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The Latest Red River Rivalry: The Supreme Court's Recent Decision Regarding the Red River Compact

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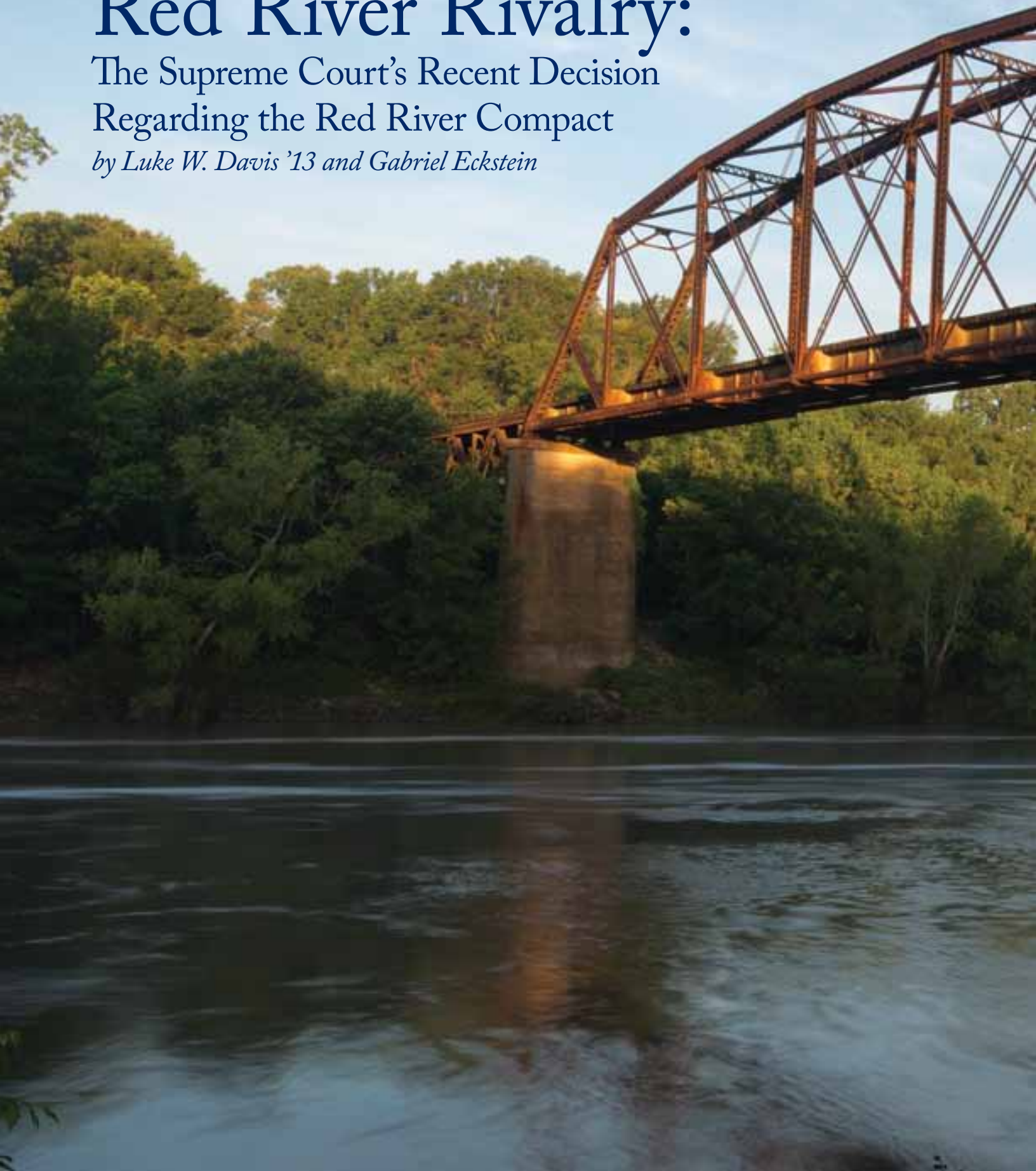


