coalition was unable to effectuate any water export plan from its neighbor to the north and TRWD commenced legal action.

This note first reviews the several steps along TRWD's path to the Supreme Court, paying special attention to the arguments of the water district as an agent of Texas and the Oklahoma Water Resources Board (OWRB) as a regulatory office of Oklahoma. After summarizing the holdings of the District Court for the Western District of Oklahoma and the affirmations on appeal to the Tenth Circuit Court of Appeals, this note briefly describes two historic cases that heavily influenced the Supreme Court and dissects the Tenth Circuit ruling that came immediately after *Tarrant* on the same facts. This note attempts to show the balance between a majority view and a lone dissenter, whose opinion foreshadows the possibility of an actual resolution to the case in question. Returning to *Tarrant Regional Water District*, this note will describe and critically analyze the decision of the Supreme Court. Recognizing the distinction between what was intended, what was argued, and what has previously

Overview, TARRANT REGIONAL WATER DISTRICT (Dec. 20, 2013), <http://www.trwd.com/AboutUs>.

8. Amended Complaint, *supra* note 7, at 6.

9. *Id.* at 7.

10. Brief for the Chickasaw and Choctaw Nations as Amici Curiae in Support of Respondents at 31, *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013) (No. 11-889).

11. *Id.*

12. *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant IV)*, NO. CIV-07-0045-HE, 2010 U.S. Dist. LEXIS 72442, *3-4, *9-11 (W.D. Okla., July 16, 2010).

been decided, this note will then delve further into the cases, which shaped the dispositive precedent. In conclusion, this note will attempt to reconcile the positive aspects of the decisions to date with the future implications for the Native American Tribes of Oklahoma, the signatory states to the Red River Compact, and the drought-stricken northern Texas districts.

II. Tarrant Regional Water District v. Herrmann

After roughly three years of unsuccessful negotiations to purchase water from parties within Oklahoma, TRWD sued in conjunction with its applications for water-appropriation to the OWRB. While the exact geography is outside the scope of this paper, the complaint alleged that TRWD had completed a hydrology study and determined the water diversion points in question were the most feasible option available; specifically because once the water flowed into the Red River it became uneconomical to treat because of its high salinity.¹³

The lawsuit, brought in the United States District Court for the Western District of Oklahoma, sought to challenge Oklahoma state laws and prevent the applications from being dismissed pursuant to those laws, and the priority those applications secured, from being lost.¹⁴ Tarrant argued that the Oklahoma laws regulating water sales and appropriations, which it called the “Anti-Export Laws,” violated the rights of Texas agencies to appropriate under the Red River Compact and unconstitutionally impeded interstate commerce in violation of the Commerce Clause.¹⁵

The defendants, represented by the Oklahoma Attorney General’s Office, were the nine members of the OWRB, named individually only in their official capacities as board members of both the Oklahoma Water Resources Board and, *ex officio*, the Oklahoma Water Conservation Storage Commission (“OWCSC”).¹⁶ These members were: (1) Rudolf John Herrmann; (2) Jess Mark Nichols; (3) Bill Secrest; (4) Ford Drummond; (5) Lonnie Farmer; (6) Ed Fite; (7) Jack W. Keeley; (8) Kenneth K. Knowles; and (9) Richard Sevenoaks.¹⁷ The board generally meets the third Tuesday of each month and its primary duties include: “water use appropriation and

13. Amended Complaint, *supra* note 7, at 7-8.

14. *Id.* at 24-25.

15. *Id.* at 15.

16. *Id.* at 2-3 (citing 82 OKLA. STAT. § 1085.1 (Supp. 2006); 82 OKLA. STAT. § 1085.18 (2001)).

17. Currently only Herrmann, Drummond, Fite, and Sevenoaks remain members of the OWRB. See *The Board*, OKLA. WATER RESOURCE BOARD, <http://www.owrb.ok.gov/about/management/board.php> (last visited Dec. 10, 2013).

permitting, water quality monitoring and standards, financial assistance for water/wastewater systems, dam safety, floodplain management, water supply planning, technical studies and research, and water resource mapping.”¹⁸

The statutes being challenged included a 2002 moratorium¹⁹ on the export by any means of surface or ground water out of state (which expired according to its terms during the course of the case in 2009);²⁰ a time-based rule requiring appropriations exceeding seven years to “promote the optimal beneficial use of water ‘in Oklahoma;’”²¹ and two laws requiring an authorizing act of the Oklahoma Legislature for any contract, sale, or exportation of water by the OWRB or an outside water district.²² Tarrant argued these laws are part of a pervasive public policy, including an Attorney General Opinion from 1978,²³ to embargo water within Oklahoma.²⁴

18. *About*, OKLA. WATER RESOURCES BOARD, <http://www.owrb.ok.gov/about/index.php> (last visited on Jan. 10, 2014).

19. Amended Complaint, *supra* note 7, at 11 (citing 82 OKLA. STAT. § 1B (Supp. 2006), and 74 OKLA. STAT. § 1221.A (Supp. 2006)).

20. In response to a dispute regarding whether the moratorium expired as per its term of years or rather its stated goal in funding a hydrology study, Judge Heaton of the D.W.D. Okla. humorously noted in note 2 of the July 16, 2010 order granting the Defendants’ Motion to Dismiss that “Defendants’ position as to the moratorium has not always been a model of consistency.” *Tarrant IV*, No. CIV-07-0045-HE, 2010 U.S. Dist. LEXIS 72442, at *4 n.2 (W.D. Okla. July 16, 2010).

21. Amended Complaint, *supra* note 7, at 13 (citing 82 OKLA. STAT. § 105.16(B) (2001)).

22. *Id.* at 13-14; *see also* 82 OKLA. STAT. § 1085.2(2) (Supp. 2006); 82 OKLA. STAT. § 1324.10(B) (2001).

