

No. 11-889

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

**BRIEF FOR THE CHICKASAW AND
CHOCTAW NATIONS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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1837 Treaty of Doaksville, Jan. 17, 1837,	
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Pub. L. No. 96-564, 94 Stat. 3305	<i>passim</i>
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CHOCTAW NATION HEAD START, ANNUAL REPORT 2010-11 <i>available at</i> http:// tinyurl.com/ChocHeadSt	9
CHOCTAW NATION HEALTH SERV. AUTH., CHOCTAW NATION HEALTH CARE CENTER, <i>available at</i> http://tinyurl.com/Choc HealthCtr	8
CHOCTAW NATION HEALTH SERV. AUTH., <i>Excellence in Rural Healthcare</i> , (2011), <i>available at</i> http://tinyurl.com/ChocHeal thServ	9
CHOCTAW NATION SCHOLARSHIP ADVISE- MENT PROGRAM (2012), <i>available at</i> http://tinyurl.com/ChocSAP	9
ECON. RESEARCH SERV., U.S. DEP'T OF AGRICULTURE, County-level Data Sets 2011, <i>available at</i> http://tinyurl.com/SE OklaPoverty	10
INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERV., IHS Pharmacy Residency Program, http://tinyurl.com/ IHSSchick	7
NATURAL RES. CONSERVATION SERV., U.S. DEP'T OF AGRICULTURE, PLANT GUIDE: GIANT CANE (2012), <i>available at</i> http://tinyurl.com/GiantCane	12

TABLE OF AUTHORITIES—Continued

	Page(s)
OKLA. WATER RES. BD., 2012 OKLAHOMA COMPREHENSIVE WATER PLAN EXECU- TIVE REPORT (2012), <i>available at</i> http://tinyurl.com/2012PlanUpdate	11
OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN (1975), <i>available at</i> http://tinyurl.com/1975Plan ...	11
OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN (1980), <i>available at</i> http://tinyurl.com/1980Plan ...	11
OKLA. WATER RES. BD., UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN 1995 (1995), <i>available at</i> http://tinyurl.com/1995Plan	11
U.S. DEP'T OF AGRICULTURE, <i>USDA Desig- nates 597 Counties in 2013 as Disaster Areas Due to Drought</i> , Jan. 9, 2013, http://tinyurl.com/EmergencyDrought	14
U.S. FISH & WILDLIFE SERV., DEP'T OF INTERIOR, OUACHITA ROCK POCKETBOOK (2011), <i>available at</i> http://tinyurl.com/OuachitaPB	12
U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, OKLAHOMA PRECIPITATION (2005), <i>available at</i> http:// www.nationalatlas.gov/printable/images /pdf/precip/pageprecip_ok3.pdf	25

TABLE OF AUTHORITIES—Continued

	Page(s)
U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, TEXAS PRECIPITATION (2005), <i>available at</i> http:// www.nationalatlas.gov/printable/images /pdf/precip/pageprecip_tx3.pdf	25
U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, WATER-DATA REPORT 2012 07344370 RED RIVER AT SPRING BANK, AR (2013), <i>available at</i> http://tinyurl. com/2012Gage	13
U.S. GEOLOGICAL SURVEY, SCIENCE IN YOUR WATERSHED (W.B. LONGBEIN & KATHLEEN T. ISERI, 1995 edit.) (1960), <i>available at</i> http://tinyurl.com/wateryr....	13
 OTHER AUTHORITIES	
<i>Hugo Lake: How Low Can It Go?</i> , NEWSOK, Feb. 13, 2013, http://tinyurl. com/HugoLow	13
Index Mundi, Oklahoma Population Growth Rate by County 2010, http:// tinyurl.com/CountyGrowth	9
John R. Swanton, Source Material for the Social and Ceremonial Life of the Choctaw Indians (Univ. of Ala. Press 2001) (1931)	12
Ken Raymond, <i>South Central Oklahoma Undergoing Renovations</i> , NEWSOK, Sept. 23, 2012, http://tinyurl.com/SEOkla	8

TABLE OF AUTHORITIES—Continued

	Page(s)
Kenneth D. Fredrick & Peter H. Gleick, WATER & GLOBAL CLIMATE CHANGE (1999), <i>available at</i> http://tinyurl.com/lowerrain	14
Mark Fogarty, <i>The Growing Economic Might of Indian Country</i> , INDIAN COUNTRY TODAY MEDIA NETWORK, Mar. 15, 2013, http://tinyurl.com/ChocEcon	8
Nat'l Drought Mitigation Ctr., Drought Monitor Statistics, http://tinyurl.com/Drought2010	13-14
<i>Nature Conservancy, Chickasaw Nation Join Forces</i> , ADANEWS, Dec. 18, 2006, <i>available at</i> http://tinyurl.com/TNCOChick2	7
The Nature Conservancy, <i>Nature Conserv- ancy Unveils Name of New Preserve Along Blue River</i> , March 31, 2012, http:// tinyurl.com/TNCOChick3	7
OKLA. EMPLOYMENT SECURITY COMM'N MEDIA, <i>Latimer, McCurtain Counties Share Highest County Unemployment Rate to Open 2013</i> , OKLAHOMA WEL- COME, Mar. 22, 2013, http://tinyurl.com/HighUnemploy	10
Okla. Water Res. Ctr., <i>Oklahoma Agricultural Losses from Drought More Than \$1.6 Billion</i> , Okla. State Univ., Sept. 9, 2011, http://tinyurl.com/DroughtLosses	14

TABLE OF AUTHORITIES—Continued

	Page(s)
Rhett Morgan, <i>Nature Conservancy Buys New Preserve Along Blue River</i> , TULSA WORLD, Dec. 7, 2011, available at http://tinyurl.com/TNCOChick	7
Scott Wigton, <i>Chickasaw Nation: Getting it Right</i> , OKLA. TODAY, May-June 2006, available at http://tinyurl.com/Ok2Day06	6
Steven C. Agee Econ. Research & Policy Inst., Okla. City Univ., <i>Estimating the Oklahoma Economic Impact of the Chickasaw Nation</i> , (2012), available at http://tinyurl.com/AgeeChick	6
Tribal Educ. Dep'ts Nat'l Assembly, Tribal Education Departments Report (2011), available at http://tinyurl.com/TribalEd	7
Vera Holding & Marijo Gibson, <i>Indians in Industry</i> , OKLA. TODAY, Spring 1974, available at http://tinyurl.com/Ok2Day74	6
Yang Hong, <i>Climate Change and Hydrological Extremes</i> (Undated), http://tinyurl.com/YangHong	13, 14

