Case No. 10-6184

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TARRANT REGIONAL WATER DISTRICT, a Texas State Agency,

Plaintiff/Appellant,

v.

RUDOLF JOHN HERRMANN, JESS MARK NICHOLS, LINDA LAMBERT, FORD DRUMMOND, JOSEPH E. TARON, ED FITE, JACK W. KEELEY, KENNETH K. KNOWLES, AND RICHARD SEVENOAKS, in their official capacities as members of the Oklahoma Water Resources Board ("OWRB") and the Oklahoma Water Conservation Storage Commission,

Defendants/Appellees.

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

APPELLANT'S REPLY BRIEF

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November 24, 2010

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APPELLANT'S REPLY BRIEF

Introduction

Tarrant seeks a declaratory judgment of the invalidity of Oklahoma's Anti-Export Laws and a permanent injunction against their enforcement. Aplt.App. 817. Defendants ignore Tarrant's contentions in its Proposition IV(A) that Tarrant is not confined to challenging Anti-Export Laws implicated by its OWRB applications since it is entitled to challenge Oklahoma's Embargo without reference to a specific, concrete transaction.[1] As to Tarrant's Proposition IV(B), which addresses why obstacles other than the Embargo do *not* prevent justiciability, Defendants' sole answer is that Tarrant's authorities concern "standing" rather than "ripeness." Answer Brief at 56-57. However, the same analysis applies to both doctrines.[2] Ripeness has meaning only in the context of

[1] The District Court's earlier holdings concur: Aplt.App. 363 n.8 (plaintiff is not seeking "approval of any specific application for permit"); Aplt.App. 361 ("Certain of the statutes challenged by plaintiff are not necessarily involved, at least in any direct sense, in the proceedings before the Board."); Aplt.App. 351 ("Plaintiff alleges that it expects to experience water shortages in the future and that it desires to address these potential shortages by obtaining water from within Oklahoma's borders by purchase or otherwise").

[2] *E.g., Khodara Environmental, Inc. v. Blakey*, 376 F.3d 187, 196-98 (3d Cir. 2004) (Alito, J.); *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council,* 589 F.3d 458, 467 (1st Cir. 2009). Both of these cases are cited in the Opening Brief at 54 n.58. Moreover, if the existence of other obstacles in the cases cited had deprived the courts of a justiciable controversy, the courts would not have upheld jurisdiction but instead dismissed.

the identified injury,[3] and Defendants do not assert that further ripening is required to know whether Oklahoma has deprived Tarrant of the opportunity to import water to meet an imminent water shortage in North Texas.[4]

Defendants' further assertion at p.15 that the challenged "Anti-Export Laws" do not include Oklahoma's statutorily declared public policy to prevent any "out-of-state" water users from acquiring "vested rights" to water within Oklahoma (82 O.S. §1086.1(A)(3)) is also incorrect (Aplt.App. 807, ¶21 and 808, ¶23 first sentence), as is Defendants' suggestion that this public policy cannot affect Tarrant's efforts to import water into Texas. *See* 82 O.S. §1086.2, *requiring Defendants to carry out the public policy*.[5] In any event, Defendants do not

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[3] *Vogel v. Foth and Van Dyke Associates, Inc.*, 266 F.3d 838, 840 (8th Cir. 2001) ("'The touchstone of a ripeness inquiry is whether the *harm asserted* has matured enough to warrant judicial intervention.'") (Emphasis added.)

[4] Defendants never asserted as an undisputed fact that Tarrant's intent to import water was pretextual. The purpose for which Defendants now cite (p.7) deposition testimony <u>excluded</u> by the District Court (as discussed *infra*), that Tarrant had not yet entered any contracts and had no immediate plans to do so, is not only improper, but irrelevant – since that testimony is not inconsistent with Tarrant's alleged plan to do so once its constitutional rights are clarified.

[5] Similarly, S.J. Res. No. 7 (1977) has *already* been relied upon (Atty.Gen. Opin. 77-274 (1978)) to prevent exportation of water from Oklahoma, as Tarrant alleged (Aplt.App. 807-808, ¶22). The same Attorney General Opinion applies 82 O.S. §1085.2(2) to require legislative approval for a permit to sell and transport water out-of-state. The Opinion itself also remains a threat to Tarrant, as this Court held in Defendants' interlocutory appeal in this case (*Tarrant,* 545 F.2d at 909 n.2), and especially considering Defendants declaration that all water located in Oklahoma is exclusively allocated to Oklahoma by the RRC. Defendants also assert that the "moratorium" has expired, ignoring the equally likely construction that it continues

challenge the District Court's holding that Oklahoma's Embargo obstructs Tarrant from importing water from Oklahoma to meet an imminent, severe long-term water shortage.[6]

As Defendants now see it, judgment on the preemption claim is a logical and necessary extension of the District Court's ruling on Tarrant's dormant Commerce Clause claim, and Tarrant should have realized during the briefing that the motion for summary judgment on the merits as to the Commerce Clause claim *sub silentio* extended to the preemption claim. Defendants do not explain how this inference could be drawn from Defendants' *only* argument on preemption, which urged the lower court *not* to reach that claim on the ground that "primary jurisdiction" barred it from doing so. Aplt.App. 404-413.[7]

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until a "comprehensive water plan" is completed, as openly advocated by the Oklahoma Attorney General and discussed by Tarrant in the Opening Brief at p.13 n.7. For other illustrations of how the Anti-Export Laws obstruct Tarrant, see Opening Brief at 10-11 and 38-39.