23. Oklahoma Attorney General Opinion No. 77-274 (Feb. 28, 1978) (available online via the Oklahoma Legal Research System) (“Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board. We can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.”).

24. *See* Amended Complaint, *supra* note 7, at 10. The Complaint alleged:

Oklahoma’s public policy is similarly reflected in 1977 Okla. Session Laws 1005, S.J. Res. No. 7, declaring - contrary to governing constitutional doctrine - that Oklahoma possessed ‘legal title’ to unappropriated water which would otherwise flow out of the state (i.e., “it is possible that by continuing to allow water to flow out of state, Oklahoma’s legal title to such water might become questionable”), and that Oklahoma asserted a “prior right for the State of Oklahoma” over “the unused and uncontrolled water flowing from the state” in a quantity about four times the amount which it has even currently appropriated to beneficial uses, or such other amount that Oklahoma might determine it

A. Procedural History

In 2007, TRWD filed three water-appropriation permits with the Oklahoma Water Resources Board (“OWRB”) concurrently with an action in United States District Court for the Western District of Oklahoma, seeking declaratory judgment enjoining the OWRB from enforcing certain Oklahoma statutes referred to as “Anti-Export Laws.”²⁵ The basic assertion was that the Red River Compact (“the Compact”)—an agreement between Arkansas, Louisiana, Oklahoma, and Texas—and the *Commerce Clause*²⁶ precluded Oklahoma from enforcing state laws, which effectively denied out-of-state applications for water appropriation.²⁷ The rationale was that each state had been allotted 25% of the “excess” flow in Reach 2, Subbasin 5²⁸ and to deny TRWD’s applications pursuant to the “anti-export laws” would be inherent protectionism adverse to interstate commerce.²⁹

In the first instance, TRWD won a slight, but technical, victory when the District Court for the Western District of Oklahoma denied the defendant OWRB’s Motion to Dismiss in 2007.³⁰ However, this decision held little value as to the merits and on appeal the Tenth Circuit only affirmed that the OWRB was not entitled to Eleventh Amendment immunity and dismissed the argument on abstention, effectively leaving the case itself untouched.³¹ Before the second hearing in district court the Oklahoma Legislature amended one of the challenged statutes regarding out-of-state water applications.³² On second hearing, the defendant attempted to argue that this revision impliedly repealed the challenged aspects of the laws and

needed to develop a “comprehensive water plan” under OWRB’s auspices.

Id. at 10-11.

25. *Id.* at 8.

26. U.S. CONST. art. 1, § 8, cl. 3.

27. Amended Complaint, *supra* note 7, at 9.

28. 82 OKLA. STAT. § 1431 (2011) (section 5.05(b)(1) of the Compact).

29. *See* Amended Complaint, *supra* note 7, at 15.

30. Tarrant Reg’l Water Dist. v. Herrmann (*Tarrant I*), No. CIV-07-0045-HE, 2007 U.S. Dist. LEXIS 79973 (W.D. Okla. Oct. 29, 2007), *rev’d sub nom.* Tarrant Reg’l Water Dist. v. Sevenoaks, 545 F.3d 906 (10th Cir. 2008).

31. Tarrant Reg’l Water Dist. v. Sevenoaks (*Tarrant II*), 545 F.3d 906, 909 (10th Cir. 2008).

32. Tarrant Reg’l Water Dist. v. Herrmann (*Tarrant III*), No. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *3 (W.D. Okla. Nov. 18, 2009); *see* 82 OKLA. STAT. § 105.12(A)(5) (2011) (one of the amended subsections of the statute, directing the OWRB to determine if the water identified by the out-of-state application could be used elsewhere in Oklahoma to alleviate in-state water shortages).

made the plaintiff's position moot; however, the district court was not persuaded.³³

However, the district court did grant the defendant's motion for summary judgment as to TRWD's Commerce Clause and Supremacy Clause claims.³⁴ The court's rationale was that Congressional approval of the Compact "constitutes an adoption of standards that preclude a successful Commerce Clause claim" relating to water subject to the Compact "the essential nature of which is to allocate and divide resources [between the signatory states]."³⁵ Moreover, the court concluded that the Compact's language specifically allows consistent state legislation, thereby negating the Supremacy Clause argument, and the plaintiff's willingness to negotiate for water not subject to the compact is "too speculative and uncertain to be ripe for resolution."³⁶ Although, the court did note that nothing in its order addressed the possibility of a signatory state, such as Texas, from suing for a compact violation or from precluding Oklahoma negotiating with Texas as a good neighbor³⁷, the plaintiff took advantage of the court's leave to file an amended complaint and the case was heard yet again in 2010.³⁸

Two separate claims were included in TRWD's amended complaint; the first involved a ten-year option to purchase ground-water from private owners in Stephens County, Oklahoma, the second concerned a memorandum of understanding entered into between the plaintiff and the Apache Tribe of Oklahoma.³⁹ The first claim was dismissed for a lack of standing; the court reasoned that more than the mere possibility of future injury was necessary for a justiciable claim and that nothing on the face of the challenged statutes, as amended to contemplate out-of-state applicants, expressly barred the sale.⁴⁰ As to the second claim, the court again relied on the "speculative" nature of the Apache Tribe's reserved water rights and possible dealings with the plaintiff to conclude the claim was not ripe for resolution.⁴¹ After failing to convince the court of the likelihood of unconstitutional use of the Oklahoma water statutes with regard to water

33. *Tarrant III*, NO. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *3, *10.

34. *Id.* at *31.

35. *Id.* at *26.

36. *Id.* at *27-28.

37. *Id.* at *30.

38. *See generally Tarrant IV*, NO. CIV-07-0045-HE, 2010 U.S. Dist. LEXIS 72442 (W.D. Okla., July 16, 2010).

