

No. 11-889

IN THE
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,
v.
RUDOLF JOHN HERRMANN, ET AL.,
Respondents.

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

**BRIEF FOR OKLAHOMANS FOR
RESPONSIBLE WATER POLICY AS AMICUS
CURIAE IN SUPPORT OF THE
RESPONDENTS**

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INTEREST OF THE *AMICUS*¹

Oklahomans for Responsible Water Policy (herein “ORWP”) is a grassroots citizens’ organization with over 14,000 members. In 2010, ORWP was incorporated as a not-for-profit for the purpose of responding to various threats on Southeast Oklahoma’s² water resources. Specifically, thirsty metropolitan entities, such as Petitioner, seek to export vast quantities of water from Southeast Oklahoma to areas of unchecked urban sprawl in North Texas.

Petitioner treats Oklahoma’s water resources as a commodity—a commodity it believes it can forcibly take from Oklahoma. However, water is much more than a simple commodity interest; it is a *community* interest—a unique resource that benefits far more than the “legal” owner. Water serves as a catalyst

¹ All parties consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. SUP. CT. R. 37.2(a). Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its members made a monetary contribution to the brief’s preparation or submission. SUP. CT. R. 37.6.

² For purposes of this brief, Southeast Oklahoma is comprised of the following counties: Atoka, Bryan, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, McCurtain, Pittsburg, Pontotoc, and Pushmataha.

for growth and development in Southeast Oklahoma by providing long-term employment opportunities for Southeast Oklahoma citizens and supplying much needed revenues to local entities, communities, and counties. While the level of economic development between Southeast Oklahoma and North Texas differ dramatically, it does not alter Southeast Oklahoma's right to utilize a natural resource within its State—nor does the difference in economic development give North Texas priority over Southeast Oklahoma for use of water located within Oklahoma. ORWP and its members will be directly and negatively affected should the vast quantities of water Petitioner seeks be removed from the basin. As such, ORWP believes its unique perspective will aid the Court in its final decision.

SUMMARY OF ARGUMENT

1. Petitioner argues the Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980), authorizes it to invade Oklahoma's sovereign territory in order to obtain the portion of water allocated to the State of Texas in Reach II, Subbasin 5. However, a foundational premise of the Red River Compact (herein "Compact") is that each Signatory State retains the right or power "to regulate within its boundaries the appropriation, use, and control of water, or quality of water." Compact § 2.10(a). Petitioner's argument runs afoul of each State's right as a quasi-sovereign to govern "all the earth and air within its domain." *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Oklahoma, like all other states, possesses the authority to protect the health and safety of its citizens. Nothing in the

Compact abrogates such right; to the contrary, both the language and intent of the Compact protects Oklahoma's ability to regulate the water resources within its borders in the manner it sees fit.

2. Petitioner also challenges the constitutionality of certain Oklahoma statutes³ (herein "Oklahoma's Water Statutes) as violating the Dormant Commerce Clause. *See* Pet. B. at § D. However, even if the Compact did allow for one State to remove its entire share of Reach II, Subbasin 5 water from within the boundaries of another State—which it does not—each State retains the authority under its police powers to place limitations upon the time, manner, and location of interstate water transfers in order to protect the public welfare of its citizens. Oklahoma's Water Statutes strike the appropriate balance between protecting legitimate public interests and using narrowly tailored means to do so.

First, Oklahoma's Water Statutes protect an undeniably legitimate interest. Implementing regulations, such as Oklahoma's Water Statutes, is at the core of Oklahoma's police power. As such, protecting Oklahoma citizens' health and safety is a legitimate public welfare interest in which Oklahoma's exercise of its police power is proper.

Second, Oklahoma's Water Statutes are narrowly tailored to achieve the articulated legitimate interests. Rather than being absolute prohibitions

³ The challenged statutes include Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, and 1086.1(A)(3).

on interstate-interbasin water transfers, Oklahoma's Water Statutes expressly contemplate out-of-state water use. However, in light of the overwhelming public health and safety concerns related to the permanent removal of water from Oklahoma, its Water Statutes place reasonable and narrowly tailored restrictions upon any interstate-interbasin transfer, similar to the restrictions Oklahoma places upon any intrastate-interbasin transfer.