[6] Aplt.App. 355 ("[I]t is clear that the overall thrust of the laws challenged is to prevent Oklahoma water from being removed from the state"); Aplt.App.783-85 (no implied repealer of Anti-Export Laws). Defendants' assertion at p.4 that HB 1483 "*authorizes* the exportation of water under certain circumstances" (original emphasis) is also incorrect. HB 1483 only imposed further conditions to any *otherwise* authorized exportation of water (Aplt. Att. 18 to Opening Brief) – and there is no such authorization absent legislative approval. *City of Altus v. Carr*, 255 F.Supp 828, 830 and 840 (W.D. Tex. 1966), *aff'd,* 385 US 35 (1966)(legislative approval requirement treated as tantamount to export ban).

[7] Defendants' accusation that Tarrant has changed its focus from the dormant Commerce Clause to the Supremacy Clause (Answer Brief at 28) is disingenuous and ironic. The Table of Contents to Defendants' own dispositive motion

Now, for the first time, Defendants assert that they raised the compact interpretational issue in their dormant Commerce Clause argument and the trial court necessarily ruled that all the water within Oklahoma's boundaries was apportioned by the RRC to Oklahoma. To the contrary: Defendants argued that the very fact that the RRC apportioned water was sufficient for the lower court to hold that dormant Commerce Clause protections were superseded (Aplt.App. 398, Prop. VI), and the district court agreed. Aplt.App. 793-94. Defendants' dormant Commerce Clause argument did not include any request that the court determine the "substantive" interpretational issue of whether the RRC permits Tarrant to divert water apportioned to Texas within Oklahoma. Rather, Defendants reasoned backwards, from their assumed premise that no RRC signatory's citizens may divert water apportioned to one state within another state's boundaries, to their conclusion that no water within any state's boundaries could have been apportioned to another state. Defendants cite Aplt.App. 398-401 in support of their assertion that the interpretational issue was part of their dormant Commerce Clause argument. Answer Brief at 4. It was not. Defendants did not propound the interpretational issue of whether Tarrant could access within Oklahoma the 25%

(Aplt.App. 376) devotes four propositions to seeking summary judgment on the dormant Commerce Clause claim while their <u>only</u> arguments addressing the Supremacy Clause were that the court could never reach that claim.

share of water that RRC's §5.01(b)(1) apportioned *to Texas*. Instead, they argued that the district court should *not* decide it. Aplt.App. 404.

Nor did Defendants suggest to the lower court their conviction professed here, that the court had simply reached an issue necessarily entailed by their dormant Commerce Clause argument. Defendants instead expressed their understanding, shared by Tarrant, that the court "did *not* resolve this compact construction problem" (Aplt.App 1107, emphasis added) but had based its decision on a finding that Plaintiff was not the "real party in interest." Aplt.App. 1105-07; Opening Brief at 20.[8] There is no basis for Defendants' assertion that Tarrant should have treated their motion as directed to the merits of its preemption claim.

Perhaps most troublesome among Defendants' new appellate assertions is their attempt to rely on materials and arguments that the District Court explicitly *disallowed*. After briefing on Defendants' motion for summary judgment was concluded, they filed a "Motion to Supplement the Record" with additional deposition excerpts (Aplt.App. 21, Doc. 124), which they now insert into their Supplemental Appendix in *this* Court as Defs.App. 115, and rely upon in their

[8] Defendants wrongly attach significance to the "clarification" the District Court requested and received that Tarrant's OWRB applications involved compacted water. Answer Brief at 23, citing Aplt.App. 1242. The court was not identifying the compact interpretational issue as one before it on summary judgment, but clarifying that all water within the scope of Tarrant's applications is subject to the RRC. Aplt.App. 782 n.3.