39. *Id.* at *3-4.

40. *Id.* at *7.

41. *Id.* at *11.

under the Compact, TRWD appealed to the Tenth Circuit in what would lead to the longest decision of the case.

On appeal, the circuit court affirmed each of the lower court's holdings and resoundingly ruled against TRWD.⁴² In reviewing the Commerce Clause claim, the circuit court spoke even more clearly than the court below in asserting that the Oklahoma statutes were consistent with the Compact. The court also found that the Compact embodies congressional consent for state regulation beyond the scope of the interstate agreement itself.⁴³ Moreover, the circuit court interpreted the Compact's repeated and consistent use of the term "unrestricted use" as a basis for deference to state authority over compacted waters within its boundaries; thus this finally did away with any further argument regarding those two permits filed in the area wholly allocated to Oklahoma.⁴⁴ The court spent a significant amount of time justifying its interpretation of the Compact section 5.05 relating to Reach II, Subbasin 5 (an image of which is attached at the end of this Note, this area essentially surrounds the Red River on either side from the New Mexico border to the Arkansas-Louisiana border) in terms of both Commerce Clause and preemption.⁴⁵ Ultimately, the court concluded that the Compact was specifically drafted so that each state would have complete control of the waters within its borders so long as the section's ultimate purpose of ensuring downstream flow. The court quickly dealt with the issues of standing and ripeness and affirmed the lower court's ruling, because neither TRWD, nor the Stephen's County private owners, nor the Apache Tribe of Oklahoma had filed for permits with the defendant board; therefore, no justiciable controversy exists.⁴⁶ This repeated technical procedure highlights a flaw in TRWD's approach to invalidating the "anti-export laws" that will be discussed later in this Note.

The most persuasive passage, in the circuit court's opinion, relates to the issue of boundary protection as an extension of state sovereignty; which became the controlling focus of the court in the final two decisions. "[T]he better reading of the Compact is that it does not obligate Oklahoma to allow Texas entities to appropriate Texas's share of the § 5.05(b)(1) water from within Oklahoma's boundaries."⁴⁷ By adopting this vantage point, the

42. Tarrant Reg'l Water Dist. v. Herrmann (*Tarrant V*), 656 F.3d 1222, 1250 (10th Cir. 2011).

43. *Id.* at 1239.

44. *Id.* at 1238.

45. *See id.* at 1243-47.

46. *Id.* at 1248-50.

47. *Id.* at 1246.

argument ceases to be that Oklahoma is adopting the entitlement bias to enact protectionist statutes, whose “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”⁴⁸ and instead, becomes couched in preserving a state’s authority to close its borders against the forcible removal of its natural resources. Holding the opposite, the court pointedly referred back to the initial complaint in which TRWD alleged “the Compact *allocates to Texas the right to take water from certain stream segments in Oklahoma.*”⁴⁹ Following the decision of the circuit court and an invitation by the Supreme Court for an amicus brief from the Solicitor General,⁵⁰ TRWD was granted certiorari to the Supreme Court.⁵¹ On June 13, 2013, Justice Sotomayor handed down the unanimous opinion of the Court⁵², which amounted to little more than a restatement and an affirmation of the holding below, as well as a testament to the ideology above.

B. What Could Have Been

Prior to the Supreme Court’s ruling, the *Tarrant* case had all the makings of a landmark decision in water law. The premise calls to mind *Altus v. Carr*, the 1966 case in which the United States District Court for the Western District of Texas invalidated on Commerce Clause grounds a Texas statute purporting to require legislative approval for the export of Texas groundwater.⁵³ *Tarrant* provided a nearly perfect vehicle to retool the arguably outdated decision in *Sporhase v. Nebraska*, which in 1982 declared ground water an article of commerce and invalidated the reciprocity provision of Nebraska statute controlling water use permitting and regulation.⁵⁴ Both cases are easily distinguished on two grounds: first, *Carr* and *Sporhase* dealt with ground water⁵⁵ and second, both cases involved individual owners with property rights on both sides of the state lines. More importantly, however, *Tarrant* involves water apportioned

48. *Id.* at 1233 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

49. *Id.* at 1247 (emphasis added); see also *id.* at 1247 n.3 (“[W]e hold that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas *regardless of what amount of water Tarrant and other Texas users can appropriate in Texas.*” (emphasis added)).

50. *Tarrant Reg’l Water Dist. v. Herrmann*, 132 S. Ct. 1878 (2012).

51. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 831 (2013).

52. *Tarrant Reg’l Water Dist. v. Herrmann (Tarrant VI or Tarrant)*, 133 S. Ct. 2120 (2013).

53. *Altus v. Carr*, 255 F. Supp. 828, 840 (D.W.D. Tex.), *aff’d*, 385 U.S. 35 (1966).

54. *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982).

55. See *Tarrant I*, NO. CIV-07-0045-HE, 2007 U.S. Dist. LEXIS 79973, at *16 n.7 (W.D. Okla. Oct. 29, 2007).

under a compact; whereas *Carr* and *Sporhase* did not—a fact the district court quickly distinguished.⁵⁶ This distinction is especially important because as the court noted, interstate water compacts approved by Congress become effectively federal statutes and as such may bestow congressional approval upon otherwise impermissible state statutes.⁵⁷

However, the writing was on the wall for the judiciary to defer from directly addressing the state statutes at issue in *Tarrant*. This case is substantially similar to the 2011 nonstarter *City of Hugo v. Nichols*, in which the Oklahoma municipality of Hugo and the Texas municipality of Irving entered into a contract to export Oklahoma water to Texas.⁵⁸ The city of Hugo already held two permits to appropriate water from the Kiamichi River south of Hugo Lake (the same location targeted by TWRD) and was seeking a third permit and modification of the existing two to include Irving, Texas, as a “place of use.”⁵⁹ Fearing Oklahoma statutes would cause the OWRB to deny Hugo’s appropriation permit application, but before the Board had acted on its application, the two cities jointly filed suit against the OWRB seeking to invalidate the statutes on Commerce Clause grounds.⁶⁰ As pointed out by Nicholas Andrew in a Note for the *Texas Environmental Law Journal*, it is clear that Hugo and Irving “missed out on a clear opportunity to differentiate their suit from *Tarrant*.”⁶¹ However, much like in the present case, the constitutional issue was overlooked in favor of narrow readings of procedural requirements.