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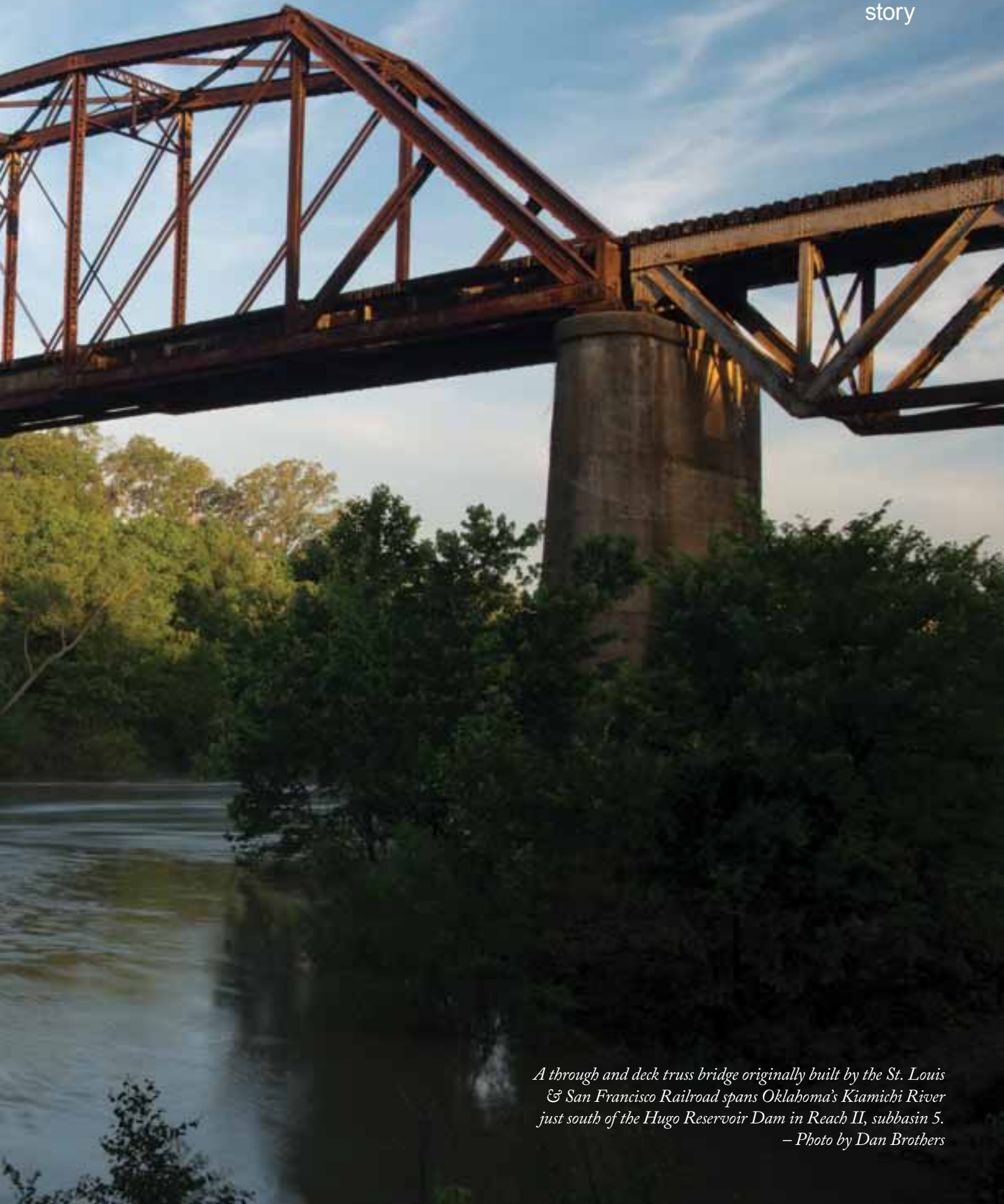
The Latest Red River Rivalry:

The Supreme Court's Recent Decision
Regarding the Red River Compact

by Luke W. Davis '13 and Gabriel Eckstein



feature
story



*A through and deck truss bridge originally built by the St. Louis & San Francisco Railroad spans Oklahoma's Kiamichi River just south of the Hugo Reservoir Dam in Reach II, subbasin 5.
– Photo by Dan Brothers*

On June 13, 2013, the United States Supreme Court issued a unanimous decision in a “Red River Rivalry” with much greater implications than the annual football game. In *Tarrant Regional Water District v. Herrmann*, the court sided entirely with Oklahoma in that state’s dispute with Texas over the allocation of Red River water. This decision will have considerable impact on Texas’ ability to meet its ever-growing water needs. Moreover, the decision could be consequential for other interstate water compacts and the states relying on the rivers and tributaries governed by those agreements.

