Case No. 10-6184

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TARRANT REGIONAL WATER DISTRICT, Plaintiff-Appellant,

v.

RUDOLF JOHN HERRMANN *et al*., Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable Joe Heaton
D.C. Case No. CIV-07-45-HE

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

This brief addresses the four specific questions submitted to the parties. In response, this brief concludes that:

1. Tarrant Regional Water District ("Tarrant") has advanced no evidence in support of its allegation that the Red River Compact ("Compact") allows diversions of water within Oklahoma by Texas because of a paucity of water in Texas, nor is there any evidence Texas is suffering any injury because of the inability of Texas to divert its compact allocation within Texas. Tarrant made a conscious choice to advance no evidence on this issue to avoid the possibility the case might be dismissed for lack of the real party in interest—Texas.

2. Because Tarrant has made no showing of any injury to Texas caused by Oklahoma that would require redress by a court, there is no case or controversy within the meaning of Article III of the United States Constitution and hence Tarrant has no standing to bring this action. Tarrant, has reversed its position in the district court and now asserts that it is a surrogate of the State of Texas in bringing this action to preclude a violation of the Compact. However, because Texas has no standing to sue, Tarrant likewise has no standing to sue.

3. The case of *Skull Valley Band of Goshute Indians v. Neilson*, 36 F.3d 1223 (10th Cir. 2004), requires that a plaintiff meet all the traditional elements of standing. It rejects the proffered doctrine of "procedural standing" in *Lujan v.*

Defenders of Wildlife, 504 U.S. 555 (1992). Because Tarrant brings the action as a surrogate for Texas, and because Texas has suffered no injury, Tarrant meets none of the requirements for standing set out in *Skull Valley*.

4. Finally, even were there Article III standing, Tarrant lacks prudential standing to sue under the Supremacy Clause because the Compact allocates water to the State of Texas and not to Tarrant. Allowing a non-signatory to file suit to seek an interpretation of a compact and enforce its provisions would generate chaos among the states and upset years of political bargaining among them. For the courts to allow non-signatories to drag them into the political thicket of interstate water allocation would establish precedents anticipated neither by the drafters of the compact clause of the constitution nor by the signatory states relying on that clause in entering into interstate compacts.

ARGUMENT

Question 1: Has Tarrant Regional Water District made a showing that the State of Texas is receiving less than its share of water under § 5.05 of the Red River Compact?

I. TARRANT DELIBERATELY MADE NO *ATTEMPT* TO SHOW THAT THE STATE OF TEXAS IS RECEIVING LESS THAN ITS SHARE OF WATER UNDER THE COMPACT SO AS TO AVOID A FINDING THAT TEXAS (AND OKLAHOMA) ARE INDISPENSABLE PARTIES TO THIS LITIGATION.

A. No record evidence even suggests that Texas has received less that "its share" of water under § 5.05 of the Red River Compact; in fact, the only record evidence on this question, from Texas' own official charged with assuring compact deliveries, is that Texas has received its full allotment.

On appeal, Tarrant half-heartedly attempts to claim that Texas has not received its full compact allotment under Section 5.05 although it was careful not to claim below or in the prior appeal that it sought to enforce the Compact. As Tarrant strenuously argues (Pl. App. 569), no water from this subbasin flows from Oklahoma into Texas; as such, Oklahoma cannot really be said to have "under-delivered" water originating in Oklahoma to Texas under normal rules of interpretation. Tarrant's claim to the contrary depends on two assumptions, one legal and one factual.

First, Tarrant assumes that Section 5.05 allocates a certain percentage of water to Texas from the subbasin as a whole, not that it gives Texas the equal right with the other states to use the water within its own borders subject to a

requirement to allow a portion to pass to the two downstream states during low flows. As discussed at length in the briefing filed to date, and not belabored herein, this first assumption is based on a highly strained, and textually indefensible, reading of the Compact. Texas is not guaranteed a certain percentage of the total flows in the subbasin, wherever it might be found. Instead, Texas is authorized to retain and use a portion of the interstate waters found within Texas before they flow to other states, provided that certain minimal flows are met. Likewise, other states specified in the Compact do the same within their own boundaries.