The city of Hugo was dismissed at the Tenth Circuit for a lack of standing under a heatedly dissented reading of *Branson*,⁶² barring federal court jurisdiction over certain controversies between political subdivisions and their parent state. The majority asserted that under its decision in *Branson*, a political subdivision has standing only to “enforce the federal statutory right, guaranteed by the operation of the Supremacy Clause in the face of conflicting state law.”⁶³ In the alternative, the majority stated that it could find no precedent for a subdivision to sue its parent state under a

56. See *Tarrant III*, NO. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, *18-19 (W.D. Okla. Nov. 18, 2009).

57. *Id.* at 15 (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)).

58. *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011).

59. *Id.* at 1254.

60. *Id.*

61. Nicholas Andrew, Note, *Interstate Water Transfers and the Red River Shootout*, 41 TEX. ENVTL. L.J. 181, 202 (2011).

62. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

63. *Hugo*, 656 F.3d at 1257 (citing *Branson*, 161 F.3d at 630).

substantive provision of the Constitution, such as the dormant Commerce Clause.⁶⁴ However, the dissent read *Branson* to grant standing to political subdivisions when bringing a structural constitutional claim and being sufficiently independent from the parent state.⁶⁵ Therefore, the dissent asserts that Hugo is alleging a structural claim, as opposed to an individual right claim, under the dormant Commerce Clause and that the court should continue the modern trend of interpreting the prohibitive political subdivision precedent more narrowly.⁶⁶ In fact, the dissent references *Sporhase, supra*, as illustrative of the connection between preemption and Commerce Clause claims in cases determining congressional consent to state statutes under the scope of federal law.⁶⁷

Subsequent to this analysis, the out-of-state political subdivision Irving was held to lack standing because the ultimate solution to its cause of action rested on third party action, not the final judgment of the court; thus, failing to meet the redressability requirement.⁶⁸ The majority found that, distinguishable from *Altus v. Carr, supra*, because Irving's standing was conditioned on its contract with Hugo, which has no right or power to command a specific decision on its permits from the OWRB, Irving's claim was not justiciable.⁶⁹ However, this too was argued in the alternative by the dissent, which asserted that *Wyoming Sawmills*, in which a timber company alleged that the Forest Service violated the Establishment Clause by expanding a protected area and thus depriving the company of access to the timber on the lands, was decided against the plaintiff because the relief sought was "too speculative and remote even if the timber company prevailed on its Establishment Clause claims against the Forest Service."⁷⁰ This rationale recalls a similar finding regarding TRWD's memorandum of understanding with the Apache Tribe of Oklahoma.⁷¹ In opposition to the majority's holding, the dissent found that a successful dormant Commerce Clause challenge would redress Irving's alleged injury by removing "a major state statutory obstacle" inhibiting its ability to contract.⁷² This

64. *Id.* (emphasis added).

65. *Id.* at 1265 (Matheson, J., dissenting).

66. *Id.* at 1266 (Matheson, J., dissenting).

67. *Id.* at 1273 (Matheson, J., dissenting).

68. *Id.* at 1263-65.

69. *Id.* at 1264-65.

70. *Id.* at 1276 (Matheson, J., dissenting) (citing *Wyo. Sawmills, Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1247 (10th Cir. 2004)).

71. *Tarrant IV*, NO. CIV-07-0045-HE, 2010 U.S. Dist. LEXIS 72442, at *11 (W.D. Okla., July 16, 2010).

72. *Hugo*, 656 F.3d at 1276 (Matheson, J., dissenting).

dissent would prove to be a faint and fleeting glimmer of hope for the north-central Texas water districts as the *Tarrant* case progressed to the Supreme Court.

C. The Supreme Court Rules on Tarrant

Justice Sotomayor delivered the unanimous opinion of the Court on June 13, 2013.⁷³ From the outset, the Court noted that TRWD was presenting two alternative claims: (1) TRWD, as an agency of the State of Texas, “is entitled to acquire water under the Compact from within Oklahoma and that therefore the Compact pre-empts several Oklahoma statutes that restrict out-of-state diversions,” and (2) Oklahoma’s water export laws violate the Commerce Clause.⁷⁴ However, the Court proceeds first to give the background of Red River disputes and discuss the way in which the Compact broke down the basin into Reaches and Subbasins.⁷⁵

Notably, of the five subbasins in Reach II only one, number five, was apportioned to the four signatory states with equal rights.⁷⁶ Section 5.05(b)(1) allocates to each state 25% of the water in this subbasin in excess of the water necessary to ensure the flow of the Red River at the Arkansas-Louisiana border is 3000 cubic feet per second.⁷⁷ Initially, the Respondents argued that Arkansas and Louisiana were indispensable parties to the litigation—both by threat of inconsistent litigation and possible effects on the salinity of the Red River should TRWD divert water from the tributaries in question; recall however, that this was dismissed by the district court.⁷⁸ While this section was purported by TRWD to indicate its right to enter Oklahoma to divert water, the Compact also provided that it should not be interpreted to interfere with the rights of the Signatory States to regulate the water within their boundaries.⁷⁹ Even still, Petitioner argued that the

73. *Tarrant VI*, 133 S. Ct. 2120 (2013).