I. Background

The Tarrant Regional Water District (“Tarrant”) is a state-sanctioned entity and water district responsible for providing water to north-central Texas (including the cities of Fort Worth, Arlington and Mansfield). Starting in 2000, with permission from Texas state government, Tarrant began exploring options to obtain and divert Texas’ entitled share of water allocated under the Red River Compact (“RRC”) from an Oklahoma tributary of the Red River, the Kiamichi River.¹ Tarrant sought to withdraw this water from Oklahoma’s Kiamichi River, before the water entered the Red River since water in the Red River is saline and requires significant desalination to make it potable.² In contrast, Kiamichi River water is suitable for domestic and industrial use and would not require refining before use.

While Oklahoma conceded that Texas is entitled to a share of water under the RRC — which apportions the Red River’s waters among Arkansas, Louisiana, Oklahoma and Texas — Oklahoma rejected Tarrant’s efforts and barred the entity from carrying out its plan. It contended that Texas and its entities are not allowed to reach into Oklahoma territory to obtain Texas’ water. Oklahoma claimed its sovereignty, language of the RRC, state laws not preempted by the RRC, and its right to discriminate against out-of-state water users prevent Texas from diverting water from within Oklahoma. According to Oklahoma, Texas can only appropriate its water once it reaches Texas.

As a result, in 2007, Tarrant sued Oklahoma disputing the Sooner state’s interpretation of the RRC. At the heart of the dispute was the interpretation of § 5.05(b) of the compact focusing on water allocation in Reach II, subbasin 5, which encompasses the Red River and its tributaries, including the Kiamichi River, from Denison Dam (impounding Lake Texoma) to the Arkansas-Louisiana state border.

II. Interstate Compacts

Interstate compacts are agreements between two or more states often used to allocate transboundary waters and coordinate flood and pollution prevention measures. The Compact Clause of the United States Constitution grants states the authority to enter into these agreements so long as they begin negotiations with congressional approval and subsequently seek congressional ratification.³ Once a compact is signed by the compacting states and ratified by Congress, the compact becomes federal law.

1. Red River Compact⁴

The RRC was crafted to allocate water from the Red River and its tributaries among the four signatory states. Its purpose is to promote relationships and remove causes of controversy while providing an equitable apportionment of the water. While negotiations over the RRC began in 1955, it wasn’t signed until 1978 and then approved by Congress in 1980.

The RRC divides the Red River Basin into five major territories (each called a “Reach”) and further divides these Reaches into topographical subbasins, with each Reach and subbasin allocating water differently. Article V of the RRC governs allocation from Reach II, subbasin 5, which includes the Kiamichi River. Under Article V:

“Signatory States shall have *equal rights to the use of runoff* originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.”⁵

Even though each state has an equal right to use the water in subbasin 5, the majority of this water is physically located within Oklahoma and none in Louisiana.⁶ Furthermore, as Tarrant noted in its petition for *writ of certiorari*, “Texas does not have access to its full apportionment of subbasin 5 water from within its borders.”⁷

2. Parties and the Underlying Lawsuit

Tarrant supplies water to almost two million people in the Fort Worth area. By 2060, the district’s water demand is projected to exceed supply by roughly 400,000 acre-feet.⁸ To alleviate the growing water demand, Tarrant needs the compacted water.

In 2007, Tarrant filed a permit application with the Oklahoma Water Resource Board (“OWRB” or “Oklahoma”) to divert and use approximately 310,000 acre-feet per year from the Kiamichi River in Reach II, subbasin 5.⁹ OWRB is the Oklahoma agency charged with administering the use, quality and permitting of groundwater and surface water in Oklahoma.¹⁰

Knowing that the OWRB intended to reject their application, Tarrant simultaneously sued OWRB alleging that various Oklahoma statutes unjustifiably and unlawfully prevented OWRB

from issuing Tarrant a permit. In particular, Tarrant argued that Oklahoma’s laws were preempted by the RRC and that they violated the Dormant Commerce Clause by restricting interstate commerce.¹¹ As the suit commenced, the parties stipulated that OWRB would take no official action on the permit applications until the litigation was concluded.¹²