Second, Tarrant assumes, but does not support with record evidence, that the amount of water originating within this subbasin in Texas is insufficient to satisfy this claimed allotment under the Compact. On this point, Tarrant made no factual showing that insufficient water arises within Texas in this subbasin which would constitute a compact allotment sufficient to meet Texas' needs. The only hint of such a factual showing came in Tarrant's Brief in Chief, which boldly claimed that "the Subbasin 5 tributaries on the Texas side are primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5[,]" and cited in support "Aplt. App. 1300-1301; Aplt. App. 718 (Ex. 12), 733 (Ex. 244)." (Br. 30). None of these citations to the Appendix, however, offer any support for the proposition claimed. The first record citation is simply to the

argument of Tarrant's counsel during oral argument below, and does not constitute evidence. *Pinkerton v. Colorado Dept. of Transp.*, 563 F.3d 1052, 1061 (10th Cir. 2009) ("Ms. Pinkerton provides nothing other than speculation and counsel's argument to the contrary; and, of course, the argument of counsel is not evidence, and cannot provide a proper basis to deny summary judgment."). The second citation to the "paucity of water" claim is to portions of the pretrial order which are not part of the record itself, and it is impossible to know whether or not they support Tarrant's claims.

In fact, as this Court noted during the oral argument, the only record evidence at all on the question whether Texas has received its full allotment in this subbasin or any other runs directly contrary to Tarrant. Herman Settemeyer, the engineering advisor to the Texas State Red River Compact Commission (a separate entity from the Interstate Red River Compact Commission created by the Compact), testified in his deposition that Texas has received its full compact allotment for at least the years 2005-2009. (Defs. App. 29-34; 56-63). This testimony was designated for use at trial, without objection from Tarrant. (Defs. App 7-8 (designation); Pl. App. 20-21 (docket sheet for the relevant dates, showing no objections by Tarrant to OWRB's designation of the deposition testimony)).

Mr. Settemeyer testified in his deposition regarding the Agency Strategic Plan for the Fiscal Years 2005-2009 Period. (Def. App. 29-30; 46). Through that

document, the Texas State Red River Compact Commission set as its goal "the delivery of 100% of Texas' equitable share of quality water annually as apportioned in the Red River Compact[,]" and provided a short definition of "equitable share," as follows: "Using the reports of the engineering and legal committees of the Interstate Commission, water shortages to Texas' users will be evaluated. If no shortages exist, Texas has received 100% of its equitable share. As used in this measure, 'Equitable Share' is defined as lack of water shortages." (Def. App. 56).

The Texas commission adopted that metric due to the plentiful amount of water in the Red River system: "Because the quantity of water of the Red River is plentiful and is usually not an issue, a formal accounting of water deliveries to each state has not yet been initiated by the commission. Due to these factors, at this time it is more meaningful to assess whether needs of Texas' users of the Red River are being met, rather than whether each state is meeting its delivery obligation (as in the measures for the Pecos and the Rio Grande)." (*Id.*) As Mr. Settemeyer explained, "If our water users don't report any shortages of water that they believe they should have received under the compact, then we use that as to indicate that Texas was receiving the waters under the compact that it believed it should receive." (Def. App. 30). He further clarified that compact compliance is measured by whether Texas' *in-state* users have complained of a shortage: "Texas

under the compact has a certain amount of water allocated per each reach of the compact. We have permitted, water right permitted users *within Texas*, plus we have domestic and livestock users *within Texas* that are not permitted. We chose to identify as an outcome to report that if none of our water users, our existing permit water users reported any shortfalls caused by underdeliveries of the compact, then we would report that as 100 percent." (*Id.* at 30-31) (emphasis added).

Three conclusions can be drawn from the use of this compact compliance metric. First, as noted, under that metric Texas received 100% of its "equitable share" under the Compact for at least the years 2005-2009. Second, the limitation of the commission's evaluation of other states' compact compliance to delivery of water to in-state users in Texas is entirely consistent with the Texas Commission on Environmental Quality's determination that it lacked jurisdiction to grant Tarrant a permit to appropriate water in Oklahoma. (Pl. App. 707; Def. App. 111). Last, and most important, the fact that the Texas commission charged with ensuring that Texas receives its share under the Compact relies on the delivery of adequate water to its *in-state water users* as the measure of compact compliance should put the final nail in the coffin of Tarrant's strange argument that Section 5.05 grants Texas (or its appropriators) the right to take water anywhere in the geographically-defined subbasin.