INTEREST OF THE *AMICI CURIAE* CHICKASAW AND CHOCTAW NATIONS¹

The *amici curiae* Chickasaw and Choctaw Nations are federally recognized Indian tribes, 77 Fed. Reg. 47,869 (Aug. 10, 2012), occupying a homeland set aside for them by the 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, [hereinafter “1830 Treaty”].² Within their homeland, which is located in present-day southeastern Oklahoma, the concerted activities of these tribal governments are creating jobs, building infrastructure, and enhancing recreational and tourism opportunities. All of this economic activity is dependent on the availability of water. The Nations’ interest in this case is in ensuring that water is available in southeastern Oklahoma to meet the future needs of their growing economy and to ensure the health and sustainability of their homeland.

That interest is threatened by the claim that the Petitioner Tarrant Regional Water District makes in this case under the Red River Compact, Act of

¹ The petitioner and the respondents have both consented to the filing of *amicus curiae* briefs in letters filed with the Clerk. This brief was not authored, in whole or in part, by counsel for any party, and no party or other person other than *Amici* provided any monetary contribution to fund the preparation or submission of this brief.

² The 1830 Treaty was made applicable to the Chickasaw Nation by art. 1 of the 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573.

Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305 [hereinafter "Compact"]. Petitioner claims that § 5.05(b)(1) of the Compact authorizes it to enter Oklahoma to harvest excess water in Reach II, Subbasin 5. Brief for Petitioner at 26-30 [hereinafter "Pet. Br."]. To be sure, the threat to the Nations' interests posed by Petitioner's claim is indirect, as the Compact expressly protects all water rights that are based on federal law by providing that: "Nothing 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." Compact § 2.07. These clear terms protect the Treaty rights in, over and to water that the Nations have asserted in separate pending litigation. See *Chickasaw Nation v. Fallin*, No. 5:11-CV-00927-W (W.D. Okla. filed Aug. 18, 2011); *Okla. Water Resources Bd. v. United States*, No. 5:12-CV-00275-W (W.D. Okla. filed Mar. 12, 2012). In these cases, the Nations are engaged in active negotiations with the State of Oklahoma over state and tribal interests in the proper management of water resources throughout the treaty territory, which resources include waters within a portion of Reach II, Subbasin 5. Petitioner's claim, if upheld, would result in interstate conflict over the management of those resources, which would complicate and make more difficult the Nations' effort in those negotiations to ensure that the future needs of the Nations' homeland will be met.

In sum, the Nations support the Respondents in this case to further the interests they share with the State of Oklahoma in protecting the water resources of southeastern Oklahoma.

SUMMARY OF ARGUMENT

The Chickasaw and Choctaw Nations are managing a growing economy – operating enterprises, creating jobs and building infrastructure – which benefits their homeland, the State, and the region. That economy relies on the water resources of southeastern Oklahoma, and further economic growth will be possible only if those resources are available to meet future needs. Thus, the critical role of water in sustaining such growth is not limited to the area served by the *amici curiae* supporting Petitioner. See, e.g., Brief for the Fort Worth Chamber of Commerce, et al., as Amici Curiae in Support of Petitioner at 2-3 [hereinafter “Fort Worth Br.”]. Nor should it be taken for granted that Petitioner’s claim will not affect the availability of water in southeastern Oklahoma to meet future needs. The ongoing drought, the impacts of climate change and recent data suggest otherwise. Indeed, even under present conditions, it has not been determined whether there is any excess water available in Reach II, Subbasin 5 for Petitioner to claim, much less the 310,000 acre feet per year that Petitioner seeks.

The Nations agree with Respondents that the Red River Compact does not support Petitioner’s claim to water in Oklahoma. The plain language of the Red River Compact does not grant one State the right to enter another State to harvest water. Petitioner argues that a right of entry exists under § 5.05(b)(1) in the absence of a state boundary restriction. That argument fails because it assumes that a right of entry exists under the Compact – which a state boundary reference would be needed to negate – when that is the very question to be decided in this case. Furthermore, the absence of a state boundary

reference in a Compact provision that allocates water cannot establish a right of entry because these are separate rights, the former relating to a quantity of water and the latter to access to land. Finally, the “equal rights to the use of” excess water that § 5.05(b)(1) provides – which do not guarantee any State any amount of water – are not offended if a right of entry is not provided to any State by the Compact.

If the Compact is considered ambiguous on that question, however, the Petitioner’s prior course of dealings under the Compact – under which it claims full authority to assert rights, 1 Joint Appendix 177 – would be highly significant. Those prior dealings show that Petitioner, as member of the North Texas Water Alliance, earlier sought to negotiate a water sale contract with the Nations and the State. In those negotiations, Petitioner did not claim that it already had the right to enter Oklahoma to harvest water and construct facilities to export that water to Texas, as it does now. Instead, Petitioner sought to buy water from Oklahoma and the Nations, which was to be transported to Texas through facilities constructed and owned by the Nations and Oklahoma. If Petitioner had the rights it now claims under the Red River Compact, it would have asserted those rights in the prior negotiations.

Finally, in the event the Court vacates the judgment below and remands this case for further proceedings consistent with the Court’s opinion, we agree with the United States that further proceedings would be needed in the district court to resolve questions of fact, Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 27 [hereinafter “U.S. Br.”], including whether there is

any excess water in Subbasin 5, and if so, whether Texas is already receiving its full share of that water. We also agree that any proceedings on remand would not require, and should not include, issues concerning the Nations' water rights, *id.* at 31, which are protected from any effect of the Red River Compact by its express terms, *id.* § 2.07, and are the subject of separate and ongoing litigation.