At the Oklahoma District Court, Tarrant sought declaratory judgment and an injunction prohibiting OWRB from enforcing statutes preventing Tarrant from receiving its share of RRC-allotted water.¹³ The court, however, granted OWRB’s summary judgment on all of Tarrant’s claims.¹⁴

On Sept. 7, 2011, the Tenth Circuit Court of Appeals affirmed the district court decision.¹⁵ The Tenth Circuit held that the language of the RRC provided clear statements that Congress authorized the compacting states to regulate water within its state, even if by discriminatory laws favoring in-state users.¹⁶ The court also rejected Tarrant’s preemption arguments, holding that the equal rights of the states to use water in subbasin 5 did not give Texas the right to take water from within Oklahoma.¹⁷ Concerned about the implications this ruling would have on its ability to supply North Texans with much needed water, Tarrant appealed to the U.S. Supreme Court.



Graphic courtesy of the Oklahoma Water Resource Board.

3. Solicitor General's Review

In an uncommon move for the Supreme Court, before accepting the petition for *certiorari*, the justices asked the solicitor general of the United States to file a brief expressing the views of the United States. Urging the court to accept Tarrant's appeal, the solicitor suggested that whether Tarrant can obtain water from within Oklahoma depends on the interpretation and preemptive effects of the RRC.¹⁸ The solicitor contended that compacts should be interpreted and read as contracts; under his interpretation of the RRC, Texas should be allowed to appropriate water from within Oklahoma. Additionally, the solicitor asserted that the dispute dealt only with RRC interpretation and preemption and that the court need not address any Commerce Clause issues.¹⁹

III. The Arguments and the Court's Decision

The arguments presented before the Supreme Court mostly revolve around, and begin with, the language and interpretation of the RRC. The three main questions that the parties presented included: 1) what is the plain and clear meaning of the phrase "equal rights to the use of" as used in § 5.05(b)(1); 2) whether the RRC preempts state laws; and 3) whether the RRC language gave congressional permission for a state to discriminate with water.

1. Language of the RRC

The contention behind this rivalry is how water in Reach II, subbasin 5, should be allocated when the RRC provides that each state has an "equal right to the use of" the subbasin water. The interpretation, intent and effect of this language are important for the subsequent preemption and Commerce Clause issues. In determining the meaning of this language, both parties looked to other sections of the RRC.²⁰

Both parties agreed that a compact is a contract and should be interpreted as one, and like a statute, should be interpreted by its plain terms. Tarrant argued that the RRC's language regarding water allocation in subbasin 5 is clear and unambiguous, and that the plain terms gave each state 25 percent of excess runoff water in this subbasin regardless of state boundaries.

Tarrant further argued that § 5.05(b) placed no geographical restrictions on the states in obtaining their 25 percent share of water, in contrast to other sections of the RRC that specifically and expressly limit where a state can obtain its water.²¹ Moreover, Tarrant contended that OWRB and the Tenth Circuit's interpretation of the RRC (that states can only obtain water from within their border) is incorrect because Louisiana would never get any of its allocated water since subbasin 5 water is situated entirely outside of Louisiana's territory.²²

In response, OWRB contended that had the parties and Congress so intended, the RRC would have explicitly declared

that one state may enter another state's territory to obtain its share of water; they also argued that where other compacts have allowed such incursion, they have always done so with specificity.²³ Oklahoma believed that the "equal right to use" language simply means a state is allocated 25 percent of the excess water to use and divert within its own state.²⁴ Accordingly, Oklahoma argued that because the RRC language does not expressly authorize Texas to enter Oklahoma, and Texas did not bargain for this right in negotiating the RRC, the RRC only allows a state to use its equal share appropriated within its own border.²⁵

Siding with Oklahoma, the Supreme Court interpreted the RRC's language to mean that Texas was not permitted to enter into Oklahoma territory to obtain its water allotment. In reaching its decision, it stated that:

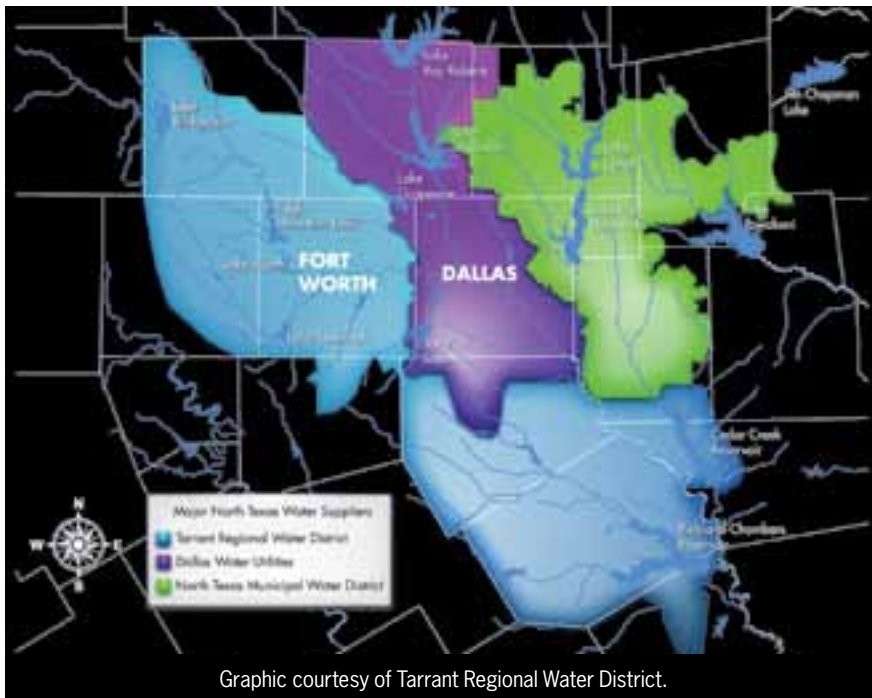
"Three things persuade us that cross-border rights were not granted by the Compact: the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing."²⁶

The Court further reasoned that § 5.05(b) of the RRC did not provide Texas with a guarantee of a minimum amount of water. Rather, it said that amount provided in the provision — 25 percent of the water in excess of 3,000 cubic feet per second — serves as a ceiling. Moreover, it asserted that if Texas believed it was not getting its fair share of the excess water, its sole remedy was to seek an accounting as provided under § 2.11 of the RRC, and based on that accounting, demand that Oklahoma desist from taking more than its share.

2. RRC and the Preemption of State Laws

Tarrant also contended that Oklahoma violated sections of the RRC by enforcing laws that are "inconsistent" with the compact, namely, statutes that prohibited Texas from withdrawing water from within Oklahoma and transporting it to Texas. It also argued, as did the solicitor general, that the "presumption against preemption" should not apply. Normally, when federal law is forced upon a state, there is a presumption that the federal law does not preempt state law. However, when a state voluntarily consents and enters into a compact allocating natural resources, Tarrant asserted that the presumption should not apply.²⁷ Therefore, according to Tarrant, any Oklahoma statute preventing Texas from obtaining its water should be deemed preempted by the RRC.

The basis of Tarrant's claim, however, was grounded on its belief that it was entitled to a certain quantity of water from subbasin 5. Given that the Court had dismissed this interpretation of the RRC and ruled that the compact does not create any cross-border rights, the Court rejected Tarrant's preemption analysis outright.



3. *The Right to Discriminate Against Interstate Commerce*

Finally, the Supreme Court was also asked to address whether clear congressional consent was given to the signatory states to pass and enforce discriminatory laws burdening interstate commerce. This required consideration of the “equal rights” language and other sections in the RRC providing that compact obligations shall not interfere with a state’s appropriation, control, and use of water that is not inconsistent with the compact.

Tarrant argued that certain Oklahoma statutes are discriminatory and have effectively resulted in an embargo on out-of-state water transactions.²⁸ According to Tarrant, for a state to favor its own citizens and discriminate against citizens of other states, a compact must include a clear statement showing Congress’ “clear and unambiguous intent” to permit the use of protectionist and discriminatory laws, which would otherwise violate the Commerce Clause.

In addition, Tarrant asserted that the Supreme Court’s *Sporhase* case addressed this issue when the Court struck down similar Nebraska laws that

prohibited out-of-state groundwater transfers.²⁹ In *Sporhase*, the Court said that Nebraska’s reliance on broad statutory language and interstate compacts, containing language similar to that used in the RRC, did not evidence clear congressional intent to remove the federal constraints on such state laws.³⁰ Tarrant argued that the scattered language in the RRC does not show the clear and unambiguous intent required for a state to pass and enforce protectionist laws favoring its own citizens.