Based upon the limited information in the record, Texas' view of the Compact is that the compact entitlement of Texas should be measured by, and is met whenever, water users within Texas have received sufficient water from within Texas to meet their needs. We cannot finally know Texas' position without Texas' participation in this litigation as a party that can be bound to the result. Nonetheless, the measure of compliance expressed by the Texas State Red River Compact Commission—whether Texas' users receive enough water within Texas to meet their permitted or unpermitted needs—is diametrically opposed to that asserted by Tarrant. Tarrant does not focus on in-state supply and in-state use; rather it focuses on supplies throughout the basin including within Oklahoma. However, supplies that are available within Oklahoma have nothing to do with the amount of water originating in, or delivered to, Texas and which is used by appropriators within Texas. Texas' metric, instead, assumes that Texas has received its full entitlement under the compact if there is sufficient water within Texas for its users, and that other states are in compliance with the Compact if they are not taking some action to deny Texas' in-state users that water. In short, Texas does not appear to agree with Tarrant's interpretation of the Compact.

B. Tarrant's failure to put on any actual evidence regarding any alleged under-delivery of water under § 5.05 of the Red River Compact is consistent with its steadfast refusal to clarify whether this is a compact enforcement action involving none of the compacting states.

Tarrant's initial complaint alleged that it "brings this action to determine and enforce *its* rights under the Red River Compact. . . ." (Pl. App. 3, ¶ 5 (emphasis added)). Tarrant thus sought an interpretation of the Compact and did not distinguish clearly between it and its sovereign, Texas: "[u]nder the Compact, *Texas* is apportioned certain stream water, including without limitation waters within Oklahoma that Plaintiff seeks to appropriate." (Pl. App. 34, ¶ 14 (emphasis added)).

Defendants filed a motion to dismiss the complaint on grounds that included the fact that the States of Arkansas and Louisiana are indispensable parties to Plaintiff's suit seeking an interpretation of the Red River Compact. (Pl. App. 314-15). At the hearing on this motion to dismiss, in response to the indispensable parties argument, Plaintiff backed away from its prior claim that they were seeking an interpretation of the Red River Compact in order to enforce *its* rights under the Compact's terms. Instead, Plaintiff proffered a flimsy distinction between enforcing the alleged allocation of water to Texas under the Compact (which it now claimed *not* to be doing) and using the Red River Compact to preempt Oklahoma state laws that would prevent it from utilizing Texas' allocation of

water:

> THE COURT: You're here today representing the Tarrant County Water District. What basis is there for me, assuming that the Tarrant County Water District is entitled to in effect act on behalf of or as the state of Texas to assert rights under at [sic] the Compact?
>
> MR. MUCHMORE: Well, let me back up and take that a piece at a time. First of all, I do not agree with the statement that we—which they have made and sort of incorporated in their arguments that we assert rights under the contract—the Compact. We're not saying that the Compact gives us the right to water. We're making a much narrower argument with respect to the Compact. It's in line with the questions that you were asking earlier. We are simply saying that it is a federal law, like any other federal law, and that it is inconsistent with Oklahoma's ban or moratorium; and, therefore, the mere existence of the Red River Compact which deals in a thorough manner with water flowing from Oklahoma to Texas, and with the interstate movement of water, the mere existence of it preempts or strikes down the Oklahoma law. That's all.
>
> Whatever rights we have under the Compact, I'm not sure that's a—that's even a realistic way to put it. I'll stay with the fact that our argument is much narrower, and that, by the way, as to the Kiamichi only, the Red River Compact is different as to the Cache and as to the Beaver, but as to the Kiamichi we're simply saying federal legislation on this subject, inconsistent with Oklahoma's ban, means the ban is struck down. So we're not really, not in a meaningful sense, saying we have rights under the contract that we want to enforce. We are simply saying the Compact strikes down the ban and we're going to appear in Oklahoma, and they did—
>
> THE COURT: But the reason the Kiamichi location is different is because that's one of the upstream locations that's identified in the Compact? Is that what—
>
> MR. MUCHMORE: The Compact addresses both locations, the Kiamichi directly and the other one by all other. And the difference is this: In the Kiamichi it says that Texas is allocated X percent of that flow from the bed which includes these streams in

Oklahoma.