3. Petitioner's attempted water grab highlights a plethora of social considerations and equitable principles. Water transfers affect far more than just the "buyer" and "seller." Citizens and communities in Southeast Oklahoma depend upon water to support the growing tourism and recreation industries. Such industries provide much needed employment for those living in the historically impoverished region. Petitioner and its *amici* seek Oklahoma's water to further develop a water-dependent metroplex in a water-scarce region; ORWP and its members seek to protect the same water to continue putting food on the table.

For all of these reasons, this Court should affirm the decision of the Tenth Circuit.

ARGUMENT**I. THE COMPACT DOES NOT RESTRICT OKLAHOMA'S SOVEREIGN POWER WITHIN ITS BOUNDARIES.**

The primary issue before the Court is the interpretation the Red River Compact (herein the “Compact”) and, more specifically, of Section 5.05 of the Compact. Section 5.05 grants each Signatory State “equal rights *to the use of* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5.” Compact § 5.05(b)(1) (emphasis added). Here, Petitioner asserts that this section grants it unregulated authority to divert water included in Texas’s apportionment of Subbasin 5 from within the territorial boundary of Oklahoma.

As a contract between the Signatory States, the Compact “must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (relying on *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)). A bedrock principal of contract interpretation is that “[a] written contract *must be read as a whole* and every part interpreted with reference to the whole,” with preference “given to *reasonable* interpretations.” *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1205, 1032 (9th Cir. 1990) (emphasis added) (internal citation omitted) (quoting *Shakey’s Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)). This is congruent to this Court’s rules of statutory construction requiring courts to look to “the language and design of the statute as a whole” when

ascertaining the plain meaning of a statute. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The purpose of the Compact is “[t]o provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries” in an effort to “remove causes of controversy between each of the affected states.” Compact §§ 1.01(a)-(b). The Compact affirms each Signatory State’s right to “use the water allocated to it by [the] Compact in any manner deemed beneficial by that state.” Compact § 2.01. The Compact further affirms that each Signatory State retains that right or power “to regulate *within its boundaries* the appropriation, use, and control of water, or quality of water.” Compact § 2.10(a) (emphasis added).

This is consistent with each Signatory State’s right as a quasi-sovereign respecting “all the earth and air within its domain.” *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992) (when deciding controversies between States regarding the pollution of shared waterways “this Court has applied principles of common law tempered by a respect for the sovereignty of the States.”). A state has “the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” *Tennessee Copper Co.*, 206 U.S. at 237. Petitioner’s interpretation of the Compact would strip Oklahoma of any such power, despite the Compact expressly reserving Oklahoma’s rights as sovereign. Under Petitioner’s implausible interpretation, non-state entities would have the right to invade Oklahoma, demolish its lands, take

its water resources, and strip from Oklahoma’s citizens the right to access and use such water—all without Oklahoma’s consent.⁴ It cannot be inferred from the language of Section 5.05 that the Compact intended to destroy Oklahoma’s sovereign rights.⁵

Section 5.05, by its unambiguous terms, provides only that “[t]he Signatory States shall have equal rights *to the use of*” water in Subbasin 5. Compact § 5.05(b)(1) (emphasis added). The section does not grant the Signatory States unabridged access to the water at any location of its choosing. Instead, Section 5.05 expressly recognizes the Signatory States’ rights and obligations to control water uses *within its own jurisdiction*. See Compact §§ 5.05(b)(2)-(3) and 5.05(c).

⁴ This also raises questions in regard to whether foreign entities would have the authority to claim “eminent domain” over Oklahoma citizens, such as ORWP’s membership, who may own land in the path of any transport line the foreign entity seeks to construct. Such a situation would have profound consequences upon ORWP and its members: if Petitioner’s interpretation is accepted, then thousands of Oklahomans would be subject to governmental control by governments in which they have no right to participate politically.

⁵ Nor can Petitioner infer water quality considerations into this section of the Compact. Specifically, Petitioner argues it must be allowed to invade Oklahoma’s sovereign territory because the salinity of the Red River renders it unusable. See Pet. B. at 6. However, the Compact’s allocation of water in Reach II, Subbasin 5 makes no mention of water quality considerations; rather, this provision of the Compact sought to harmonize the signatory states’ divergent water law schemes and account for Louisiana’s inability to construct reservoirs for water storage when equally allocating the water. 1JA27. As such, Petitioner’s argument is misplaced and irrelevant.