74. *Id.* at 2125.

75. *Id.* at 2125-28.

76. *Id.* at 2127.

77. *Id.* at 2126-27.

78. *Tarrant I*, NO. CIV-07-0045-HE, 2007 U.S. Dist. LEXIS 79973, at *12-3 (W.D. Okla. Oct. 29, 2007), *rev'd sub nom.* *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

79. *Tarrant VI*, 133 S. Ct. at 2127-28 (quoting section 2.10 of the Compact). The Court adds, “Rather, [s]ubject to the general constraints of water availability and the apportionment of the Compact, each state [remains] free to continue its existing internal water administration.” *Id.* It is unclear whether there was any argument over the use of the word “existing” in this context given the changes that have taken place both in terms of population and legislation. Certainly the Court did not see fit to mention it if there was.

Compact's silence on state boundary lines in section 5.05(b)(1) indicates the intention to create a common pool.⁸⁰

The Court believed resolving this silence was the key to determining if Oklahoma water statutes were pre-empted by the Compact.⁸¹ Ultimately, the Court decided the Compact did not create cross-border rights on three bases: "[1] the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; [2] the fact that other interstate water compacts have treated cross-border rights explicitly; and [3] the parties' course of dealings."⁸² First, TRWD argued that because even signatory states to the Compact would necessarily need to be permitted by the OWRB to access this water, the sovereignty of Oklahoma over its water resources is not being challenged; however, this argument failed under a "have-your-cake-and-eat-it-too" standard.⁸³ Second, the petitioner was unable to persuade the Court that the custom of spelling-out cross-border rights in interstate compacts is not substantially exhaustive.⁸⁴ However, TRWD did make the interesting point that since the ratification of the Compact the southern border between Oklahoma and Texas has changed from the "south bank" to the "southern vegetation line." This change could conceivably be seen as creating a retroactive cross-border right, although not to the extent required by the Court to interpret Section 5.05(b)(1).⁸⁵ Finally, the Court cited *Alabama v. North Carolina*⁸⁶ to indicate that "course of performance under the Compact is highly significant evidence of its understanding of the compact's terms."⁸⁷ Not only has no state attempted to utilize cross-border rights for the purposes of water diversion since the Compact was approved by Congress, but also TRWD itself previously attempted to purchase the water it is currently suing to appropriate as a matter of right.⁸⁸

The Court dispels with petitioner's Commerce Clause argument rather handily. Essentially, TRWD argued that if the water in controversy within Subbasin 5 belongs entirely to Oklahoma and a substantial portion of that water is not allocated to any signatory state, then that water is available to

80. *Id.* at 2129-30.

81. *Id.* at 2130.

82. *Id.* at 2132.

83. *Id.* at 2133.

84. *Id.* at 2133-35.

85. *Id.* at 2134-35.

86. 130 S. Ct. 2295, 2299 (2010).

87. *Tarrant VI*, 133 S. Ct. at 2135 (internal quotations omitted).

88. *Id.*

TRWD following approval by the OWRB.⁸⁹ However, because Oklahoma water laws prevent this “unallocated water” from diversion out-of-state to applicants such as TRWD, those laws violate the Commerce Clause by impairing interstate commerce.⁹⁰ Instead of addressing this argument the Court declares that the water located in Oklahoma, in excess of Oklahoma’s 25% share, remains “allocated to Oklahoma unless and until another State call for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share. The Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated.”⁹¹ In a footnote, the Court further explains that even if Oklahoma utilized less than its 25% share and allowed the remainder to flow out of the state, under the terms of the Compact it would pass from Reach II to Reach V and be fully allocated to Louisiana.⁹²

This holding seems to miss the point of petitioner’s argument, forego entirely any attempt to conflate section 5.05(b)(1)’s language with the geographical realities, and decline to offer any valuable guidance as to the construction of state protectionist statutes regarding valuable natural resources. If it is true, as alleged in TRWD’s initial complaint⁹³, that the excess “unallocated” water flowing out of Oklahoma through these tributaries is wasted into the Gulf of Mexico, then this Court has bolstered each State’s case for “hogging” natural resources and operating under the entitlement bias.

Clearly TRWD’s argument for cross-border rights established by the Compact was the weaker of the two; however, the stronger argument that Oklahoma has enacted several statutes amounting to a public policy that discourages or disallows export of Oklahoma water in violation of the Commerce Clause received significantly shorter shrift from the courts.

D. Brief Analysis of the Supreme Court Ruling

In this instance, the Court focused on debunking arguments rather than staring down the Commerce Clause elephant in the courtroom. Although TRWD’s argument that the Red River Compact authorizes cross-border entries and takings clearly stretched any reasonable understanding of state sovereignty and could be easily disputed given their own course of dealings

89. *Id.* at 2136.

90. *Id.* at 2137.

91. *Id.*

92. *Id.*

93. Amended Complaint, *supra* note 7, at 8.

in attempting to purchase the water prior to filing suit,⁹⁴ the assertion that Oklahoma statutes impede interstate commerce was and remains valid. When addressing this argument, however, the Court focuses on TRWD's use of the term "unallocated water" in their dormant Commerce Clause challenge and thereupon side-stepped the constitutional issue in favor of denying that any water remains "unallocated" under the Compact.⁹⁵ Therefore, because no water is "unallocated," no water remains to be an article of commerce. Without an article of commerce upon which to challenge its regulatory scheme, any Commerce Clause argument inherently fails.