> Now allocated simply means that people can come in and going through the proper procedures move up to that amount into Texas. No, that—that still, it's in front of the Water Board to approve and we went through all of that. But the difference is when it comes to Beaver and Cache Creeks the wording is different. It says simply that nothing will interfere with the free and unrestricted use of the water in Oklahoma. So it doesn't allocate a certain percentage to Texas.
>
> So it's different wording, but it still contemplates water flowing into Texas, and as such, whatever the particulars of it are, this Court doesn't need to—we're not asking you to enforce it, you don't need to be concerned with it when we get to the merits, simply the existence of the entire scheme and the allocation and the contemplation that Texas can use the Beaver and Cache so long as they don't interfere with Oklahoma's free and unrestricted use, the existence of that means that Oklahoma's ban has to be struck down. That's all we're arguing.

(Pl. App. 1192-94).

Based in part on this clarification, the District Court rejected Defendants' indispensable party argument, concluding instead that "Plaintiff has not requested the court to appropriate water or to determine water rights under the Red River Compact or otherwise." (Pl. App. 358). The Court noted, however, that "Plaintiff's complaint is not altogether clear in this regard. *See Complaint*, opening paragraph, p.1 and para. 5 (referencing plaintiff's rights under the Red River Compact). However, plaintiff clarified at the hearing that it relies on the Red River Compact only as the expression of federal law it alleges to have preempted the challenged Oklahoma statutes." (Pl. App. 358 n.4). Defendants appealed the

denial of their motion, which was affirmed on appeal. *Tarrant Regional Water District v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

Defendants subsequently filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. (Pl. App. 375). During the oral argument regarding this motion, Plaintiff again appeared to assert that it was seeking to enforce the Red River Compact's alleged allocation of water in Oklahoma to Texas:

> THE COURT: I don't know that it's pertinent to the immediate question, but I'm just curious: Is it the plaintiff's view that if a permit for the use of water was to be approved by the Water Resources Board, is it your view that it has to be in perpetuity?
>
> MR. PATRICK: If the applicant were to—well, I see two different scenarios depending upon the reading of the compact, different reaches. With respect to the waters of the main stem geographic area, that would be in perpetuity if Texas, in our instances, was seeking to appropriate Texas's allocated share of the Compact, which we do.

(Pl. App. 1238). The Court again expressed its concern, like it did in the prior hearing, that Plaintiff was seeking a determination of Texas' rights under the Red River Compact:

> THE COURT: Well, let me ask you, too, kind of a related question. I have wrestled before with this when we talked about it two years ago, and to the extent that, and I guess this would apply just to the Kiamichi application, but to the extent that you're here talking about Texas's rights under the Red River Compact, the allocation of its equal share and so on, aren't you going beyond simply using the Red River Compact as a basis for saying what you term the anti-export laws are illegal as contrary to federal law and you're actually trying to assert Texas's rights under the Compact?

> MR. PATRICK: No, your honor. We remain focused on the fact that the entire breadth of this case is that there is a body of law that prevents us from being treated equally within this state to acquire water by appropriation and purchase. All we're asking this Court, and all we've pled in this case is for you to sweep away these laws so that we may be on a same equal footing as an in-state resident of the state of Oklahoma to acquire this water.
>
> Now, that being stated, you do have the language of the Compact, and the language of the Compact directs the Oklahoma Water Resources Board, each state to act in conformance with the Compact. And, therefore, the OWRB would have to take into consideration the allocated share within the Kiamichi basin, just like we would have to take into consideration the issues with respect to Cache and Beaver we've talked about today. All we're asking this Court to do is to strike down this body of law that prevents us from being treated in an equal manner.

(Pl. App. 1278-80).

Following this hearing, the District Court granted summary judgment against Plaintiff. (Pl. App. 780-99). The Court thus dismissed the Complaint, with leave to amend to cure the ripeness problem identified in the order. Plaintiff did file such an Amended Complaint, (Pl. App. 800), and Defendants filed another Motion to Dismiss. (Pl. App. 832). During the oral argument on this Motion to Dismiss the Amended Complaint, the Court, once again, had to address the question whether Plaintiff was actually seeking to assert Texas' rights under the Red River Compact:

> THE COURT: But don't we still have the—I don't know the way to describe it—the tension here that it seems to me that it is one thing to come in and say that these various anti-export laws are unconstitutional under either the Dormant Commerce Clause or the