Answer Brief at pp. 7 and 14. Tarrant objected below that Defendants' motion to supplement violated the court's summary judgment procedures and should be denied unless Tarrant was allowed an opportunity to respond.[9] The District Court *denied* Defendants' Motion in its November 18, 2009 Order. Aplt.App. 799 ("Defendant's motion to supplement the record as to that subject matter [Doc. #124] is **DENIED.**"). This Court will not even grant a *motion* to supplement the record on appeal with materials not considered by the district court[10] -- but that of course assumes that an appellate litigant has at least first *asked* this Court rather than just filing the materials without leave.[11]

Defendants sporadically refer to contentions that were not proffered for summary judgment, are not tendered even now as a basis to affirm, and which the District Court rejected -- *e.g,* that Tarrant was actually seeking to enforce the RRC

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[9] Defendants do not include Tarrant's objection in their supplemental appendix, but it is reflected on the docket sheet, Aplt.App. 21, Doc. 126.

[10] (*Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111, n. 11 (10th Cir. 2010); *Daiflon, Inc. v. Allied Chemical Corp*., 534 F.2d 221, 226-27 (10th Cir. 1976) (refusing to consider deposition testimony which was not properly before district court); *U.S. v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000).

[11] The Oliver deposition excerpts – excluded by the lower court – are addressed in footnote 5, *supra*. The Settlemeyer deposition excerpts – excluded by the lower court – were taken out of context but even the excerpts reveal that Mr. Settlemeyer was testifying only that *existing* permits receive all the water allocated to them. Defs.App. 132-33. The position of the State of Texas as to whether Texas is receiving all the water apportioned to it by the RRC is reflected in Texas' amicus briefs both herein (filed October 12, 2010) and below (Aplt.App. 890).

or appropriate water in federal court rather than the OWRB,[12] or that Arkansas and Louisiana were indispensable parties to Tarrant's preemption claim.[13]

Finally, Defendants cite and quote at Answer Brief at p.6 from the TCEQ letter they attached to their *reply* brief on the dispositive motion, but do not make any specific point for good reason, since the point they tried to make below (Aplt.App. 691 n.6) was disproved by Tarrant (Aplt.App. 942-43) and repudiated by the State of Texas (Aplt.App. 890).

This leaves for argument the "substantive" Compact interpretational issue that is integral to Tarrant's preemption claim (Proposition I, *infra*) and the dormant Commerce Clause issues which were actually part of Defendants' motion for summary judgment (Proposition II, *infra*). The remaining issues regarding the propriety of the District Court *reaching* the preemption claim on grounds not raised by Defendants (Opening Brief, Proposition I) and the District Court's error underlying its justiciability holdings (Opening Brief, Proposition IV) are adequately addressed above.

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[12] *E.g.,* Aplt.App. 358 n.4 and Aplt.App. 363 n.8 (District Court holdings).

[13] Aplt.App. 358-59, District Court rejecting this contention and citing the same conclusion by the District Court of New Mexico rejecting a similar contention resisting the challenge to New Mexico's Embargo. *City of El Paso v. Reynolds,* 563 F.Supp. 379, 382-83 (D.N.M. 1983).

ARGUMENT AND AUTHORITIES

I. OKLAHOMA AND TEXAS HAVE BEEN APPORTIONED "EQUAL RIGHTS TO THE USE OF" ALL SURFACE WATER WITHIN REACH II, SUBBASIN 5

RRC's §5.05(b)(1) unambiguously apportions the "equal rights to the use of" the subbasin's water among RCC's signatories, using ordinary words, with commonly understood meanings. If it was proper for the District Court to reach the interpretational issue, then it should have granted summary judgment to Tarrant. However, if "equal rights to the use of" water was unclear, as Defendants suggest by proffering multiple, often conflicting interpretations, then the lower court must resolve that unclear and disputed meaning by reference to extrinsic evidence.

Tarrant has always maintained that §5.05(b)(1) unambiguously supports its preemption claim. RRC's §5.05(b)(1), a federal law, conflicts with Oklahoma's Embargo by allocating "equal rights to the use of" the subbasin's water to the RRC's signatories when the specified 3,000 cfs condition is satisfied. In contrast, Section 5.01 is clear that Oklahoma's apportionment of the free and unrestricted use of specified intrastate watercourses in Reach II is confined to streams "*above*" the specified damsites, which ultimately flow into the Red River between Denison Dam and the Arkansas border. RRC's drafters could have easily included in the §5.01 apportionment to Oklahoma those same streams *below* the specified

damsites if that was intended – rather than granting "equal rights to the use of" that water via §5.05 with the only qualification being the proviso that "no state is entitled to more than 25 percent …."

The District Court itself correctly summarized the §5.05(b)(1) apportionment:

> Under the terms of the RRC, waters in the areas to which the Kiamichi application applies are allocated equally (subject to certain limits) to the four signatory states to the compact.