The comments to the Compact affirm such an interpretation. The Compact's drafters noted the divergent water laws of the four Signatory States complicated the allocation of Reach II, as did the fact that Louisiana had no reservoir sites of significant size in which to store water. Although the "[u]stream states never questioned that Louisiana needed and is entitled to water; the problem was to make provision for this flow without releases from upstream storage." IJA25. To resolve these many issues, Reach II was divided into five subbasins. Within the first four upstream subbasins, "flows were divided between the concerned states." IJA25. In the last subbasin, Subbasin 5, "the upstream states agree to cooperate in assuring a reliable flow to Louisiana." IJA25. As the comments evidence, there is no nefarious meaning behind the absence of state boundary delineations; rather, Reach II, Subbasin 5 addressed the complicated factual realities associated with ensuring Louisiana maintained a reliable flow.

Moreover, nothing in Section 5.05 abrogates the overarching premise that Signatory States control water uses within their own jurisdiction. The Comments make clear that the Compact "is not intended to interfere with any state's internal administration of water and/or water rights. . . . Sections 2.01, 2.05, 2.10 and 2.14 each, at least in part, are intended to insure that the state's internal autonomy is not displaced by the Compact." 1JA12.

Nothing in the Compact's plain language or underlying intent allows one State to invade the sovereign territory of another State for the removal of water.

II. EVEN IF THE DORMANT COMMERCE CLAUSE IS APPLICABLE, WHICH IT IS NOT, OKLAHOMA'S WATER STATUTES ARE NARROWLY TAILORED TO PROTECT LEGITIMATE PUBLIC WELFARE INTERESTS.

ORWP concurs with the compelling legal argument made by Respondents that the Dormant Commerce Clause is inapplicable to the water allocated by Reach II, Subbasin 5 of the Compact. However, even if the Dormant Commerce Clause was applicable to this situation—*which it is not*—Oklahoma, as a quasi-sovereign, must have reasonable control over the time, manner, and location of water removed from its territory in order to protect the health, safety, and welfare of its citizens. Oklahoma's Water Statutes afford such reasonable control through legislation that is narrowly tailored to protect legitimate health, safety, and welfare interests.

Oklahoma's Water Statutes set forth different requirements for interstate-interbasin users, for intrastate-interbasin users, and for intrastate-intrabasin users. Because the Statutes treat interstate users differently than intrastate users (whether intrabasin or interbasin) the Statutes are considered invalid unless narrowly tailored to the asserted legitimate local interest. *See Sporhase v.*

Nebraska ex rel. Douglas, 458 U.S. 941, 955 (1982) (“Although Commerce Clause concerns are implicated by the fact that [Nebraska’s groundwater statute] applies to interstate transfers but not to intrastate transfers, ***there are legitimate reasons for the special treatment accorded requests to transport groundwater across state lines.***”) (emphasis added).

A number of factors inform the determination of whether a restriction on commerce imposed by a State’s water regulations is reasonable or unreasonable, including traditional federal deference to state regulation of its water resources, a state’s authority pursuant to its police power to protect the public health and safety, a state’s interest in conserving and preserving finite water resources, and environmental protections. *Id.* at 953-954.

Historically, the federal government deferred to state law regarding water allocation and administration. *See id.* at 956. United States law acknowledges the relevance of state boundaries when allocating finite water resources. *See id.* at 956. As such, States have come to have a “legal expectation” that restrictions on water within their borders are proper in certain circumstances. *See id.* at 956 (“the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts”) (internal citations omitted).

Additionally, Oklahoma holds the surface water within its state in a public trust for the benefit and welfare of its citizens. *See* Okla. Stat. tit. 60, § 60 (2013) (“such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state”). By doing so, Oklahoma recognizes that water is something that cannot be privatized—it is something in which the entire community has an interest. While Oklahoma’s treatment of surface water as a public trust “cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource.” *Sporhase*, 458 U.S. at 956; *see also Hicklin v. Orbeck*, 437 U.S. 518, 533-534 (1978) (“Although the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource.”).

Moreover, Oklahoma has an interest in conserving and preserving the finite water resources within its borders. Although none of these factors, standing alone, insulate Oklahoma from the exercise of federal regulatory authority, these factors do inform the Court’s analysis regarding the reasonableness of Oklahoma’s Water Statutes. *See Sporhase*, 458 U.S. at 953.