> Supremacy Clause on the basis that there's some inherent inconsistency or something, it's something else again to say that Oklahoma has acted in a fashion that is contrary to the compact.
>
> I mean, you've been very careful throughout this case to make clear that Tarrant is not here essentially asserting a contract claim, that you're doing something else. It seems to me that at least in part all these arguments that you're making are potentially pertinent to the contract claim. If someone, the proper entity, maybe it's you, maybe it's some other Texas entity that says, look, Oklahoma is violating the compact by not letting us come get our water in reach 5, or whoever it is, that may well be where that leads, may well be a violation. But for present purposes it seems to me the question is a bit different. Where to the extent you're talking about a Supremacy Clause challenge that somehow is different than that, I'm not sure I see where the dividing line is.

(Pl. App. 1338-39).

Because of this ever shifting position, and Tarrant's refusal to clarify whether its Supremacy Clause claim could be distinguished from a Compact violation claim, it is not surprising that Tarrant made no apparent effort to demonstrate with record evidence that Texas received less than its equitable share of water under Section 5.05 of the Compact.

Question 2: If no showing has been made, does Tarrant lack Article III standing to sue under the Supremacy Clause due to lack of injury or redressability?

II. BECAUSE NOT EVEN *STATES* CAN BRING AN ACTION FOR AN EQUITABLE APPORTIONMENT OR TO ENFORCE A PROVISION OF AN INTERSTATE WATER COMPACT WITHOUT SHOWING ACTUAL INJURY, TARRANT, NOT ITSELF A SIGNATORY TO THE COMPACT, LACKS STANDING TO DO SO.

To ask this second question is almost to answer it. If Texas is currently

receiving, by its own metric, 100% of its "equitable share" of the waters under the Red River Compact, how can the compact be the basis of any Supremacy Clause claim by one of its political subdivisions seeking water in addition to that "equitable share"? Indeed, whether from lack of standing or from a failure to state a claim, even *States* are precluded from seeking redress from another State without showing injury from the alleged under-delivery of water by the other state. "Our cases establish that a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it 'real or substantial injury or damage.' This rule applies even if the state seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit." *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *see also Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983) ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage."); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1254 (11th Cir. 2002) (expressing doubt that the Supreme Court would accept an equitable apportionment action brought by Florida "while the Compact is in effect and *there is no proven shortage of water*." (emphasis added)).

The burden of establishing standing rests on the plaintiff. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). To establish standing, a plaintiff must show three things: "(1) an injury in fact that is both concrete and

particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008) (internal quotation marks omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing these three elements as an "irreducible constitutional minimum of standing").

Questions of standing are not evaluated in a vacuum; instead, the question is whether the plaintiff has standing to raise the allegations actually brought. *Goode v. City of Philadelphia*, 539 F.3d 311, 316 (3d Cir. 2008) ("In determining whether appellants have standing, we must consider their specific allegations and the relief which they seek."). Here, that analysis is frustrated by Tarrant's reliance on a supposed distinction between bringing an action to enforce a compact—to which the complete lack of injury to Texas, the Compact's signatory, should prove fatal—and bringing a Supremacy Clause claim using the Compact as the expression of federal law that preempts the challenged state statutes—which claim, as described above, is based on a reading of the Compact not supported by Texas. This presents in stark relief the fictive nature of Tarrant's proposed distinction; this Court could only possibly invalidate the Oklahoma statutes challenged by Tarrant if it accepts Tarrant's claims as to what are the real views of Texas (which is not a

party) and then only if this Court further agrees to enforce the Compact's provisions against the State of Oklahoma (also not a party).

Nonetheless, under any theory, the Texas commission charged with determining whether other states have shorted Texas under the Compact has determined that Texas has received 100% of its "equitable share" of the Compact waters. This simple fact precludes any Supremacy Clause claim based on the Compact by Texas, much less the non-signatory political subdivision Tarrant.

Because Tarrant's standing is derivative of that of Texas, and because Texas has not been injured, Tarrant lacks standing to sue under the Compact. The lack of under-deliveries of water to Texas is fatal to any action to "enforce" the Compact. Moreover, how can any Oklahoma statute be said to be preempted by the Compact to the detriment of Texas or one of its appropriators if Texas is receiving 100% of the bargain it struck under the Compact even with the statutes in place? Without injury to Texas, there can be no unlawful state action to preempt or any legally-cognizable injury that can be redressed by a final decision on the merits. Tarrant lacks standing to bring its Supremacy Clause claims.