Aplt.App. 782-83. That plain language, common-sense reading of §5.05(b)(1) comports with Tarrant's understanding.[14]

Defendants acknowledged below that §5.05(b)(1) apportioned water within Oklahoma equally to Texas, but asserted that Texas users must <u>*wait*</u> to exercise Texas' equal rights until the water *crossed into* Texas.[15] On appeal, with Defendants' new awareness that "water from Reach II, Subbasin 5 does not flow from Oklahoma to Texas" (Answer Brief at 11), they now abjure that Texas users were ever granted equal rights to use the subbasin's water to begin with. Defendants never attempt to identify any express terms within §5.05(b)(1) that

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[14] Certainly "equal" indicates intent that all states have the *same* use of the subbasin's water. *E.g.,* Oxford Dictionaries (online, April 2010): "[B]eing the same in quantity, size, degree, or value. Having the same rights or being treated the same." Webster's Third New International Dictionary (2002), "1a(1): of the same measure, quantity, amount, or number as another or others."

[15] *E.g.,* Aplt.App. 691: "Once the water crosses the border into Texas, it is subject to allocation by Texas regulatory entities." *See also* Opening Brief, p.29, n.31.

support this view or warrant Defendants' disparaging characterizations that Tarrant's plain-language reading of "equal rights" is "borderline frivolous" (p. 28) and "radical" (p. 38). The certainty with which Defendants issue those epithets survives even their own struggle to find a consistent, alternative meaning. Defendants' tender no fewer than five conflicting interpretations of "equal rights":

1. On page 20, Defendants say it is "clear from the text of the Compact" that the phrase "equal rights to the use" of Subbasin 5's water "simply means that each state can permit its diverters within the state to use water on the same basis as the other states."[16]

2. On page 30, Defendants say that "equal rights" in §5.05(b)(1) means the same thing that it must have meant in §5.05's "*low flow"* provisions -- where the term is not used at all: "There, 'equal rights' allocated to each state means the right of the state to use water subject to an obligation to allow a certain amount of water to pass when the flow targets are not met."

3. On page 31, countering Tarrant's contention that Texas' "equal rights" applies to "all tributaries in Subbasin 5," Defendants say that that "there can be no other meaning" of the Compact's allocation of "the use of water to a particular 'state' than that it is for that state's exclusive in-state use."

[16] This nearly mirrors Tarrant's position that Defendants are constitutionally required to treat in-state and out-of-state applicants for Subbasin 5 water on the same basis.

4. On page 32, Defendants say: "The phrase 'equal rights' simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states."

5. Then finally on page 37, Defendants say the phrase "equal rights to the use" of the subbasin's water "provides Texas the same right as the other states to use water within its boundaries, up to 25% of the total flows subject to the flow requirements at Louisiana, but it does not guarantee a full supply."

None of these interpretations is grounded in the plain language of §5.05(b)(1); however, they do emphatically illustrate that Defendants are not content to rely on the "four corners" of the Compact, as they profess to do (*e.g.*, p.10).

Defendants acknowledge that the Compact is properly construed under construction rules governing contracts.[17] Assuming that Defendants had presented the interpretational issue for summary judgment, the District Court's first task would be to determine whether the Compact's apportionment language was ambiguous: "The initial question … concerning the existence of an ambiguity is

[17] Defendants cite a partially *dissenting* opinion (without identifying it as such) for this statement (Answer Brief at 28), but the statement is still correct, as shown by the majority opinion, *Oklahoma v. New Mexico,* 501 U.S. 221, 235 n.5 (1991) and the authority it cites, *Texas v. New Mexico,* 482 U.S. 124, 128 (1987). *See also Energy Solutions, LLC v. Utah*, 2010 WL4456986, *7 (10th Cir. 2010).

one of law that may be decided summarily by the court." *Gomez v. American Elec. Power Service Corp.*, 726 F.2d 649, 651 (10th Cir. 1984). Only when ambiguity is found does the controlling standard treat the constructional issue as one of fact:

> Thus, in an ambiguous contract, if the intent of the parties is disputed, a genuine issue of material fact exists which cannot be determined summarily by the court.

Id. at 651.[18]

Turning back to Defendants' five alternative interpretations, Tarrant maintains that none of them furnish a reasonable basis for finding ambiguity in §5.05(b)(1), much less construing it in disregard of the ordinary meaning of its terms. Tarrant reviews those interpretations in sequence:

Interpretation No. 1 (p.20) -- that "*equal rights*" means each state can "use water on the same basis as the other states" -- contributes nothing to the analysis but is at least consistent with the term's plain meaning. Oklahoma's Embargo deprives Texas water users of the right to use subbasin 5's water "on the same basis" as Oklahoma water users.