ARGUMENT

I. THE GROWTH OF THE NATIONS' ECONOMY DEPENDS ON THE AVAILABILITY OF WATER RESOURCES TO MEET FUTURE NEEDS.

A. The Nations Are Managing A Growing Economy That Benefits The Nations, The State And The Region As A Whole.

The Chickasaw and Choctaw Nations are funding the basic blocks used to build a self-sufficient, growing economy: Jobs, roads, healthcare and education. In so doing, they are pursuing the economic development and self-sufficiency goals of the federal Indian policy of tribal self-determination.³

³ That policy was announced by President Nixon in 1970. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564-66 (July 8, 1970). As this Court has recognized, "the goal of promoting tribal self-government," includes "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

When the Chickasaw Nation purchased a motor inn in Sulphur, Oklahoma in 1974,⁴ it initiated a period of unprecedented tribal economic development. The Nation's enterprises now include banking, gaming, professional services and other enterprises, which together generate over \$1.3 billion in annual revenue. Steven C. Agee Econ. Research & Policy Inst., Okla. City Univ., *Estimating the Oklahoma Economic Impact of the Chickasaw Nation* 4 (2012), available at <http://tinyurl.com/AgeeChick> [hereinafter "Agee"]. From 1987 to 2006, the Chickasaw Nation's budget grew from \$11 million to \$350 million dollars. Scott Wigton, *Chickasaw Nation: Getting it Right*, OKLA. TODAY, May-June 2006, at 40, 45, available at <http://tinyurl.com/Ok2Day06>. The tribal government spends over a quarter billion dollars each year in payroll and other government expenditures. Agee at 4. The Nation also brings federal funds into the treaty territory: in 2011 the Nation brought over \$7 million in federal road funding into Oklahoma. *Id.* at 8.

These revenues pump over \$1.5 billion dollars into the regional economy. *Id.* at 6. Multiplier effects bring the overall economic impact of the Chickasaw Nation in Oklahoma to \$2.4 billion a year. *Id.* And this activity supports nearly 16,000 jobs in Oklahoma. *Id.*

The Chickasaw Nation also contributes to the quality of life in southeastern Oklahoma in other ways. The Chickasaw Division of Health maintains a 72-bed hospital and hosts nearly 430,000 outpatient

⁴ Vera Holding & Marijo Gibson, *Indians in Industry*, OKLA. TODAY, Spring 1974, at 15, 15-16, available at <http://tinyurl.com/Ok2Day74>.

visits a year. INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., IHS Pharmacy Residency Program, <http://tinyurl.com/IHSCChick> (last visited Mar. 24, 2013). Its educational services range from Head Start programs serving over 260 children, Tribal Educ. Dep'ts Nat'l Assembly, Tribal Education Departments Report 18 (2011), *available at* <http://tinyurl.com/TribalEd>, to a higher education scholarship program that helps fund between 1,900 and 2,300 college students' education every academic year. *Id.* at 20.

In addition, the Nation has developed a long-term partnership with the Nature Conservancy of Oklahoma ("TNCO") to protect water sources in its homeland. Rhett Morgan, *Nature Conservancy Buys New Preserve Along Blue River*, TULSA WORLD, Dec. 7, 2011, *available at* <http://tinyurl.com/TNCOChick>. Through that partnership, TNCO and the Nation seek to protect the water quality of the Blue River, and thus its availability as a source of drinking water and recreational opportunities, and to preserve its aesthetic beauty. *Nature Conservancy, Chickasaw Nation Join Forces*, ADANEWS, Dec. 18, 2006, *available at* <http://tinyurl.com/TNCOChick2>. One result of this partnership is *Oka' Yanahli*, or "water flowing," a 490-acre preserve along the Blue River in the treaty territory. By protecting the Blue River, it helps maintain the quality of the River's water as it flows past Durant, Oklahoma and into the Red River. The Nature Conservancy, *Nature Conservancy Unveils Name of New Preserve Along Blue River*, Mar. 31, 2012, <http://tinyurl.com/TNCOChick3> (last visited Mar. 24, 2013); Morgan. This maintains its quality as a source of drinking water, recreation and natural beauty.

The Chickasaw Nation has also helped increase tourism in the region, much of which is driven by water-based recreational activities. The Chickasaw Cultural Center has attracted over 150,000 visitors since 2010. Ken Raymond, *South Central Oklahoma Undergoing Renovations*, NEWSOK, Sept. 23, 2012, <http://tinyurl.com/SEOkla>. And the Nation is building a new hotel on the site of the historic Artesian Hotel in Sulphur which, in conjunction with a new Chickasaw Nation Visitors Center, will serve as the gateway for visitors to the nearby Chickasaw National Recreation Area, a unit of the National Park Service. *Id.* The Nation has also partnered with the Arbuckle Country Marketing Association to market these resources to tourists and visitors, bringing more tourism money into the region. *Id.*

The Choctaw Nation has also made a large contribution to the growth of the economy of their homeland, and to the State and regional economies. The Nation maintains a workforce of more than 6,000, and has an annual payroll approaching \$300 million. Mark Fogarty, *The Growing Economic Might of Indian Country*, INDIAN COUNTRY TODAY MEDIA NETWORK, Mar. 15, 2013, <http://tinyurl.com/ChocEcon> (last visited Mar. 25, 2013). The Nation also invests in services, such as healthcare and education, that improve the economy of southeast Oklahoma while also improving the quality of life of its people. In 1999, the Choctaw Nation became the first tribe to build its own hospital with its own funding. CHOCTAW NATION HEALTH SERVS. AUTH., CHOCTAW NATION HEALTH CARE CENTER, *available at* <http://tinyurl.com/ChocHealthCtr> (last visited Mar. 26, 2013). With an annual budget of over \$100 million, the Choctaw Nation Health Services provide healthcare to inpatients and manage more than

540,000 outpatient visits annually. CHOCTAW NATION HEALTH SERVS. AUTH., *Excellence in Rural Healthcare* (2011) 4, *available at* <http://tinyurl.com/ChocHealthServ> (last visited Mar. 24, 2013). The Nation also provides education services: they begin with managing thirteen Head Start facilities for nearly 340 children annually, CHOCTAW NATION HEAD START, ANNUAL REPORT 2010-11 5, *available at* <http://tinyurl.com/ChocHeadSt>, and continue all the way to funding the Scholarship Advisement Program, which prepares students to graduate high school and enter college, CHOCTAW NATION SCHOLARSHIP ADVISEMENT PROGRAM (2012) <http://tinyurl.com/ChocSAP> (last visited Mar. 24, 2013), and providing a free GED preparation program for adults. CHOCTAW NATION, EDUCATION, *available at* <http://tinyurl.com/ChocGED> (last visited Mar. 24, 2013).