In response, Oklahoma contended that *Sporhase* is distinguishable because it addressed groundwater rather than surface waters, and that there had not been an interstate compact allocating the groundwater at issue in that case. Furthermore, Oklahoma argued that the Tenth Circuit correctly found the required clear congressional intent for Oklahoma’s water embargo in four provisions of the RRC.³¹ Accordingly, Oklahoma contended that because Congress adopted the RRC as federal law, the RRC explicitly carves out an exception to the Dormant Commerce Clause and allows states to pass laws protecting and favoring its citizens.

In considering Tarrant’s contentions, the Supreme Court again referred to its conclusion that § 5.05(b) of the RRC does not afford Texas a guaranteed volume of water. Accordingly, because Texas is not entitled to water from within Oklahoma, it has not suffered any discrimination as an out-of-state user participating in interstate commerce. The Court asserted that under § 5.05(b), all water exceeding Oklahoma’s 25 percent share in excess of the 3,000 CFS base amount is allotted to Oklahoma “unless and until another state calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share.” In effect, discrimination against Texas could only be proven through an accounting showing that Oklahoma used more than its allotment of the excess water and that Texas was somehow prevented from using its share of that excess water. In the absence of an accounting and evidence of discrimination, the Court deemed Tarrant’s claim without merit.

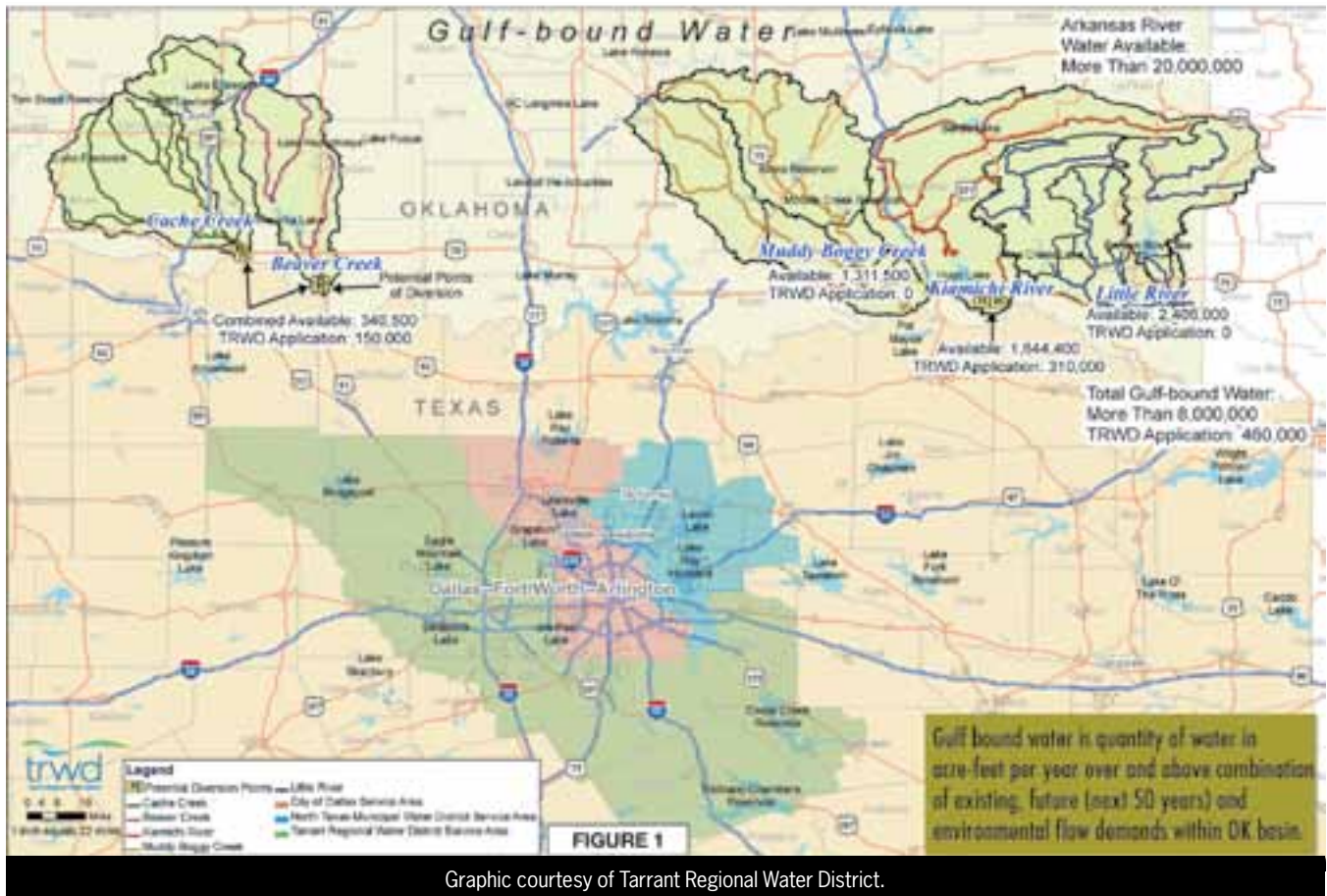
IV. Implications of the Court’s Decision