Interpretation No. 2 (p.30) is that "*equal rights*" in §5.05(b)(1) -- the *high* (or normal) flow provision[19] -- means what Defendants contend it *would have*

[18] *See also Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist.*, 226 F.3d 1170, 1176 (10th Cir. 2000)); *SCO Group, Inc. v. Novell, Inc.,* 578 F.3d 1201, 1214-15 (10th Cir. 2009); *Bevill Co., Inc. v. Sprint/United Management Co.*, 154 Fed.Appx. 49, 51-52, (10th Cir. 2005); *Wilcox v. Barber-Colman Co.*, 3 Fed.Appx. 752, 755 (10th Cir. 2001).

meant *had* that phrase been used in the "low flow" provisions of §5.05. Aside from the inscrutable elasticity of this proposition,[20] there is good reason why the references to *boundaries* within the "low flow" clauses are not attached to the controlling term "equal rights to the use of" water. Those clauses do not concern a right to *take* water from within a state's political boundaries, but a duty to *release* water from within a state's boundaries to downstream states.[21] A state cannot be required to "allow … to flow" downstream water that is located within another state, but can be granted the "equal rights to the use of" water within a multi-state region.[22]

Moreover, the RRC does contain *other* affirmative apportionments confined to water within state boundaries. Had its drafters intended Defendants' view of

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[19] According to the RRC Interpretive Comments, this flow scenario occurs approximately 96% of the time. Aplt.App. 435.

[20] Courts are reluctant to "…read absent terms into an interstate compact given the federalism and separation-of-powers concerns…". *Energy Solutions*, *supra*, *8.

[21] These low flow provisions are designed for the infrequent occasions when the initial 3,000 cfs target is not met, estimated to be 4.2% of the time in the Interpretive Comments. Aplt.App. 435, RRC p.17. The low flow scenario addressed by §5.05(b)(3) and (c) is even rarer (0.2 % or less of the time), as also indicated by the Interpretive Comments, Aplt.App. 435-436.

[22] Defendants also suggest that by granting a permit for out-of-state water use, Oklahoma could somehow incapacitate itself from complying with its Compact low-flow obligations. Brief at 14 and 33. This directly contradicts new 82 O.S. §105.12A(B)(1). Moreover, while Oklahoma should monitor the impact of its permits for in-state water use on its downstream compact obligations, its issuance of a permit for use of water in Texas has no such impact, since that water is chargeable to Texas' own compact apportionment.

§5.05(b)(1), they did not need to hope that a court would infer that their use of "equal rights" in that section meant the same thing it *would have meant* had they also used that phrase in §5.05's low flow provisions. They could have instead simply referred to political boundaries, like they did in §5.03(b) (Aplt.App. 429), and like they did in §6.03(b) (Aplt.App. 437).

Interpretation No. 3 (p.31) -- that §5.05(b)(1)'s allocation of "equal rights to the use of" water is an allocation of water "for that state's exclusive in-state use" – is apparently intended to assert that the phrase "equal rights" means an equal right to the "exclusive" use of water within a state's boundaries. Since neither the term "exclusive" nor "boundary" is used within the clause being interpreted, it is hard to see the basis of this assertion. Indeed, had Congress intended that all water in Oklahoma be apportioned to Oklahoma for its exclusive, in-state uses, Congress could have said so in one sentence.

Interpretation No. 4 (p.32) is that "*equal rights* to the use of" water means that "each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states." This again requires acceptance of Defendants' *ipse dixit,* this time that (i) §5.05(b)(1) must be referring to use of water "within the state," and (ii) such use "cannot exceed" the amount used by any other state. These invented tenets are nowhere within §5.05(b)(1) for good reason, since they lead to an illogical result. As an example

of Defendants' construction, if Texas can access only 5% of the subbasin's total water within Texas' own boundaries, then Oklahoma's and Arkansas' use also "cannot exceed" 5%. Accordingly, Defendants' view is that RRC's drafters required the remaining 85% to flow into the Red River downstream to Louisiana. Even if Louisiana had some beneficial use for this water, it could not use more than its own respective 5% share.

Accordingly, under Defendants' view a minimum of 80% of the subbasin's water could not be put to beneficial use notwithstanding that §5.05(b)(1) grants the states "equal rights to the use of" the water and notwithstanding that the interpretive comment declares that absent competing uses, "all states are free to use whatever amount of water they can put to beneficial use." Aplt.App. 435, RRC p.17.

Interpretation No. 5 (p.37) is that each state may "use water within its boundaries, up to 25% of the total flows subject to the flow requirements at Louisiana …." Again, "within its boundaries" is not part of §5.05(b)(1). And interlineating it into §5.05(b)(1) leads to the same absurdity as Interpretation No. 4, but on a lesser scale. Defendants finally build into their interpretation the 25% limit in times of competition. But if that limit is recognized, then (again) whether water within the subbasin can ever be put to beneficial use depends on the temporal fortuity of whether its geographical dispersion among the signatories is

perfect. Thus if Oklahoma has 80% and Texas has 20% of the subbasin's water within their respective borders, Oklahoma must discharge its extra 55% into the Red River where it is polluted beyond practical municipal use and then wasted into the Gulf of Mexico,[23] again contrary to §5.05(b)(1) and the interpretive comments discussed above.