When the Chickasaw and Choctaw Nations invest in these aspects of the regional economy, they attract people and businesses that rely on the region's infrastructure to maintain a good quality of life for themselves and their employees. And, indeed, southeastern Oklahoma is attracting new residents: According to the U.S. Census, four of the top ten fastest growing counties in Oklahoma are located in the treaty territory. Index Mundi, Oklahoma Population Growth Rate by County (2010) <http://tinyurl.com/CountyGrowth> (last visited Mar. 24, 2013). Furthermore, by developing a tourist economy in partnership with regional boosters, the Nations help bring in a stream of revenue to local businesses that would otherwise be smaller or non-existent. In sum, by investing in southeast Oklahoma, the Nations are fueling an economic engine that produces benefits for

the entire state and region.⁵ Thus, the interests that Dallas and Fort Worth assert in continuing their economic growth, Fort Worth Br. at 2; Brief of City of Dallas as Amicus Curiae in Support of Petitioner at 16-17 [hereinafter "Dallas Br."], do not stand alone.

B. The Continued Economic And Environmental Health Of The Nations' Homeland Depends On The Sound Management And Future Availability Of Water Resources.

The Nations, businesses, and communities of the treaty territory all depend on the availability of an adequate supply of water. As the Nations continue to grow their own enterprises, and attract new employers and employees to the area, the demand for

⁵ Although the Nations have invested in southeast Oklahoma's economy to the benefit of the State and the region, there is still more room – and need – for growth. In 2011, thirteen of the 22 counties in the treaty territory had poverty rates of 17.9% or higher, and five more had poverty rates between 15.9% and 17.8%, compared to an overall Oklahoma rate of 17.3% and a national rate of 15.9%. ECON. RESEARCH SERV., U.S. DEPT OF AGRICULTURE, County-level Data Sets 2011, *available at* <http://tinyurl.com/SEOklaPoverty> (last visited Mar. 24, 2013) (for national poverty rate, click "Overview," then "Poverty," then scroll down to list to "National"). Five of the ten most impoverished counties in Oklahoma are in the treaty territory, including the most impoverished county, McCurtain, which has an overall poverty rate of 30.9% and a childhood poverty rate of 40.3%. *Id.* And McCurtain County began 2013 with an unemployment rate of 9.8%, tied for highest in the State. OKLA. EMPLOYMENT SECURITY COMM'N MEDIA, *Latimer, McCurtain Counties Share Highest County Unemployment Rate to Open 2013*, OKLAHOMA WELCOME, Mar. 22, 2013, <http://tinyurl.com/HighUnemploy>.

water will grow. As a result, the Nations' ability to rely on the waters of the treaty territory will only become more important over time. Thus, like the cities of Dallas and Fort Worth, *see* Fort Worth Br. at 7-12; Dallas Br. at 15-17, the Nations have a substantial interest in the availability of water to meet their future needs.

Petitioner relies on the 2012 Oklahoma Comprehensive Water Plan to assert that water is abundant in southeastern Oklahoma. *See* Pet. Br. at 14. But that document does not purport to address the Nations' needs for water.⁶ Furthermore, while Petitioner apparently considers any water left in the streambed to be "unused," Pet. Br. at 14, this overlooks the importance of instream flows to the ecology and upland and aquatic resources of south-

⁶ Oklahoma has yet to implement any policy for state-tribal water resource planning and management. The State's 1975 and 1980 water plans both denied the existence of tribal water rights within Oklahoma. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN 7-8 (1975), *available at* <http://tinyurl.com/1975Plan>; OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN 11 (1980), *available at* <http://tinyurl.com/1980Plan>. And while the State's 1995 plan recognized the significance of tribal water right claims and called for proactive intergovernmental engagement to seek a resolution of those claims, OKLA. WATER RES. BD., UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN 119, 138 (1995), *available at* <http://tinyurl.com/1995Plan>, the State had not followed through on this plan by 2012, when it returned to its water plan. The 2012 plan reaffirms the State's recognition of the significance of tribal water rights – stating that federal law rules “tend to favor the tribal position” – and renews the call for proactive intergovernmental engagement. OKLA. WATER RESOURCES BD., 2012 OKLAHOMA COMPREHENSIVE WATER PLAN EXECUTIVE REPORT 13, 35-36 (2012), *available at* <http://tinyurl.com/2012PlanUpdate>. Nevertheless, the Oklahoma Comprehensive Water Plan makes no attempt to address or accommodate tribal water needs.

eastern Oklahoma. The Kiamichi River is of special concern because it is part of the habitat of the Ouachita Rock Pocketbook, which is an endangered species. U.S. FISH & WILDLIFE SERV., DEPT OF INTERIOR, OUACHITA ROCK POCKETBOOK 1 (2011), *available at* <http://tinyurl.com/OuachitaPB>. And among the natural resources that depend on instream flows, river cane is especially important to the Nations, particularly for basketry. John R. Swanton, *Source Material for the Social and Ceremonial Life of the Choctaw Indians* 40-41 (Univ. of Ala. Press 2001) (1931).⁷ In sum, whether there is an abundance of water in southeastern Oklahoma depends on what needs and uses are recognized in making that determination.

There are also unanswered questions about the amount of excess water in Reach II, Subbasin 5, and when it is available. The Red River Compact's interpretive comments, prepared in 1979, reported that the flow of the Red River at the Arkansas-Louisiana boundary was less than 3,000 cubic feet per second ("cfs") only 4.2% of the time, 1 J.A. 30, RED RIVER COMPACT COMM'N, RED RIVER COMPACT

⁷ Rivercane grows in dense stands called canebreaks. NATURAL RES. CONSERVATION SERV., U.S. DEPT OF AGRICULTURE, PLANT GUIDE: GIANT CANE 1 (2012), *available at* <http://tinyurl.com/GiantCane>. Although continual saturation can harm cane, canebreaks rely on regular sources of water to grow. *Id.* at 5-6. Canebreaks also require periodic disturbances to maintain healthy growth. *Id.* at 5. Such disturbances include fires or flooding. *Id.* In the absence of regular, controlled fires, natural periodic floods provide good conditions for cane growth. *Id.* Instream flows provide sufficient water for cane to grow, and allow for the periodic flooding of riparian habitats that are necessary to maintain the healthy canebreaks that support the Nations' cultural uses.