A. Oklahoma’s Water Statutes Protect Legitimate Public Health, Safety, and Welfare Interests.

This Court has “long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.” *Sporhase*, 458 U.S. at 956. Implementing regulations for the purpose of protecting the health of a State’s citizens “is at the core of its police power.” *Id.* at 956. This Court recognized that protection against drought is a legitimate public welfare interest for which a State, such as Oklahoma, can exercise its police power. *See id.* at 956 (stating that a “State’s power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens – and not simply the health of its economy – is at the core of its police power.”) Courts “are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage.” *Id.* at 956. Moreover, conservation and preservation of a State’s water resources is an “unquestionably legitimate and highly important” purpose. *Id.* at 954.

Oklahoma articulated the legitimate interests it seeks to protect in its Water Statutes, including protecting the public welfare⁶, protecting basins of origin⁷, protecting domestic uses⁸, maintaining

⁶ Okla. Stat. tit. 82, §§ 105.12(A) and 105.12A(A) (2013).

⁷ Okla. Stat. tit. 82, §§ 105.12(A)(4) and 105.12(B) (2013).

⁸ Okla. Stat. tit. 82, § 105.12(A)(3) (2013).

adequate supplies for present and future demands of the state⁹, and facilitating the conservation and preservation of its public waters¹⁰.

Oklahoma's ability to protect the health and safety of the public becomes particularly critical during times of drought. Currently, drought paralyzes the State—the U.S. Drought Monitor classified all seventy-seven counties in Oklahoma as experiencing drought conditions, with over half the state experiencing extreme drought conditions.¹¹ Approximately ten percent (10%) of Oklahoma suffers from Exceptional Drought, which is the U.S. Drought Monitor's highest drought intensity category.¹² Earlier this year, federal officials declared the drought-stricken State of Oklahoma a disaster area and made low-interest emergency loans available to farmers in all seventy-seven Oklahoma counties.¹³ Forecasts indicate the drought currently gripping Oklahoma will not loosen its hold in the near future.¹⁴ Because of such grim drought predictions, it is imperative that Oklahoma be able

⁹ Okla. Stat. tit. 82, § 105.12A(A) (2013).

¹⁰ Okla. Stat. tit. 82, § 105.12A(A) (2013).

¹¹ See Univ. Neb.-Lincoln, United States Dept. of Agriculture, Nat'l Oceanic and Atmospheric Administration, *Oklahoma Drought Monitor*, (Mar. 21, 2013) (available at http://droughtmonitor.unl.edu/DM_state.htm?OK,S).

¹² See *id.*

¹³ Michael Overall, *Extreme Drought Prompts Statewide Disaster Declaration In Oklahoma*, Tulsa World (Jan. 10, 2013).

¹⁴ William Crum, *Long-Range Forecasts Predict Dry, Hot Summer For Oklahoma*, The Daily Oklahoman (Mar. 12, 2013).

to protect the health, safety, and welfare of its citizens, particularly when dealing with the present and unrelenting drought conditions.

Oklahoma also has legitimate interests in protecting nonconsumptive uses, such as instream flows¹⁵, environmental flows, and recreational uses. In the recently published Oklahoma Comprehensive Water Plan (OCWP), “technical analyses discovered that due to forecasted increases in demands on surface water the magnitude and probability of gaps (shortages) will increase in many basins across the state, greatly increasing the likelihood of periods of low to zero flow.” Oklahoma Water Resources Board, *2012 Oklahoma Comprehensive Water Plan Executive Report*, 12 (Feb. 2012). This is particularly concerning because instream and environmental uses were not accounted for in the OCWP’s water availability calculations. See Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Southeast Watershed Region Report*, 21 (Feb. 2013) (“OCWP demands were not projected for non-consumptive or instream water uses, such as hydroelectric power generation, fish and wildlife, recreation and instream flow maintenance”). As a result, the amount of water reported as surplus water or water available for appropriation is dramatically overstated. To remedy this, Oklahoma is exploring different approaches, such as the

¹⁵ The definition of “instream flow” varies dramatically; however, for purposes of this brief, instream flow refers to the quantity and timing of water flow required in a stream or river to sustain its freshwater ecosystem and the human livelihoods that depend upon it.

instream flow requirements mandated in Texas, to develop its own instream flow standards. It is well within Oklahoma's power as quasi-sovereign to protect nonconsumptive uses.

Accordingly, Oklahoma's Water Statutes are clearly motivated by "unquestionably legitimate and highly important" local interests, thereby satisfying the first prong of this Court's strict scrutiny analysis.