Finally, Tarrant addresses Defendants' belittlement of the notion that natural water resources within one state should be accessible to citizens within another state as "radical" (pp. 38 and 48) and "borderline frivolous" (p.28). To the contrary, the *status quo ante* -- before any compact is entered -- constitutionally *requires* this access.[24] Accordingly, if Defendants mean to rely on a supposed *presumption* as to the parties' intent, that presumption should be that the interstate

[23] While Defendants vow to use all water for in-state uses, they now claim (on appeal but not on summary judgment) that their annual discharge of over 34 million acre feet is to benefit downstream water quality for Gulf estuaries (Brief at 14), and that granting Tarrant's permit for 460,000 acre feet for municipal potable water needs of millions of North Texas citizens would threaten this benefaction by Oklahoma (Brief at 7). This new story lacks any grounding in RRC's provisions, and has the same credibility as its necessary corollary -- that beneficial use of Texas' apportionment results in increased downstream salinity while beneficial use of Oklahoma's apportionment does not. Answer Brief at p. 7; Defs. App. 5-6; *see also* Def.s. App. 2-3.

[24] *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *City of El Paso v. Reynolds*, 563 F.Supp. 379 (D.N.M. 1983); *City of Altus v. Carr,* 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd,* 385 U.S. 35 (1966).

access otherwise constitutionally guaranteed is not to be divested absent a clear expression within the compact of that intent.[25]

Apparently assuming ambiguity, Defendants protest that Tarrant had ample opportunity to present its disputed extrinsic evidence bearing on construction in oral argument on April 26, 2010. That oral argument post-dated the summary judgment order appealed here, and the Court not only failed to grant Tarrant's request to supplement and present its evidence (Aplt.App. 1351-52), but issued a final order which failed to address either (1) Tarrant's references to additional "evidence that we've submitted as exhibits to the trial" dealing with the constructional "substantive" issue for which Defendants had not sought summary judgment in their motion (Aplt.App. 1334) (including other compacts, Aplt.App. 1337, and legislative history, Aplt.App. 1348), or (2) Tarrant's additional arguments presented on that non-tendered constructional issue (Aplt.App. 30-34

[25] Defendants also assert that "complex accounting mechanisms" are necessary for Oklahoma to give Texas its "equal rights to the use of" subbasin 5 water. Answer Brief at 42. Assuming *arguendo* that this is relevant, it is not true and is certainly not part of Defendants' summary judgment evidence. Water permits regulate the quantities of diverted water regardless of whether the water is used in-state or out-of-state. Oklahoma law requires diversions to be measured and accounting of diversions to be provided. 82 O.S. §105.28; OAR 785:20-0-1(i)(1) [capacities of diversion works]; OAR 785:20-9-5(a) [requiring reports of diversions and use to the OWRB]; and OAR 785:20-11-6 [measurement of water]. Tarrant's diversions would be no different. Lastly, Defendants' claim that states may only take water below a designated accounting point (p. 42) is baseless since the RRC contains no "accounting point" as between Oklahoma and Texas.

and 42-29). The court did not even reference its previously issued summary judgment except to assure the parties that its prior ruling "was not grounded wholly, or even principally, on a question of standing …." Aplt.App. 1165.

Defendants may not so lightly discount the Federal project authorizing legislation which they deprecate as "so-called" legislative history. Answer Brief at 26. The water held in Federal project reservoirs may be used *only* for purposes and uses authorized by that legislation. Aplt.App. 420, RRC §2.02. Defendants argue against its materiality, first because it concerns the Hugo Reservoir which is not the subject of Tarrant's OWRB application for subbasin 5, and second by denying that the history demonstrates Texas was an intended beneficiary of water located within Oklahoma. Defendants are wrong on both counts.

Tarrant did not rely on the legislative history for the Federal Reservoirs in Oklahoma to support a contention that its subbasin 5 application embraced those reservoirs. Tarrant relied on it to refute Defendants' proclamation that the RRC would never contemplate allowing one state access to natural water resources located within another state (as would otherwise be constitutionally guaranteed). In fact, Defendants *still* maintain that water located in the Hugo Reservoir, and indeed all Federal Reservoirs in Oklahoma, have been apportioned solely to Oklahoma. Answer Brief at 26. To the contrary, under RRC's express language, water in Federal Reservoirs is not apportioned to *any* state. *See* Aplt.App. 420,

RRC §2.02, cited in the Opening Brief at 37 (and ignored by Defendants), which clearly requires that Federal project water be used in accordance with the authorizing legislation and charges that use "to the state or states receiving the benefit therefrom."