WITH SUPPLEMENTARY INTERPRETATIVE COMMENTS OF LEGAL ADVISORY COMMITTEE (1979) [hereinafter "Interpretive Comments"]. But conditions have changed since 1979. This is shown by U.S. GEOLOGICAL SURVEY, DEPT OF INTERIOR, WATER-DATA REPORT 2012 07344370 RED RIVER AT SPRING BANK, AR (2013), *available at* <http://tinyurl.com/2012Gage>. The Spring Bank gage is approximately 4.5 miles north of the Arkansas-Louisiana border,⁸ and it shows monthly mean values of less than 3,000 cfs in five of the twelve months of the 2012 Water Year.⁹ *Id.* at 2. And for the period from 1998-2012, the daily mean fell below 3,000 cfs at least once in eight of twelve months. *Id.* And locally, Hugo Lake, just upstream from Tarrant's proposed diversion, tied its all-time low water mark on October 12, 2012. *Hugo Lake: How Low Can It Go?*, NEWSOK, Feb. 13, 2013, <http://tinyurl.com/HugoLow> (last visited Mar. 24, 2013).

The ongoing drought also creates uncertainty about the water that will be available in southeastern Oklahoma in the future. In 2010-11, Oklahoma experienced a major drought, similar to the serious droughts of the 1930s, 1950s, 2001-02 and 2005-06. Yang Hong, *Climate Change and Hydrological Extremes* (Undated), <http://tinyurl.com/YangHong> (last visited Mar. 24, 2013) [hereinafter "Hong"]. From

⁸ There are no significant tributaries between the Spring Bank gage and the Arkansas-Louisiana border, and thus a significant difference in streamflow between the two points is unlikely.

⁹ The water year begins on October 1 and ends on September 30 of the next year; it is identified by the year it begins. See U.S. GEOLOGICAL SURVEY, SCIENCE IN YOUR WATERSHED (W.B. LONGBEIN & KATHLEEN T. ISERI, 1995 edit.) (1960), *available at* <http://tinyurl.com/wateryr>.

mid-July to November 2010, more than half of the state was in "Exceptional Drought," with all parts of the state experiencing some degree of water shortage. Nat'l Drought Mitigation Ctr., Drought Monitor Statistics, <http://tinyurl.com/Drought2010> (last visited Mar. 24, 2013). Preliminary estimates conservatively placed the losses to Oklahoma's agriculture incurred by the drought at \$1.6 billion. Okla. Water Res. Ctr., *Oklahoma Agricultural Losses from Drought More Than \$1.6 Billion*, Okla. State Univ., Sept. 9, 2011, <http://tinyurl.com/DroughtLosses> (last visited Mar. 24, 2013). The drought continues; on January 9 of this year, the United States Department of Agriculture declared seventy-six of Oklahoma's seventy-seven counties to be federal natural disaster areas due to ongoing drought. U.S. DEPT OF AGRICULTURE, *USDA Designates 597 Counties in 2013 as Disaster Areas Due to Drought*, Jan. 9, 2013, <http://tinyurl.com/EmergencyDrought> (last visited Mar. 24, 2013).¹⁰

These data and reports give weight to the Nations' concerns about the availability of water to meet future needs in their homeland; if it is not adequate, the value of the investment in the economy of southeast Oklahoma that the Nations and others have made to date would be undermined. And it

¹⁰ And such droughts are likely to recur in the future, in southeastern Oklahoma and across the state, as average annual temperatures in the state are expected to rise by between 2.3 and 4.5 degrees Celsius by 2100, while anomalously low rainfalls are anticipated in southeastern Oklahoma throughout the next century. Hong. Climate change models predict that Oklahoma's average rainfall will decrease relative to the rest of the world's by 2090. Kenneth D. Fredrick & Peter H. Gleick, *WATER & GLOBAL CLIMATE CHANGE 6* (1999), available at <http://tinyurl.com/lowerrain>. In short, the drought in southeast Oklahoma is likely here to stay.

would be more difficult to attract new businesses and residents to southeastern Oklahoma. In sum, if the future availability of water in southeastern Oklahoma is insecure, southeastern Oklahoma will suffer the consequences just as it is beginning to attract new businesses.

II. THE COMPACT DOES NOT GRANT PETITIONER THE RIGHT TO ENTER OKLAHOMA TO OBTAIN WATER.

A. The Plain Language Of § 5.05(b)(1) Rejects Petitioner's Claim.

The plain language of section 5.05(b)(1) of the Compact secures to each Signatory State "equal rights to the use of" the runoff and undesignated water in Subbasin 5 when the flow of the Red River at the Arkansas-Louisiana border exceeds 3,000 cfs, provided that "no state is entitled to more than 25% of the water in excess of 3,000 [cfs]." *Id.* Petitioner asserts that this also means that a State may take its share of excess water "*regardless of where in the subbasin the water is located or where it originated,*" Pet. Br. at 27. But the words supplied by Petitioner, though essential to make its case, would be unnecessary if § 5.05(b)(1) actually contained such language. It does not.

Seeking to fill this gap, Petitioner asserts that the absence of a state boundary reference in § 5.05(b)(1) means that one State may enter another to harvest excess water. Pet. Br. at 27-29. The United States advances essentially the same argument. U.S. Br. at 17-19. But the use of a state boundary reference could not negate a right of entry, nor would it be necessary to do so, unless that right was first shown to exist under the Compact. Rather than address

this question, Petitioner assumes that under the Compact, each State has the right to enter another State to harvest water unless that right is negated. *See* Pet. Br. at 27.¹¹ As just shown, however, the plain language of the Compact does not support that assumption.