The Court did little more than provide a spark notes version of a narrowly tailored Red River Compact and suggest the Texas agency demand an accounting of the water, essentially amounting to a "call on the river."⁹⁶ This suggests that any signatory state or state agency must appeal to the Compact Commission under §2.11 of the Compact; however, this does not address lack of the authority the Commission has over the signatory states and ultimately amounts to a reconstruction of the Compact to institute an actual governing body. Renegotiating the decades old, and now possibly outdated, compact with the four signatory states and all potentially affected Indian tribes seems an interestingly difficult idea from the same Court which referred to accounting the total amount of water within Oklahoma above its 25% allocation as a "herculean task."⁹⁷ However, Andrew points to the recent Truckee River Operating Agreement, signed in 2008, between California, Nevada, the United States, and the Palute Tribe of Nevada as "a possible blueprint for how to end a protracted and multi-dimensional water-rights struggle."⁹⁸ The two main reasons for the success of the agreement are a voluntary exchange of stored water coupled with an effective administration and dispute resolution system.⁹⁹

Moreover, the Court further muddied the waters (pun intended) on the rights of reservoir-stricken Louisiana to waters of Reach II, Subbasin 5. It effectively disallowed the equal proportionment of water agreed upon in

94. Brief for the Chickasaw and Choctaw Nations as Amici Curiae in Support of Respondents, *supra* note 10, at 31.

95. *Tarrant VI*, 133 S. Ct. at 2136-37.

96. *Id.* at 2136.

97. *Id.* at 2134.

98. Andrew, *supra* note 61, at 202.

99. *Id.* at 200 (citing Barbara Cosens, *Farmers, Fish, Tribal Power, and Poker; Reallocating Water in the Truckee River Basin, Nevada and California*, 14 HASTINGS W.-N.W.J. ENVTL. L. & POL'Y 1243, 1291-92 (2008)).

the Compact itself, save what could be garnered from within the borders of each signatory state. Whether by the fault of TRWD or by omission of the Court, it appears that the petitioner's desire to challenge the statutes regardless of the actual, quantified "share" received by Texas was overlooked.¹⁰⁰ The practical benefits of this opinion will rest only in drafting interstate-compacts, water rights leases and purchase agreements with Indian nations, and in affirming state sovereignty to borders and natural resources.

Yet, these benefits were not foreign concepts in the jurisprudence leading up to the *Tarrant* decision. At the district court level the Apache Tribe of Oklahoma attempted to intervene as plaintiff based upon their documented work with TRWD and their stated intent to continue that work until the Tribe's rights were quantified. However, the Apache Tribe was denied on the basis of ripeness;¹⁰¹ which seems somewhat inconsistent with the criterion of "realistic fear or apprehension that the statute in question will be enforced against them" espoused in *Carr*.¹⁰² Although not wholly unlike the redressability standard as used in *Hugo*, "a party must show that a favorable court judgment is likely to relieve the party's injury."¹⁰³ Recall again, that the majority in *Hugo* relied on *Wyoming Sawmills, supra*, for the proposition that Irving did not meet the redressability requirement for standing whereas the dissent employed the same language from that case as used against the Apache Tribe, "too speculative," to distinguish Irving claim and argue in favor of hearing the case on the merits.¹⁰⁴

While not as "practical" as these *Tarrant* decisions could have been, the judiciary successfully avoided conflating the final outcome of the entire litigation process with the arguably premature suit to invalidate and enjoin based on the lack of a signed water contract in the face of a comprehensive water compact.¹⁰⁵ One of the major flaws with the approach attempted by TRWD, *Hugo*, and Irving is that it did not wait for the state to take action on its permit applications, nor did any party have a specifically prohibited

100. *Tarrant V*, 656 F.3d 1222, 1240 (10th Cir. 2011).

101. *Tarrant I*, No. CIV-07-0045-HE, 2007 U.S. Dist. LEXIS 79973, at *9 (W.D. Okla. Oct. 29, 2007), *rev'd sub nom.* *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

102. *Altus v. Carr*, 255 F. Supp. 828, 836 (D.W.D. Tex.), *aff'd*, 385 U.S. 35 (1966).

103. *City of Hugo v. Nichols*, 656 F.3d 1251, 1264 (10th Cir. 2011) (citing *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011)).

104. *Id.*

105. Andrew encourages, and this author believes rightly so, that the next challengers of Oklahoma water laws attempt a more aggressive or innovative option to force the court to make a substantial analysis of the law itself. See Andrew, *supra* note 61, at 202.

contract in place such that the court must necessarily review the public policy behind the anti-export statutes. At all times throughout these ongoing disputes, save possible foreshadowing in the dissent to *Hugo* by Justice Matheson, the court was able to set aside the clear intent of the Oklahoma legislature even when referencing the inherent public interest argument in the dormant Commerce Clause.¹⁰⁶ It remains important to note that not all efforts to resolve Tribal claims for federal reserved water rights have their impetus in securing “wet water” rights for immediate *use* by the tribe. Unless of course, the term *use* is deemed to include selling or leasing those rights for the purposes of economic development.¹⁰⁷ It is hard to relate the federal government’s support of tribal self-determination¹⁰⁸ with the ability of state governments to define the uses to which the tribe can put their quantified water rights. The court may feel the backlash of these procedural side-steps when faced with redundant litigation aimed at determining tribal rights and tribal water-export leases.

III. Case Law Before the Decision

The Supreme Court, in *Sporhase v. Nebraska*, held that water is an article of commerce.¹⁰⁹ However, in the same case, the Court urged caution in deciding the validity of state statutes regulating interstate commerce because the un-invoked ability of Congress to regulate “does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water.”¹¹⁰ Factors weighing on the Commerce Clause inquiry include states’ interests and competence in “preserving scarce water resources,” claims of public ownership, and

106. *Tarrant III*, NO. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *22 (W.D. Okla. Nov. 18, 2009).