The consequences of the Court’s decision are not insignificant. For the Tarrant Regional Water District as well as for the whole of Texas, the outcome will make it more difficult to enjoy and utilize water allotted to the state under the RRC. While Texas does have rights to excess water in subbasin 5 (as well as rights to Red River water from other subbasins), it will have to obtain its allotment from the more salty Red River rather than from fresher tributaries flowing within Oklahoma. The cost of desalinating that water now will be one of the challenges that Tarrant will have to evaluate when considering whether to use Red River water as a source of potable water.

Related to this challenge, and an issue left unsettled by the Court, is the manner in which Texas would access its share of excess water from subbasin 5. Under agreements predating the RRC, Oklahoma actually “owns” both banks of the Red River up to the vegetation

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Graphic courtesy of Tarrant Regional Water District.

line on the river's southern shore. Since, under this decision, Texas may not enter Oklahoma to obtain its share of subbasin 5 water without Oklahoma's consent, it is unclear how Texas would access its water allotment.

From a broader perspective, the decision has likely raised the barrier for future challenges to interstate compacts by compact members seeking access to cross-border water resources. In ruling for Oklahoma, the Court's decision suggests a presumption that expectations in property interests established under interstate water compacts are "reasonable" ones that should be protected. In a prior case, the Supreme Court stated, "We have recognized the importance of honoring reasonable expectations in property interests. But such expectations can only be of consequence where they are 'reasonable' ones."³² Given the scope of property rights created by interstate compacts and related state water laws, the presumption of reasonableness will be a daunting hurdle to overcome and could have serious consequences for other interstate compact challenges, including Texas' recently filed Supreme Court case against New Mexico over the 1938 Rio Grande Compact.

In the final analysis, the most important lesson resulting from the Red River Rivalry may not be found in the Court's opinion. Rather, it is likely located in the Court's nearly century-old admonition that state riparians to interstate waters, whether or not governed by an interstate compact, should always look to cooperative study, conference and mutual concessions before beginning judicial proceedings.³³ Having spent \$6 million on its failed lawsuit, Tarrant must now redouble its efforts to negotiate a truce with its neighbors across the river and seek a viable water supply solution for north-central Texas. Careful negotiating of new compacts or amendments to existing agreements may be the few avenues left to Tarrant to acquire new water sources. The same can be said for all of the thirsty states across our nation. ■



Luke W. Davis graduated in May 2013, *cum laude*, from Texas Wesleyan School of Law. During law school, Davis took several classes from Professor Gabriel Eckstein, including Water Law. Davis also helped Eckstein on independent research assignments regarding groundwater resources. Following his passion for

water, Davis hopes to pursue a legal career focusing on water rights and issues.



Professor Gabriel Eckstein joined the law faculty at Texas Wesleyan School of Law in 2010. Previously, he was a law professor at Texas Tech University School of Law where he held the George W. McCleskey Chair in Water Law and directed the Texas Tech Center for Water Law & Policy. Professor Eckstein teaches

in the areas of water law, property law, oil and gas law and related courses. Much of his research focuses on topics that intersect the fields of law, natural resources and the hard sciences. He is especially known for his scholarship on transboundary and global water issues and has published and spoken extensively in this area. Prior to entering academia, Eckstein served as senior counsel for CropLife America, an agrichemical trade association working on environmental regulation and legislative matters. And before that, he worked as a litigator in private practice on environmental, toxic tort and asbestos cases.

¹ Petition for writ of certiorari at 4, *Tarrant Regional Water District v. Herrmann*, No. 11-889 (Jan. 19, 2012), 2012 WL 167019.