Petitioner does point to instances in which the Compact uses the boundaries of a State to describe the limits of a Reach or Subbasin, or to allocate water within a subbasin. Pet. Br. at 28. But Petitioner does not explain why the use of state boundaries for those purposes means that one State may enter another to harvest water whenever such boundaries are not referenced. The flaw in this argument is that it treats an allocation of water to a State as also granting a State the right to take that water anywhere it wishes. Because those rights are distinctly different – one is a right to use water, and the other a right to enter land to obtain water – the right of entry cannot be implied from an allocation of water.

**B. The Right Of Entry That Petitioner
Claims Cannot Be Implied From
§ 5.05(b)(1).**

Petitioner relies on the phrase “equal rights to the use of [excess water]” that appears in § 5.05(b)(1) in

¹¹ Petitioner goes so far as to claim that under § 2.05(c) of the Compact – which contains no state boundary reference – any State has the right to build a storage facility in another State, as long as doing so would not interfere with the delivery of water apportioned to the other State. *See* Pet. Br. at 29. If Petitioner were correct, however, the construction of a storage facility by one State in another could never interfere with the other State’s apportionment of water, since the other State would be free to take its apportionment in any of the other three States.

an effort to imply a right of entry under that provision. But this argument places more weight on that phrase than it will support. The rights of the States are equal because each State has the same right to use excess water, without regard to the contribution it makes to the total quantity of excess water available under § 5.05(b)(1). Thus, Louisiana – which has no land in Subbasin 5, and therefore contributes nothing to its excess waters – has the same right as the other States. Furthermore, no State is guaranteed any minimum quantity of water by § 5.05(b)(1) – instead, it caps each State's right to use excess water at 25% of the flow above 3,000 cfs. Accordingly, the term “equal rights” cannot be read to guarantee a State any quantity of excess water in Subbasin 5, much less to imply a right of entry to harvest that water. And since no State has such a right, its unavailability does not offend the equality of their rights.

Petitioner also contends that each State must have the right of entry in order to harvest its share of excess water because otherwise Louisiana, which has no land in Subbasin 5, would have no right to water under § 5.05(b)(1). Pet. Br. at 31. That argument is rejected by the terms of the Compact. Whether there is any excess water in Subbasin 5 depends on the flow at the Arkansas-Louisiana border, § 5.05(b)(1). If there is excess water, Louisiana's share is delivered to it at the Arkansas-Louisiana border, at the same time its right to that water comes into being. Furthermore, Louisiana's right to use the bed and banks of the Red River to transport runoff and undesignated water from other States is provided by

§ 2.05(d) of the Compact, which secures the same right to each Signatory State.¹²

Finally, Petitioner supports its claimed right to enter Oklahoma to harvest excess water by asserting that the water in the mainstem of the Red River is too saline to use as drinking water. Pet. Br. at 6. That assertion is, however, irrelevant to the scope of Petitioner's rights under the Compact. The Signatory States were aware of the natural salinity of the Red River water when the Compact was negotiated, as the Interpretive Comments show. 1 J.A. 48. But the Compact does not enlarge or decrease any State's apportionment of water in relation to its quality. To the contrary, while § 2.10(b) of the Compact recognizes each State's right to "lessen or prevent the pollution or natural deterioration of water within its jurisdiction," it expressly states that such recognition "shall not alter any provision of this Compact dealing with the apportionment of water or the rights thereto. . . ." *Id.*¹³

In sum, Petitioner's claim fails because § 5.05(b)(1) does not grant one State the right to enter another State to harvest excess water, much less the right to construct facilities in another State to transport that water back to the harvesting State.

¹² Section 2.05(d) provides that each Signatory State "shall have the right to" "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this compact." *Id.*

¹³ And even if Petitioner's contention that the salinity of the Red River makes it unusable as drinking water were relevant, it may not be correct, as the United States has shown that Texas is treating and using water from Lake Texoma as drinking water, and Lake Texoma (which impounds the Red River) is immediately upstream from Subbasin 5. U.S. Br. at 26.

III. PETITIONER'S PRIOR COURSE OF PERFORMANCE CONCERNING THE RED RIVER COMPACT REJECTS ITS PRESENT CLAIM.

A. Petitioner's Prior Effort To Buy Water From Oklahoma And The Nations Cannot Be Squared With Its Present Position.

In determining the meaning of a compact provision that is ambiguous, "the parties' course of performance under the Compact is highly significant." *Alabama v. North Carolina*, __ U.S. __, 130 S.Ct. 2295, 2309 (2010). Petitioner is a Texas state agency, *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1227 (10th Cir. 2011),¹⁴ with full authority to assert Texas' rights under the Red River Compact. "The State of Texas and Texas Attorney General, construing Texas law, have expressly recognized [Petitioner's] authority to seek to acquire for the benefit of Texas citizens water apportioned by the Red River Compact to Texas." 1 J.A. 177, Supplement to Amended Complaint at ¶ 28.1. Thus, Petitioner's course of performance under the Compact is highly significant in determining whether its current interpretation of the Compact is correct.

¹⁴ Petitioner is a political subdivision of the state that serves only governmental functions. *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609, 614 (Tex. App. 2001).

In late 2000, Petitioner and several other Texas water districts and municipalities formed the North Texas Water Alliance ("NTWA").¹⁵ 2 J.A. 344-45, OKLA. WATER RES. BD., JOINT STATE/TRIBAL WATER COMPACT & WATER MARKETING PROPOSALS 8 (2002) [hereinafter "Status Report"]. They then sought to negotiate a contract with the State of Oklahoma and the Chickasaw and Choctaw Nations to purchase water in southeastern Oklahoma. 2 J.A. 344-45, Status Report 7-8. The NTWA initiated that effort by responding to the Nations' and the State's Request for Proposals ("State/Tribal RFP") for the use and development of surface waters in southeastern Oklahoma. 2 J.A. 344, Status Report 7.¹⁶

The NTWA proposed "the taking of approximately 120,000 to 160,000 acre-feet/year of water from the Kiamichi River below Hugo dam," and "up to an additional 200,000 acre-feet/year from the Little and Mountain Fork River Basins." 2 J.A. 347, Status Report 10. Petitioner now seeks to divert water from

¹⁵ The *amici* North Texas Municipal Water District and Upper Trinity Water District, were also members of the NTWA. 2 J.A. 345, Status Report 8.