B. Oklahoma's Water Statutes are Narrowly Tailored.

Oklahoma's Water Statutes likewise satisfy the second prong of the strict scrutiny analysis because they are narrowly tailored to achieve the articulated legitimate purposes. Oklahoma's Water Statutes are not total bans on the interstate transport of water; rather, the Statutes place reasonable restrictions on the permanent interbasin transfer of a vital natural resource.¹⁶

For *all* permit requests, the Oklahoma Water Resources Board (herein "OWRB") must determine whether (1) there is unappropriated water available in the amount sought; (2) the applicant has a present or future need to put the water to beneficial use; and (3) the proposed use does not interfere with domestic

¹⁶ Indeed, the Water Statutes challenged by Petitioner expressly contemplate out-of-state transfers. *See* Okla. Stat. tit. 82, §§ 105.12(A)(5), 105.12(D), 105.12(E), 105.12(F), and 105.12A. Rather than prohibiting such transfers, Oklahoma's Water Statutes set forth reasonable requirements to allow the State to responsibly manage a precious natural resource.

or existing appropriative uses. *See* Okla. Stat. tit. 82, § 105.12(A) (2013).

Additional requirements are placed on intrastate- and interstate-interbasin transfers. Specifically, no interbasin transfer—regardless of whether such transfer is for intrastate or interstate use—can “interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein.” Okla. Stat. tit. 82, § 105.12(A)(4) (2013). Moreover, any pending application for use of water within the basin of origin “shall first be considered in order to assure that applicants within the stream system shall have all of the water required to adequately supply their beneficial uses.” Okla. Stat. tit. 82, § 105.12(B)(1) (2013). Normally, applications are processed in the order in which they are received¹⁷; however, this leap-frog provision allows intrabasin applications to be considered before interbasin applications in order to protect the consumptive and nonconsumptive needs of those within the basin. The OWRB is also statutorily required to “review the needs within the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.” Okla. Stat. tit. 82, § 105.12(B)(2) (2013).

When viewed in their entirety, Oklahoma’s Water Statutes do not discriminate based upon State citizenship, but rather create a paradigm where the applicant must make a greater showing to the

¹⁷ *See* Okla. Stat. tit. 82, § 105.1A (2013) (“priority in time shall give the better right.”).

OWRB, depending upon how far the applicant is located from the proposed withdrawal, whether outside the basin of origin or outside the State. Oklahoma places strict restrictions upon its own citizens seeking to transport water outside the basin of origin. In light of such legitimate restrictions, which are applied both within and without the state, Oklahoma “is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.” *Sporhase*, 458 U.S. at 955-956. To allow an exemption for interstate transfers when a state imposes strict restrictions upon its own citizens “would be inconsistent with the ideal of evenhandedness in regulation.” *Id.* at 956.

III. SOCIAL CONSIDERATIONS AND EQUITABLE PRINCIPLES SUPPORT THE TENTH CIRCUIT’S HOLDING.

This Court’s decision is of extreme importance to ORWP and its members. Petitioner’s attempted “water grab” raises a number of policy issues and social considerations, which highlight the unique characteristics of water. Unlike normal commodities, in which a transfer affects the buyer and the seller, water transfers affect a host of “third parties,” including other water rights holders, agriculture, the environment, rural interests, urban interests, ethnic communities, Indian tribes, and taxpayers.¹⁸

¹⁸ Committee on Western Water Management, Natural Research Council, *Water Transfers in the West: Efficiency, Equity, and the Environment*, 38 (National Academy Press) (1992).

Historically, Southeast Oklahoma was an impoverished region of the State with a large percentage of its citizens falling below the poverty line.¹⁹ Recently, however, tourism and recreation opportunities supported by access to water provide many citizens in the region with steady, well-paying jobs. Those jobs place food on the table, pay mortgages and utility bills, buy school shoes and supplies for their children, and help launch the next generation of educated and productive Oklahomans.

Additionally, water related tourism and recreation provides much needed tax revenues to counties and communities. For example, lodging taxes in McCurtain County, Oklahoma, have nearly doubled since 2006, providing roughly \$400,000 dollars to the County's coffers in 2012.²⁰ Despite the Nation's dismal economic climate, McCurtain County's exponential growth mirrors the growth of many Southeast Oklahoma counties—all made

¹⁹ According to the United States Census Bureau Small Area Income and Poverty Estimates, an average of twenty-two percent (22%) of persons in Atoka, Bryan, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, McCurtain, Pittsburg, Pontotoc, and Pushmataha Counties fell below the poverty line 2009, down from twenty-eight percent (28%) in 1989. See United States Census Bureau, *Small Area Income and Poverty Estimates*, Oklahoma State and County Data (Feb. 2013) (available at <http://www.census.gov/did/www/saipe/data/interactive/#view=StateAndCounty>).