Defendants isolate a single excerpt (as to a 1960 estimate by the US Public Health Service) in the 1962 Corp of Engineers Report to deny that the legislative history shows the Federal projects were authorized in reliance on Texas' future water needs. Answer Brief at 27, citing Aplt.Att. 4 at p.10. This suggestion is dispelled by the Corps of Engineers own final, 1962 report (Aplt.Att. 4) which concludes that "[t]he Kiamichi River Basin offers an excellent potential source of future water supply for the central Oklahoma – North Texas region" (*id.,* p.7), then attaches the Corps economic analysis finding, based on the demands of North Texas, that the Kiamichi reservoirs would provide water supply for "metropolitan centers of Oklahoma City, Dallas, and Fort Worth" (*id.*, p.16).[26]

Defendants cite other water compacts to observe that they do not apportion water within the same subbasin and allow access without reference to state boundaries. Answer Brief at 40-42. RRC's §5.05(b)(1) plainly does just that, and

[26] Moreover, if the legislative history was unclear – and if the Compact language was itself ambiguous so that the legislative history was relevant – this would only necessitate reversal for further proceedings where the extrinsic evidence including legislative history could be fully explored.

even if it was ambiguous Defendants' observation would not aid in its construction, since the RRC is nearly unique in equally apportioning a watercourse that does not flow between the beneficiary states. Moreover, if resort is to be made to other compacts, their most instructive aspect is that when their subscribers desired to apportion water by reference to state boundaries, they did so expressly. In fact, language like RRC's Article V cannot be found within any of Oklahoma's other interstate compacts. Those compacts use simple, direct, and clear language to accomplish the very meaning which Defendants impute to Article V.[27]

If the RRC §5.01(b)(1) interpretational issue should have been reached, then the lower court should have granted summary judgment to Tarrant. At best, however, assuming Defendants have tendered any reasonable interpretation contrary to §5.01(b)(1)'s plain language, reversal is still required for further proceedings to determine the disputed fact question.

[27] The Canadian River Compact between New Mexico, Texas and Oklahoma, apportions the rights to water on a state line basis: "...use of all waters of the Canadian River *in Oklahoma.*" 66 Stat. 74 (Art VI). The 1973 Arkansas River Basin Compact between Kansas and Oklahoma apportions the rights to water on a state line basis: "...the right to develop and use all water originating within the Lee Creek sub-basin *in the State of Oklahoma*." 80 Stat. 1409 (Art. III(D)). And the 1966 Arkansas River Basin Compact between Arkansas and Oklahoma limits the apportionment and right to "use of the waters of the Arkansas river basin *within Oklahoma* subject to the provisions of this compact ...." 87 Stat. 569 (Art. VI). (Emphasis added.)

II. THE DORMANT COMMERCE CLAUSE APPLIES EXCEPT WHERE FEDERAL LAW EXPRESSLY AUTHORIZES OKLAHOMA'S DISCRIMINATION AGAINST OUT-OF-STATE WATER USE

For the most part, Defendants' arguments relating to Tarrant's dormant Commerce Clause claim depend upon assumptions refuted in the Introduction or Proposition I above – so Tarrant will focus here only on the residue.

Tarrant agrees that an interstate water compact allows its signatories to grow into their allocated respective shares of water from interstate streams. However, Tarrant's main point in its dormant Commerce Clause argument is that the RRC authorizes Oklahoma to discriminate only as to water both (i) allocated exclusively to it and (ii) for which it has a foreseeable competing beneficial use. Opening Brief at 41. Tarrant refocuses on this dispositive point which Defendants neglect.

A. The RRC does not authorize Oklahoma to discriminate as to all water within its borders.

Defendants do not deny that Oklahoma cannot constitutionally discriminate as to water not allocated to it, but rely on their assertions that if water is located within Oklahoma, it follows the water is allocated to Oklahoma. Defendants further concede that Oklahoma's argument fails if their interpretational contentions as to Subbasin 5 water are incorrect. Answer Brief at 48.

Defendants are mistaken that something less than the RRC's "express authorization" can suffice to dismantle dormant Commerce Clause protections. If

the RRC is silent on a state's right to access water apportioned to it, then the dormant Commerce Clause is relevant to prevent Oklahoma from discriminating against Texas water-users seeking to access the water apportioned to Texas. Texas water users should occupy no worse position than did the claimants who prevailed in *Sporhase, supra, El Paso, supra, and City of Altus, supra,* notwithstanding Oklahoma's contention that here, unlike in those cases, the water is governed by an interstate compact. Dormant Commerce Clause protection remains unless the compact has authorized the discrimination at hand, and the RCC does not do so, either as to (1) water apportioned to Texas, or even (2) other water within Oklahoma for which it has no beneficial use.