² Brief for Petitioner at 19, *Tarrant Regional Water District v. Herrmann*, No. 11-889 (Feb. 19, 2013), 2013 WL 648790. Tarrant also wants this water because of its location; Tarrant's other option was to pump water several hundred miles from South Texas. *Id.* at 15 n.7.

³ U.S. CONST. art. I, § 10 ("No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ...").

⁴ Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (emphasis added); TEX. WATER CODE § 46.013 (West 2008) (emphasis added).

⁵ § 5.05(b) (1), 94 Stat. 3305.

⁶ Brief for Petitioner, *supra* note 2, at 9.

⁷ Petition for writ of certiorari, *supra* note 1, at 10.

⁸ An acre-foot is an amount of water adequate to cover 1 acre of land to a depth of 1 foot, or roughly 325,000 gallons of water.

⁹ Petition for writ of certiorari, *supra* note 1, at 10. Tarrant also sought to appropriate water from Reach I, subbasin 2, which the RRC gives Oklahoma free and unrestricted use of water in this subbasin. These denied permits are not before the Supreme Court.

¹⁰ OWRB, "What is the OWRB?" http://www.owrb.ok.gov/about/about_pdf/owrb.pdf (OWRB also helps set policy regarding water use and permits).

¹¹ *Id.*

¹² Two other Texas entities, Upper Trinity Regional Water District and North Texas Municipal Water District (both submitting *amicus curiae* briefs in support of petition for a writ of certiorari) have applied to OWRB for permits to appropriate water from the Kiamichi River.

¹³ Petition for writ of certiorari, *supra* note 1, at 11.

¹⁴ *Id.* at 12.

¹⁵ *Tarrant Regional Water District v. Herrmann*, 656 F.3d 1222, 1250 (Tenth Cir. 2011).

¹⁶ Petition for writ of certiorari, *supra* note 1, at 12-13.

¹⁷ *Id.* at 13.

¹⁸ Brief for the United States as *amicus curiae* at 10, *Tarrant Regional Water District v. Herrmann*, No. 11-889 (Nov. 30, 2012) 2012 WL 6019368.

¹⁹ *Id.* at 16.

²⁰ Other language relied upon includes various sections in Article II and Article V.

²¹ Petitioners Brief, *supra* note 2, at 27 (RRC language limiting where water may be taken include § 5.03(b) "within respective states" and § 6.03(b) "within their respective boundaries").

²² *Id.* at 3 (Tarrant further argued the extrinsic evidence that water was anticipated to cross state lines is in § 2.05(d), which allows states to use of the "bed and banks" of the Red River and tributaries to transport water.).

²³ Brief in Opposition to Petition for a writ of certiorari at 29, *Tarrant Regional Water District v. Herrmann*, No. 11-889 (Feb. 21, 2012) 2012 WL 590128 (OWRB, like the Tenth Circuit, thinks Tarrant is reading).

²⁴ *Id.* at 30, 33-34.

²⁵ *Id.* at 36-37.

²⁶ *Tarrant Regional Water District v. Herrmann*, No. 11-889, slip op. at 14, (U.S. June 13, 2013).

²⁷ Petitioners Brief, *supra* note 2, at 38; Brief for the United States as *amicus curiae*, *supra* note 19, at 10-11.

²⁸ *Id.* at 16-19. Tarrant claims there is an Oklahoma water embargo because: the Oklahoma attorney general stated that no out-of-state user is a proper permit applicant; there is a statute that out-of-state surface water must be put to beneficial use in less than seven years, and Tarrant needs at least 15 years; there is a statutory preference for in-state users because all out-of-state permits are subject to review at least every 10 years and OWRB can add more conditions or is subject to divestiture, which in-state users are not subject to. *Id.* Moreover, legislative approval is required before OWRB will grant an out-of-state permit. Brief for the United States as *amicus curiae*, *supra* note 19, at 5-6.

²⁹ Petitioners Brief, *supra* note 2, at 48.

³⁰ *Id.* at 48-49 (citing *Sporhase v. Nebraska ex. Rel. Douglas*, 458 U.S. 941, 943-44 [1982]).

³¹ These provisions include § 2.10(a), § 2.01, the general language of § 5.05, and the purpose of the RRC in § 1.01.

³² *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469 (1988).

³³ *Texas v. New Mexico*, 462 U.S. 554 (1983), quoting *New York v. New Jersey*, 256 U.S. 296, 313 (1921).