107. Andrew, *supra* note 61, at 197. Andrew makes the interesting point that the Choctaw Tribe, which joined the Chickasaw Tribe in their Amicus Brief in Support of Respondents, is in the best position to sell water to users in Texas. “[H]owever, it seems that the goal of the Choctaw is to keep as much of the water as it can for local uses, and it will resist any transfers of its water to either Texas or central Oklahoma.” *Id.* (citing Bill Hanna, *Tarrant Water Officials Return to Federal Court in Oklahoma Water Fight*, FORT WORTH STAR-TELEGRAM, Apr. 24, 2010, <http://www.star-telegram.com/2010/04/24/2140337/tarrant-water-officials-return.html>).

108. *See* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (“[T]he goal of promoting tribal self-government,” includes, “Congress’ overriding goal of encouraging tribal self-sufficiency and economic development.”) (citations omitted).

109. *Sporhase v. Nebraska*, 458 U.S. 941, 953-54 (1982).

110. *Id.* at 954.

“Congress’ deference to state water law.”¹¹¹ Even so, in dormant Commerce Clause cases the burden of proof rests on the state defending its impermissible regulation to demonstrate that Congressional consent is unmistakably clear or expressly stated.¹¹² The state bears the initial burden to show a close fit between its statutory requirements and the asserted local purpose of those requirements.¹¹³

The *Hughes* test is then employed to determine if the local purpose is legitimate and if that purpose could be achieved in a less discriminatory way on interstate commerce.¹¹⁴ *Hughes* involved a commercial minnow farmer in Texas who ventured across state lines into Oklahoma to purchase Oklahoma-grown minnows to take back across the border.¹¹⁵ The Court struck down the Oklahoma law prohibiting such transport as impermissible under the dormant Commerce Clause, overruled *Geer v. Connecticut*,¹¹⁶ and reversed the criminal courts below.¹¹⁷ Justice Brennan, writing for the majority, enumerated a simple three-step process to assess compliance:

- (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.¹¹⁸

“It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.”¹¹⁹ It is equally well settled that a state may not impose regulations on articles of commerce that burden or discriminate against interstate commerce.¹²⁰

111. *Id.* at 953.

112. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *see also* *United Egg Producers v. Dep’t of Agric. of P.R.*, 77 F.3d 567, 570 (1st Cir. 1996).

113. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *see also* *Sporhase*, 458 U.S. at 957.

114. *Hughes*, 441 U.S. at 336.

115. *Id.* at 324.

116. 161 U.S. 519 (1896).

117. *Hughes*, 441 U.S. at 324-25.

118. *Id.* at 336.

119. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937)).

120. *City of Altus v. Carr*, 255 F. Supp. 828, 837 (D.W.D. Tex. 1966) (relying on *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *The Minnesota Rate Cases*, 230 U.S. 352 (1913)).

In *West v. Kansas Natural Gas Co.*, the State of Oklahoma argued its authority to conserve, essentially to reserve, the “resources of the state for the use of [its] inhabitants” to the extent that it effectively denied individuals the right to transport natural gas across state boundaries.¹²¹ The Supreme Court struck down the offending statute under an entitlement bias analysis, that reasoned, produced gas becomes a commodity, regulated as an article of commerce, yet conserved for the business welfare of the state such that the only outcome of the policy, if widespread, would be the hoarding of natural resources by the producing state.¹²² Both *West* and *Carr* are distinguished from the present case because *Tarrant* deals with water apportioned to the states, not individuals as personal property, subject to a comprehensive water compact.

Moreover, both cases more egregiously violated the Commerce Clause by denying transportation rights across state lines rather than enacting protectionist measures and denying the assertion of cross-border rights as in *Tarrant*. Humorously, TRWD argued for an injunction preventing the denial of its applications, which would result in the loss of priority as responsive applications for appropriation were likely, and relied on the likelihood that Oklahoma would amend its laws in response to the application—precisely what the State of Texas did nearly forty-two years earlier which led to the *Carr* decision.¹²³ Although *Carr* was decided mostly on procedural grounds—a window into the future some forty years—it definitively held in regard to a defense of prematurity, that if a state official may enforce a statute equally by declining to act as by taking some affirmative action that there is threat enough to bring suit.¹²⁴ Although this did not receive any mention in the *Tarrant* decisions, the premise stands in contrast to the language in *Hugo, supra*, implying that the city ought to have waited for the OWRB to act before bringing suit.¹²⁵ Looking further down the road, it will be interesting to see if that same sentiment will affect Tribal negotiations with the State of Oklahoma regarding water rights now that several tribes have expressed interest in selling water out-of-state.

Also of note, is the reluctance of the courts to discuss the *Reynolds* case, mentioned by the parties but never dealt with outright, in which El Paso, Texas, challenged a New Mexico law purporting to ban any export of

121. 221 U.S. 229, 250 (1910).

122. *Id.* at 255.

123. *Carr*, 255 F. Supp. at 832; *see also* Amended Complaint, *supra* note 7, at 6.

124. *Carr*, 255 F. Supp. at 836.

125. *City of Hugo v. Nichols*, 656 F.3d 1251, 1253-54 (10th Cir. 2011).

groundwater from New Mexico.¹²⁶ The court, in *Reynolds*, relied on the language of *Sporhase, supra*, in specifically deciding against upholding discriminatory state statutes that could not both protect a legitimate public interest and maintain only incidental effects on interstate commerce.¹²⁷

IV. *The Tribal Nations' Role in the Tarrant Decisions*

Tarrant identified early on in this proceeding that it was both willing and able to purchase the water from public and private parties within Oklahoma.¹²⁸ The amici curiae brief filed jointly by the Chickasaw and Choctaw Tribes of Oklahoma cites this interest—negotiating purchase rather than appropriation—as an admission by TRWD that it does not have any rights to appropriate water from within the borders of another state.¹²⁹ However, it would appear that Tarrant proceeded upon two alternative grounds: one being the right to appropriate existed under the Compact, which preempted Oklahoma state law, or the second that the state laws preventing the successful negotiations to purchase were unconstitutional. The Winters Doctrine guarantees the reserved water rights that are inherent in each reservation; as such these rights are a product of federal law and outside the scope of state legislation.¹³⁰ The waterways on a reservation are considered an integral part of the land given to the Nation, such that the streams belong to the Tribe as if they were part of the land, and upon realization the priority will date back to the establishment of the reservation without the risk of being loss due to non-use.¹³¹