²⁰ Documentation is on record with ORWP and can be provided at the Court's request.

possible by access to the very water Petitioner improperly seeks to remove.²¹

The removal of such vast quantities of water would halt any further economic development in Southeast Oklahoma.²² Yet, Petitioner makes no effort to hide the fact that it seeks Oklahoma's water in order to further *its own* economic development. *See* Pet. B. at 13. Allowing a foreign entity to control water in Oklahoma would be, in practical effect, a judicial determination that the economic development of Texas is more important than the economic development of Oklahoma.²³ Moreover,

²¹ While the counties and citizens in Southeast Oklahoma certainly “use” the water, the uses are largely nonconsumptive. Currently, Oklahoma law does not account for nonconsumptive beneficial uses, which results in an extraordinarily low reporting of the quantity of water “used” in Oklahoma. *See* Pet. B. at 14. However, one of the OWRB's recommendations in its 2012 OCWP was to develop and implement a system for protecting and accounting for such nonconsumptive—yet immensely important—uses.

²² ORWP vehemently objects to Petitioner's assertion that removing tremendous quantities of surface water from Oklahoma, and particularly from Southeast Oklahoma, will have “medium/low Third Party adverse impacts.” 2JA35. As established above, Southeast Oklahoma's budding economy revolves wholly around water—specifically water in its natural place.

²³ ORWP supports the fundamental purpose of the Commerce Clause and understands the prohibition on restrictions motivated purely by economic protectionism. However, ORWP does *not* believe the purpose of the Commerce Clause was to allow one state to wield the prohibition on economic protectionism as a weapon against another state in order to sate its own economically motivated hunger.

such a determination would place one hundred percent (100%) of the burden on Oklahoma and its citizens, while Petitioner and Texas would reap one hundred percent (100%) of the benefit.²⁴

Petitioner attempts to justify its water grab by pointing to “unused water” flowing out of Oklahoma and into the Red River. *See* Pet. B. at 14. However, as stated, *supra*, the amount of water classified as “surplus” or “available” water by the Oklahoma Comprehensive Water Plan is wildly overstated, since it does not account for the many nonconsumptive uses of Oklahoma’s water resources. *See supra* p. 13 and note 22. Moreover, as Congress made clear when prohibiting future out of basin transfers from the Great Lakes, which comprise approximately twenty percent (20%) of the world’s freshwater supply, the quantity of water in a given area is not a dispositive factor. *See* 42 U.S.C. § 1962d-20 (2013) (finding the Great Lakes provide water supply, clean energy, transportation, and recreational uses for United States and Canadian citizens and declaring that “any new diversions of Great Lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes States and Canadian provinces”).

²⁴ Assuming the Compact allows one state to remove water from within the boundaries of another state—which, as explained *supra*, it does not—Petitioner should be required to obtain as much of its “equal share” from within its own borders before raiding the water resources of Oklahoma and burdening Oklahoma’s citizens.

Implicit in Petitioner’s quantity-based argument is a presumptuous assumption that it knows the best “use” for Oklahoma’s finite natural resource. However, Oklahoma’s public policy is to “conserve and utilize the waters of the state, and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses,”²⁵ while it has been the policy of some North Texas municipalities to allow the unabashed waste of limited water supplies. Indeed, in 2011—the driest year in recorded Texas history—outdoor watering comprised forty-five percent (45%) of the City of Fort Worth’s total water usage. See Texas Water Development Board, Technical Note 12-01, *The Grass Is Always Greener...Outdoor Residential Water Use In Texas*, 28 (Nov. 2012). During the same period, the City of Dallas dedicated forty-seven percent (47%)—**nearly half**—of its total water usage to outdoor watering. See *id.* Now, as a result of its own wasteful use of a finite water supply, Petitioner seeks to similarly waste Oklahoma’s valuable water resources, which Oklahoma has so diligently sought to protect.

²⁵ Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Instream Flow Issues and Recommendations*, 4-5 (Feb. 2011) (internal citations omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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