Question 3: **Does Tarrant have standing to sue under Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004), even through Texas already may be receiving its share of water under the Compact?**

III. *SKULL VALLEY BAND OF GOSHUTE INDIANS v. NIELSON* DOES NOT AUTHORIZE TARRANT TO BRING AN ACTION TO ENFORCE THE INTERSTATE COMPACT IF THERE IS NO INJURY TO THE STATE OF TEXAS.

To avoid the obvious conclusion that Tarrant is bringing this action as a surrogate for the State of Texas to redress an alleged breach of the Red River Compact by Oklahoma, Tarrant denied below that it was seeking to enforce the Compact on Texas' behalf. On appeal, it has abandoned this fiction and asserts Texas' entitlements under the Compact as its sole basis for relief. Unfortunately for Tarrant, as a result of Tarrant's procedural fencing, it failed to present evidence of injury to Texas that would create a justiciable controversy among the compacting States. Tarrant's failure to present evidence of a justiciable controversy cannot be cured by relying on the precedent established by *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004) ("*Skull Valley*").

This Court's decision in *Skull Valley* did not relieve any potential litigant of its obligation to demonstrate the existence of a live controversy as a basis for standing to sue. It reaffirmed that "perhaps the most important aspect of this case or controversy requirement is that the party invoking the jurisdiction of the federal

court must have standing to sue." 376 F.3d at 1234 (citing *Allen v. Wright*, 468 U.S. 737 (1984)). This Court reaffirmed, rather than drew into question, the three distinct elements of standing described above. *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors. v. City of Jacksonville*, 508 U.S. 656 (1993)).

Furthermore, this Court concurred with the District Court that "there are instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." *Skull Valley*, 376 F.3d at 1236; *see also Arjay Assoc. Inc. v. Bush*, 891 F.2d 894 (Fed. Cir. 1989) (holding that if a party's claim was not one they had the legal right to pursue, there was no standing to invoke the jurisdiction of the Court).

If, at some future trial Tarrant were able to demonstrate that the failure to divert compacted water from the Kiamichi in Oklahoma were more financially difficult than diverting compacted water within Texas, then presumably Tarrant could meet the injury requirement. However, the test is not whether Tarrant has merely suffered injury; the Plaintiffs in *Lujan* and *Arjay Associates* arguably suffered an injury, but that injury was not to a "legally protectable interest."

It is the State of Texas that holds the legally protected interest in enforcement of the Compact, not Tarrant. *See* Point II, *supra*. Hence Tarrant fails to meet this standing element. Nor is any action by Defendant OWRB causing any

injury to Tarrant. The challenged statute here (HB 1483) simply directs the OWRB to follow the language of the Red River Compact which apportions the waters among the parties. If Tarrant is unable to receive the waters of the Kiamichi within Oklahoma because of Oklahoma's interpretation of the Compact, this injury is due entirely to the language of the Compact and Oklahoma's interpretation of it. If Oklahoma is correct, and we believe it is, then it was the position taken by the State of Texas in negotiating that compact that has caused Tarrant injury.

Tarrant is not without remedies. Tarrant may seek to have the State of Texas compel Oklahoma, Arkansas, and Louisiana to accept the position asserted by Tarrant in a compact enforcement suit, or it might join with Texas in bringing the the matter before the Red River Compact Commission—two actions the State of Texas has thus far refused to do, but could be persuaded to do in the future. But in the end this is Texas' choice. Principles of federalism and deference to the final decisions of state legislatures argue persuasively against political subdivisions challenging choices of states in matters involving interstate conflict. *See, e.g.*, *Branson School District v. Romer*, 161 F.3d 619 (10th Cir. 1998) (discussed in briefing filed in related *Hugo* litigation).

Nor does Tarrant meet the redress of grievances element of standing, which requires than an order in this case would finally resolve the matter in Tarrant's

favor. Indeed, there little likelihood that a decision in favor of Tarrant would result in the redress of the alleged violation of the Compact by Oklahoma. Arkansas and Louisiana have a significant stake in the outcome of this litigation if the result is a reduction of hundreds of thousands of acre-feet of water. Such a reduction could impact the water quality of the Red River in their state or reduce the navigability in fact of those waters. (Def. App. 2-6). The State of Texas, not a party to this case which would be bound by the result, may conclude in the future that pressing this compact interpretation could result in a very unfavorable political tradeoff for access to water in other areas of the Red River Basin. Finally, the State of Oklahoma, also not a party to this litigation and not bound by the result, could very well seek relief in the Supreme Court if it disagrees with the outcome. Accordingly, it is far from clear that any relief ordered in this case that is premised on a finding of a breach of the Compact by the OWRB would result a full redress of the alleged grievance of Tarrant in this matter.