In evaluating the very likely possibility of out-of-state sale by Indian tribes, Andrew, *supra*, discusses two possible arguments Oklahoma could make to impair their ability to do so.¹³² First, the state could assert “conditional prohibition” requiring the out-of-state buyer to seek legislative approval from the state, instead of the in-state seller.¹³³ Second, the state could allege that the tribes were selling the water off-reservation on account of the distance of pipeline that would need to be constructed.¹³⁴ However,

126. *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

127. *Id.* at 388.

128. Amended Complaint, *supra* note 7, at 19.

129. Brief for the Chickasaw and Choctaw Nations as Amici Curiae in Support of Respondents, *supra* note 10, at 10.

130. *Winters v. United States*, 207 U.S. 564, 577 (1908).

131. *Id.* at 576-77.

132. Andrew, *supra* note 61, at 195-96.

133. *Id.*

134. *Id.*

as noted, both arguments would most likely fail; the first due to the Indian Commerce Clause¹³⁵ and the second because not only would the water district most likely be responsible for partial pipeline construction, as indicated by the previous dealings between TRWD and the Tribes, but also because modern precedent leans toward allowing off-site sale of articles produced on the reservation without interference from state law.¹³⁶ The Note is quick to point out, as an unresolved matter, that interstate compacts function as federal law and have not yet been pitted against tribal commerce rights.¹³⁷

Denied by the Western District of Oklahoma District Court for ripeness, the Apache Tribe of Oklahoma initially attempted to intervene as plaintiff alongside Tarrant. The Apache Tribe argued that because the tribe had reserved water rights and had entered into a memorandum of understanding together to further the goal of quantifying those rights for future sale to TRWD, the Tribe could claim a prospective injury on the count that pursuant to the 2002 moratorium the OWRB would almost assuredly inhibit the export of tribal water. Judge Heaton called that scenario “too speculative and subject to too many contingencies” such that any decision by the court would be “tantamount to an advisory opinion.”¹³⁸

Interestingly, the Chickasaw and Choctaw Tribes of Oklahoma wrote an amicus curiae brief to the Supreme Court in favor of the respondents, OWRB.¹³⁹ However, this brief seems to concur with the state’s argument that TRWD does not have rights to appropriate or take water from within Oklahoma’s boundaries, but instead must purchase that water. Notably, the Tribes hint that once their own reserved water rights are quantified, they may be able to resolve TRWD’s claim.¹⁴⁰ Currently the water rights of the two Nations are being litigated in two cases: *Chickasaw Nation v. Fallin*, No. 5:11-CV-00927 (W.D. Okla. filed Aug. 18, 2011); *Okla. Water Res. Bd. v. United States*, No. 5:12-CV-00275-W (W.D. Okla. filed Mar. 12, 2012). Both bases are currently stayed pending the results of mediation.

135. *Id.* (citing *Warren Trading Post Co. v. Ariz. State Tax Comm’n*, 380 U.S. 685, 690-91 (1965)).

136. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *California v. McCovey*, 685 P.2d 687 (Cal. 1984)).

137. *Id.*

138. *Tarrant IV*, NO. CIV-07-0045-HE, 2010 U.S. Dist. LEXIS 72442, at *11, *11 n.11 (W.D. Okla., July 16, 2010).

139. Brief for the Chickasaw and Choctaw Nations as Amici Curiae in Support of Respondents, *supra* note 10, at 8.

140. *Id.* at 43-44.

TRWD argued in its amended complaint: “[s]urface and groundwater owned by sovereign tribal entities secured by treaty or reservation with the United States is not subject to, and is excluded from governance under, the Red River Compact, as provided in Article II, Section 2.07.”¹⁴¹ This section of the Compact protects water rights based on federal law, such as tribal reserved rights, stating, “[n]othing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin.”¹⁴² It seems as though all interested parties would be forced to agree with this understanding of the compact; however, given that Oklahoma has enacted statutes specifically curtailing tribal compacts any actual export by tribal nations may still be fought by the state.

V. Conclusion

The granting of certiorari in the *Tarrant* case caused excitement among the water law legal community; although, in its effect the ultimate holding fell far short of its anticipated grandeur. Yet, the blame does not lie with the Court, or the State of Oklahoma, or even with the thirsty State of Texas and its water districts. The Court, on the full weight of precedent, acted as a champion of state sovereignty to borders and natural resources in constructing a precedent of very limited application. The Oklahoma statutes alleged to be unconstitutionally restrictive on interstate commerce cannot be attacked from a posture of probabilities; such an attempt will inherently fall on the swords of procedure and jurisprudence, as has been the case from 2007 to present. Certain opinions—whether in dissent against the less-narrowly-minded-majority or in early denials of motions for summary judgment—indicate there may be rapids around the next bend of the water appropriation river; however, until such time as direct action is taken by a signatory state to put protectionist words into prohibited practice these waters remain still. At present, the best course of action for the Red River states is to amend the Compact or go outside it. As long as Tribal Nations are engaged in lengthy general stream adjudication and the quantification of their reserved water rights, it remains abundantly clear that they cannot be counted on to deliver several hundred thousand acre-feet of water. However, from the foregoing it is apparent that upon delivery of these rights much will change.

141. Amended Complaint, *supra* note 7, at 7.

142. Brief for the Chickasaw and Choctaw Nations as Amici Curiae in Support of Respondents, *supra* note 10, at 8.