As to the first category of water – that apportioned to Texas – it seems particularly clear that the RRC has not authorized Oklahoma to discriminate against Texas water users.[28] As to the second category – water located in Oklahoma that is not apportioned to Texas but for which Oklahoma has no current or reasonably foreseeable use – the RRC has not granted Oklahoma the dictatorial powers it purports to wield. Both sides have quoted in their principal briefs the

[28] Tarrant's main point as to why the Anti-Export Laws are not "narrowly tailored" to any RRC authorization to discriminate is that they do not solely apply to water allocated by a Compact for Oklahoma's exclusive use. Defendants respond only to the subordinate point that the laws are not even "limited to compacted waters" (Answer Brief at 49) – a response dependent on their assumptions regarding justiciability which they fail to defend. *See* Introduction.

RRC Interpretive Comment that the "states are free to use whatever amount of water they can put to beneficial use" unless they have "competing uses" for which the available water is inadequate. Aplt.App. 435, RRC p.17. The RRC thus expressly contemplates that an out-of-state user can divert water for which the other states have no competing use – and nothing in the RRC indicates an intent to truncate this right by according lesser access to this unused water than would be guaranteed by the dormant Commerce Clause without any compact.[29]

Defendants do respond to Tarrant's arguments related to compacted water in Reach I, Subbasin 2 (the subject of Tarrant's Cache and Beaver Creek applications), where Oklahoma has "free and unrestricted *use*" of the water. Answer Brief at 48-49. Defendants misplace reliance on *Oklahoma v. New Mexico*, 501 U.S. 221 (1991). The Court held that "free and unrestricted use"

[29] Defendants accordingly misplace reliance on cases where the dormant Commerce Clause was rejected as a basis for challenging an interstate compact itself or the compacting members' consentaneous action pursuant to its express terms. *E.g., Intake Water Co. v. Yellowstone River Compact Comm'n,* 590 F.Supp. 293, 296-97 (D. Mont. 1983) (dormant Commerce Clause challenge to the compact itself and language authorizing discrimination as to out-of-basin water transfers, distinguishing cases where a compact did not deal with specifically challenged state action); *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n,* 198 F.3d 1, 9 (1st Cir. 1999) (Compact Commission was authorized by compact to regulate milk prices). *See also* this Court's recent decision in *Energysolutions, LLC v. Utah,* 2010 WL 4456986 (10th Cir. 2010), where the compact expressly allowed a Compact Committee to obstruct the importation of low level radioactive waste. *Id*. at *9. All these cases were essentially a dormant Commerce Clause attack on the compact itself.

allowed New Mexico to enlarge the Conchas Reservoir to capture all the waters flowing into the river, not to do virtually anything it wished with the water as Defendants suggest at p.49 (citing other case law that concerns neither that Compact language nor an interstate water compact at all). Enlarging the Conchas Reservoir *would* of course be "free and unrestricted use" (emphasis added) of the water for New Mexico's benefit. The Supreme Court did not suggest that New Mexico was also free to insist on *non-use* of the water, which is the right Defendants seek to claim for Oklahoma. Western water law and the prior appropriation doctrine, recognized by both Oklahoma and Texas, accords great weight to the requirement of beneficial use. When water is abundantly available and there is no competing in-state use, the dormant Commerce Clause does not allow Oklahoma to discriminate on the sole basis that water would be beneficially used *out-of-state*. Tarrant's Commerce Clause claim accordingly applies to Oklahoma's embargo as to Reach I, Subbasin 2 water as well as other compacted and non-compacted water.

B. The dormant Commerce Clause is not displaced as to Tarrant's claims to purchase water from Oklahoma entities.

As to Tarrant's challenge to Oklahoma's obstruction of the purchase of water in Oklahoma for out-of-state use, Defendants rely on the same erroneous justiciability concepts refuted by Tarrant in its Opening Brief, Proposition IV(A), that Defendants refuse to address at all. Answer Brief at 50 ("Plaintiff has never

alleged any attempt to purchase such compacted water from an in-state purchaser….".) Moreover, Tarrant did allege such an attempt, in its original complaint. Aplt.App. 40, ¶25.

C. Policy Considerations

Defendants are mistaken in asserting that Tarrant invoked public policy to override the RRC. Answer Brief at 50-53. Federal courts "have no occasion to interpret the terms of [a] Compact more broadly than the parties who signed it." *New Jersey v. New York*, 523 U.S. 767, 782 n.4 (1998). Here, RRC's drafters expressed their intent for constructive use by any state of water for which no other state has a "competing use." Aplt.App. 435, RRC p.17. Such foresight reflects sound public policy, which does not countenance any state's obdurate insistence on uselessly hoarding – or worse, affirmatively wasting – natural water resources which another state sorely needs.

Respectfully submitted,

s/Kevin L. Patrick

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I hereby certify that on this 24th day of November, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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I further certify that on the 24th day of November, 2010, seven true and correct copies of the foregoing Appellant's Reply Brief were dispatched to Federal Express for delivery within 2 business days to:

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