A comparison of this case and *Skull Valley* is instructive. In *Skull Valley*, an Indian tribe and a private consortium of utility companies sought relief against a host of Utah state provisions that, allegedly in violation of the Supremacy and Commerce Clauses, impeded the ability of the utilities to receive a license from the Nuclear Regulatory Commission ("NRC"). The license, if granted, would allow the storage of spent nuclear fuel ("SNF") waste at a private facility located on

Skull Valley tribal lands in Utah. The two interests of the Plaintiffs were straight forward. The utility consortium wanted a license from the federal NRC and wanted to store SNF. The tribe wanted to make revenues from the lease once the license was granted and was to receive a substantial up-front payment.

The question of whether the license should be issued to a private facility was pending before the NRC when the District Court action was filed. Defendants asked the District Court to refrain from ruling on the Supremacy Clause and other issues until the matter was decided by the NRC. The Utah parties argued that until the NRC had ruled on the question of whether there could be a license, there was no injury to the tribe and the private utilities because they had no vested right to go forward. The District Court concluded there was standing, because to wait until the ruling by the NRC would be very costly to the plaintiffs because of mobilization costs and bonding that would be required. As a result, a decision whether the Utah provisions would improperly impede the license if issued presented injury in fact because of the delays that would be incurred if the process had to start ab initio after the licensing decision. And, the cost of bonding and mobilization could increase and be modified based upon a decision on the constitutional issues.

By the time the case reached this Court, the NRC had approved the license. This Court accepted the decision of the NRC and noted the remedies of appeal held

by the Utah officials in seeking a review of the NRC decision. The Court concluded that, as to nuclear safety, Congress resolved the interstate commerce questions, in effect preempted the field and had vested discretion in a federal agency to make choices as to where and how SNF could be transported to individual states such as Utah. The Court noted that the federal law vested jurisdiction in a commission with special expertise and that "many of the concerns that Utah has attempted to address through the challenged statutes have been considered in the extensive regulatory proceedings before the NRC as well as in appeals from the NRC's decisions. We are hopeful that Utah's concerns—and those of any facing this issue in the future—will receive fair and full consideration there." *Skull Valley*, 376 F.3d at 1254.

Two cases less comparable than *Skull Valley* and this case can hardly be imagined. In *Skull Valley*, the utility consortium owned the right under federal law to receive a license from a federal agency if it met federal criteria. Here, the right to enforce the interstate compact is not held by Tarrant, but by the States of Texas, Oklahoma, Arkansas and Louisiana. In *Skull Valley* there was a pending proceeding before the federal agency—the NRC—that could grant it relief in the form of a license. That is, were the license granted, the offending Utah statutes would be ripe for review. Here, Tarrant seeks no relief from the Red River Commission and it has not engaged the States holding the authority to enforce the

Compact. Further, it is not otherwise waiting for a green light from Oklahoma, Arkansas, Louisiana and Texas to enforce the Compact. In *Skull Valley*, the matter was both "ripe" and injury was being suffered by the real parties interest—the potential licensee and the Tribe. Once the license was issued, Utah statutes limiting the actions of the Plaintiffs could either be enforced or struck down. In this case, whether Tarrant ever receives any relief requested is dependent entirely upon the actions of the Compacting States—actions over which this Court has no control.

The utility consortium in *Skull Valley* did not file suit against the Utah defendants because they were improperly interpreting the federal law controlling their receipt of a license. That issue was properly raised before the NRC. The consortium challenged state impediments to the federal laws regarding SNF deposition and storage which were also being interpreted by the federal regulatory. While not a party to the case, the federal agency was poised to provide the guidance needed to this Court. Indeed, this Court accepted the reasoning of the federal agency. Here, Tarrant has scrupulously avoided seeking relief from any party with the authority to accept its interpretation of the federal law at issue (the Red River Compact): the Red River Compact Commission or the compacting states themselves.