¹⁶ The State/Tribal RFP required that any proposal be "consistent with the cornerstone principles and criteria contained within the Kiamichi Basin Water Resources Development Plan." *Id.* The first cornerstone principle requires that "present and future water needs in the [Kiamichi] basin area are protected," and is implemented by the first evaluation criteria, which inquires whether "the proposal [is] consistent with the cornerstone principle that grants Oklahomans the highest priority related to present and future water needs?" 2 J.A. 342, Status Report 5.

the Kiamichi River at the same location – below Hugo dam. Pet. Br. at 15.¹⁷ But there is one major difference between its present claim and its prior position. The NTWA, including Petitioner, earlier sought to buy water from the State and the Nations, which would be delivered in Texas by the State and the Nations. 2 J.A. 365, 372, Status Report 28, 35. By contrast, Petitioner now claims that it already has the right to enter Oklahoma to obtain water and construct facilities to export that water to Texas. Pet. Br. at 26-30. And it seeks to take 310,000 acre-feet/year from the Kiamichi River below Hugo dam, *Id.* at 15, which is twice the amount earlier sought from that location.

**B. Petitioner's Conduct In Negotiations
To Buy Water From The Nations And
Oklahoma Also Rejects Its Present
Claim.**

Petitioner's conduct in the contract negotiations that were subsequently entered into by the NTWA with the Nations and the State is also wholly inconsistent with its present claim. That contract would have been between the NTWA and the State-Tribal Intergovernmental Compact Commission ("STICC"), which consisted of the Nations and the State. 2 J.A. 363, Status Report 26.¹⁸ Those negoti-

¹⁷ The diversion point for both proposals is within Reach II, Subbasin 5, which includes the Red River from Denison Dam to the Arkansas-Louisiana border and all tributaries not included in other subbasins of Reach II. Compact § 5.05(a).

¹⁸ The STICC was to be created under the terms of a Tribal-State compact that would have governed the authorization of out-of-state water use agreements. 2 J.A. 353-56, Status Report 16-19.

ations, and the terms of the draft contract, are also discussed in the Status Report.

The NTWA proposed to phase in water exports to Texas by incrementally increasing the amount exported, 2 J.A. 365, Status Report 28. In the initial phase, water would be diverted from the Kiamichi River downstream from Hugo Lake, transported in a pipeline across the Red River “to the point of delivery, where the NTWA would be responsible for all pipelines, pumps, easements and other costs for infrastructure within the State of Texas to distribute water to NTWA members.” *Id.* (emphasis added). In other words, Oklahoma and the Nations would jointly manage water on one side of the state line, while Texas would manage water on the other side. “The NTWA proposal . . . clarifies that no Texas entity will own property in Oklahoma. The HCR 1066 Working Group and Oklahoma negotiating team concur that ownership of infrastructure by a Texas water sale entity could threaten Oklahoma’s control of water going to Texas. The draft contract specifies that the STICC . . . would own all property and infrastructure, including all pipelines, easements, pumps and pumping stations, and all water rights associated with the water sale. The NTWA would have only a contractual right to have water delivered at the point of delivery within the State of Texas, just south of the Red River.” 2 J.A. 372, Status Report 35 (emphasis added).

The Status Report also reviews the negotiations over the price of water. The parties agreed that “the least cost-alternative approach to pricing the water would be appropriate.” 2 J.A. 373, Status Report 36. NTWA’s position was that the least cost alternative would be to construct the Marvin Nichols Reservoir

“on the Sulfur River, in east Texas south of Idabel, Oklahoma,” which had an estimated cost of “approximately \$1.7 billion (amortized over 30-40 years through bonds that would be used for payment of construction costs).” *Id.* But while the Red River Compact is referenced in the Status Report, no mention is made of the alternative Petitioner now claims – that under the Red River Compact it already has the right to enter Oklahoma to obtain water for free, forever, and the right to construct facilities of its own, in Oklahoma, to transport that water to Texas.

In sum, the negotiations between the STICC, including the State and the Nations, and the NTWA, including Petitioner, show that Petitioner did not believe that under the Red River Compact it had the right to enter Oklahoma to obtain water, much less to construct facilities there to transport that water to Texas.

IV. IF THE JUDGMENT OF THE COURT BELOW IS NOT AFFIRMED, FURTHER PROCEEDING WOULD BE NEEDED ON REMAND TO RESOLVE PETITIONER’S CLAIM.

In the event the Court vacates the judgment below and remands this case for further proceedings consistent with the Court’s decision, we agree with the United States that further proceedings would be needed in the district court to resolve questions of fact. U.S. Br. at 27. We also agree that any such proceedings would not require, and should not include, issues concerning the Nations’ water rights, *id.* at 31, which are protected from any effect of the Red River Compact by its very terms. Compact § 2.07.

A. Factual Questions Would Have To Be Resolved On Remand To Determine Whether Tarrant Has Any Right To Water In Oklahoma Under § 5.05(b)(1).

In the event of a remand, there are several factual questions that would have to be resolved in order to determine whether Petitioner has a right to excess water in Oklahoma under § 5.05(b)(1) of the Compact.

First, there are outstanding questions about the amount of excess water available in Subbasin 5, and when it is available. *See supra* at 12-14.

Second, it remains to be determined whether Texas is already receiving 25% of the runoff and undesignated water in Subbasin 5. If so, Petitioner could not rely on § 5.05(b)(1) of the Compact to claim more water, since “no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.” *Id.* Petitioner earlier dismissed the relevance of this question, stating that “Tarrant has neither alleged nor presented evidence regarding Texas’ current use or receipt of water under the Compact, since that is not an element of Tarrant’s claim for relief or its Article III standing,” Tarrant’s Response to Court’s June 15, 2011 Order for Supplemental Briefing at 1, *Tarrant Reg’l Water Dist. v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011) (No. 10-6184). Petitioner added that, if the question were material, it could show that Texas was not receiving its share of water, but then asserted that its share of water is “unlimited” when the measured flow exceeds 3,000 cfs and there are no competing uses, before finally stating that Texas was not receiving an equal share in any event. *Id.* at 1 n.1. But Petitioner

did not say how much water Texas was already receiving.

Furthermore, there are reasons to think that Texas is already receiving its full share. Texas has a larger portion of the drainage area in Reach II, Subbasin 5 within its borders than does Oklahoma. 2 J.A. 316, REPORT OF THE ENGINEERING ADVISORY COMMITTEE TO THE RED RIVER COMPACT COMMISSION, at Figure 3 (1978) (identifying the drainage area for Texas as 1485 square miles, and for Oklahoma, 858 square miles). And the precipitation rates for northeastern Texas and southeastern Oklahoma are comparable. Cf. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, TEXAS PRECIPITATION (2005), *available at* http://www.nationalatlas.gov/printable/images/pdf/precip/pageprecip_tx3.pdf (illustrating average annual Texas precipitation 1961-1990) *with* U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, OKLAHOMA PRECIPITATION (2005), *available at* http://www.nationalatlas.gov/printable/images/pdf/precip/pageprecip_ok3.pdf (illustrating average annual Oklahoma precipitation 1961-1990). Thus, the assertion that Texas has less water available to it in Subbasin 5 than Oklahoma is speculative. And while Petitioner makes that very claim, Pet. Br. at 9 n.5, the 1970 report on which it relies (which Petitioner has lodged with the Clerk) makes no reference to Subbasin 5.

Nor has Petitioner said anything about how much undesignated water, *see* Compact § 3.01(l) (defining undesignated water), already flows into Subbasin 5 in Texas from the fourteen existing, authorized or

proposed last downstream major damsites in Texas that demark the Texas portion of Subbasin 5. Compact §§ 5.02(a) (listing eleven), 5.04(a) (listing three). All of that water would become excess water when it flows into Subbasin 5, provided that the flow at the Arkansas-Louisiana border exceeds 3,000 cfs § 5.05(b)(1).

Third, even if Texas were not receiving its full share, it would be necessary to determine how much excess water it was receiving in Subbasin 5 within its borders, since Petitioner could not claim more than the difference between that amount and Texas' 25% share, as § 5.05(b)(1) makes clear. And as the United States points out, that information is also needed to avoid intruding on the other States' share of excess water. *See* U.S. Br. at 24.

B. If Remanded, This Case Would Not Require The Resolution Of Any Question Concerning The Nations' Water Rights.

We agree with the United States that any remand in this case should not include any issues concerning the Nations' water rights. U.S. Br. at 31 & n.11. The Red River Compact expressly disclaims any effect on rights held by the United States or those claiming under its authority: "Nothing 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." Compact § 2.07. The Nations' treaty rights to the waters of the Red River Basin are both obligations of the United States and are claimed by

the Nations under the authority of the United States, and as such are protected by § 2.07.¹⁹

This conclusion is confirmed by the Interpretive Comments and the legislative history of the Compact. The Interpretive Comments state expressly that § 2.07 “insures that federal rights and obligations are unaffected by the Compact.” 1 J.A. 14 (emphasis added). That conclusion is underscored by statements made at the Congressional Subcommittee hearing on whether to approve the Compact. The Assistant Director of Civil Works of the Army Corps of Engineers stressed in his statement “that the [Red River] Compact is an agreement among the States and not binding upon the U.S. Government. . . . [T]he United States’ participation should not be viewed as binding on the rights, duties or obligations of the Federal government.” *Red River Compact and Caddo Lake Compact: Hearing Before the Subcomm. on Admin. Law & Gov’tl Relations of the H. Comm. on the Judiciary*, 96th Cong. 2d. Sess., 4 (1980) (statement of Col. Alan Laubscher). The parties intended that the United States’ interests would not be affected by the Compact. *Id.* at 4 (citing Compact § 2.07). “Section 2.07 effectively precludes any interference in the powers, rights, or obligations of the United States.” *Id.* Furthermore, the United States was not contractually bound by the agreement since it was not a party to the agreement; its powers and

¹⁹ This interpretation of the Compact is shared by Petitioner. In its Amended Complaint, Petitioner states that “[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.” 1 J.A. 170, Amended Complaint at ¶ 36.

obligations could not be affected by the Compact. *Id.* at 7. No representative present at the hearing or testifying witnesses expressed a contrary view.²⁰

Finally, in the event that the proceedings on remand ultimately determine that Petitioner has a right to excess water in Subbasin 5 under § 5.05(b)(1) of the Compact, any conflict between those rights and the rights of the Nations should be considered in the separate already pending litigation concerning the Nations' rights. *See Chickasaw Nation v. Fallin*, No. 5:11-CV-00927-W (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 cases are currently stayed as the Nations and State take part in mediation. *See, e.g.*, Joint Status Report and Joint Motion for a Further 90-Day of this Action at 1-2, Nos. 5:11-CV-00927-W, 5:12-CV-00275 (W.D. Okla. Feb. 19, 2013). This court-supervised mediation, *see, e.g.*, Order, *Fallin*, No. 5:12-CV-00275 (W.D. Okla. Feb. 26, 2013), has continued productively since the parties jointly requested a stay in both cases on March 27, 2012. *See* Joint Motion by the Plaintiffs Chickasaw and Choctaw Nations, the Defendants Governor Mary Fallin, et al., for a 60-Day Stay of this Action, *Okla. Water Res. Bd.*, No. 5:12-CV-00275-W (W.D. Okla. Mar. 27, 2012). If Petitioner is held to

²⁰ Even without § 2.07, the Red River Compact would not affect the Nations' Treaty rights to water. Those rights cannot be abrogated unless there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)) (internal quotation marks omitted). There is no such evidence in the Red River Compact or its legislative history.

have rights to obtain water in Oklahoma under § 5.05(b)(1), the ongoing mediation might well provide a means of resolving Petitioner's claim as well.

CONCLUSION

The Compact does not support Petitioner's claim that it may enter Oklahoma to harvest water in Reach II, Subbasin 5. That claim is also wholly inconsistent with Petitioner's prior conduct in seeking to buy water from the State of Oklahoma and the Nations. For these reasons, and those set forth in the Respondents' brief, Petitioner's claim should be rejected, and the decision below should be affirmed.

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