Nothing in the holding of *Skull Valley* is intended to or does contradict the Supreme Court's consistent holdings that no action to enforce a right in interstate waters can be brought without proof of injury to one of the compacting states. To constitute "a justiciable controversy between the States . . . it must appear that the complaining State has suffered a wrong through the action of the other State. . . ." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). To create such a controversy over which a court has jurisdiction "a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). As articulated by Justice Marshall: "Our cases establish that a state seeking to prevent of enjoin a diversion by another state bears the burden of proving that the diversion will cause it 'real or substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. 176, 187, n.13 (1982). Thus, *Skull Valley* provides no support for Tarrant.

Question 4: Aside from Article III standing, does Tarrant lack prudential standing to sue under the Supremacy Clause, where the Compact does not allocate water to Tarrant but only to Signatory States?

IV. TARRANT LACKS PRUDENTIAL STANDING TO RAISE CLAIMS ON BEHALF OF A SIGNATORY STATE TO THE COMPACT, PARTICULARLY WHEN THOSE CLAIMS ARE INCONSISTENT WITH THE EXPRESSED VIEWS OF THAT STATE.

In addition to constitutional standing requirements, "the Supreme Court recognizes a set of 'prudential' standing concerns that may prevent judicial

resolution of a case even where constitutional standing exists." *Habecker v. Town of Estes Park, Colo.*,518 F.3d 1217, 1224 n.7 (10th Cir. 2008). This prudential standing consists of "a judicially-created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial powers." *Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (internal quotation marks omitted). Generally, there are three prudential-standing requirements: (i) "a plaintiff must assert his own rights, rather than those belonging to third parties"; (ii) "the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens"; and (iii) "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* at 1112 (internal quotation marks and citations omitted).

Most relevant here is the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). As noted by this Court's question on this topic, Tarrant is not a party to the Red River Compact which, in any event, allocates water to the Signatory States, not Tarrant. Here, Tarrant has at various times claimed to seek to enforce Texas' alleged right under

the Compact to divert water in Subbasin 5 within Oklahoma. This theory of the Compact, however, has been rejected by Texas on at least two occasions: (1) when the TCEQ denied jurisdiction to issue such a permit to Tarrant, and (2) when the Texas State Red River Compact Commission decided to measure other states' compliance with the Compact by any claimed shortages by in-state water users of delivery of physical water to lands within the boundaries of Texas.

Moreover, this interpretation of the Compact should not be adjudicated in a case where none of the signatory states are present. The Red River Compact was carefully negotiated by those states over a period of more than two decades, and it would be imprudent, to say the least, to allow the result of that political compromise among sovereigns to be potentially upset without their participation through Tarrant's attempt to assert the asserted (but disclaimed) rights of Texas. This Court should deny Tarrant prudential standing to assert this claim.

CONCLUSION

Tarrant advanced no evidence in support of its allegation that the Compact allows diversions of water within Oklahoma by Texas because of a paucity of water in Texas. There is no record evidence Texas is suffering any injury because of the inability of Texas to divert its compact allocation within Texas. This failure of proof was intentional. Because Tarrant has made no showing of any injury to Texas caused by Oklahoma that would require redress by a court, there is no case

or controversy within the meaning of Article III of the United States Constitution. Tarrant has no standing to bring its Supremacy Clause claims. The case of *Skull Valley Band of Goshute Indians v. Neilson*, 36 F.3d 1223 (10th Cir. 2004), requires that a plaintiff meet all the traditional elements of standing. Because Tarrant brings the action as a surrogate for Texas, and because Texas has suffered no injury, Tarrant meets none of the requirements for standing set out in *Skull Valley*. Finally, even were there Article III standing, Tarrant lacks prudential standing to sue under the Supremacy Clause because the Compact allocates water to the State of Texas and not to Tarrant. To hold otherwise would throw the administration of the Compact into disarray.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS AND CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **SUPPLEMENTAL BRIEF**, as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Trend Micro Client / Server Security Agent, Version 16.0.2122, updated June 28, 2011, a commercial virus scanning program, and, according to that program, is free of viruses. In addition, I certify that all required privacy redactions have been made. I hereby certify that a copy of the foregoing **SUPPLEMENTAL BRIEF** was furnished through ECF electronic service to the following on this 29th day of June, 2011, as follows:

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