

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 OF *AMICUS CURIAE* NORTH TEXAS
COMMISSION IN SUPPORT OF PETITIONER**

MICHAEL J. BOOTH
Counsel of Record
TREY NESLONEY
BOOTH, AHRENS &
WERKENTHIN, P.C.
515 Congress Avenue
Suite 1515
Austin, TX 78701
(512) 472-3263
lawfirm@baw.com

*Counsel for Amicus Curiae
North Texas Commission*

February 26, 2013

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
I. TEXAS AND THE METROPLEX NEED OKLAHOMA WATER	5
II. TEXAS AND THE METROPLEX ARE NOT WASTING WATER.....	7
A. Reuse.....	7
B. Conservation.....	8
III. REDUCTION OF POTENTIAL ALTER- NATIVE WATER SUPPLIES FOR TEXAS.....	9
A. Fastrill Reservoir.....	9
B. Waters Bluff Reservoir.....	10
C. Other Threatened Water Supply Options.....	11
IV. THE RED RIVER COMPACT GRANTS TEXAS EQUAL RIGHTS TO REACH II, SUBBASIN 5.....	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
<i>City of Dallas, Tex. v. Hall</i> , 562 F.3d 712 (5th Cir. 2009).....	9, 10
<i>City of Dallas, Tex. v. Hall</i> , Nos. 3:07-CV- 0060-P, 3:07-CV-0213-P, 2008 WL 2622809, at *11 (N.D. Tex. 2008).....	9, 10
<i>Sabine River Auth. v. U.S. Dep’t of Interior</i> , 745 F.Supp. 388 (E.D. Tex. 1990).....	10, 11
<i>Sabine River Auth. v. U.S. Dep’t of the Interior</i> , 951 F.2d 669 (5th Cir. 1992).....	10
<i>Tarrant Reg’l Water Dist. v. Herrmann</i> , 656 F.3d 1245 (10th Cir.2011).....	13, 14
<i>Texas v. New Mexico</i> , 482 U.S. 124, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987).....	13
 STATUTES	
16 U.S.C. § 668dd(a)(3).	10
Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980).....	4, 13, 14
§ 1.01(b).....	13
§ 2.01	13
§ 5.03(b).....	14
§ 5.05	13, 14
§ 5.05(b)(1).....	13
§ 5.05(b)(2).....	13
§ 5.05(b)(3).....	13, 14, 15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
Region C Water Planning Group, <i>2011 Region C Water Plan</i> (2011), http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf	3, 6, 7, 8, 9, 11, 12
Region C Water Planning Group, <i>Errata 2011 Region C Plan</i> , 4 of 13 (2011), www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWP_Errata3.pdf	6
Texas Water Development Board, <i>Conserving Water Indoors</i> (Feb. 2011), http://www.twdb.texas.gov/publications/brochures/conservation/doc/ConservingWaterIndoors.pdf	8
Texas Water Development Board, <i>Water for Texas: 2012 State Water Plan</i> (2012).....	2, 5, 6, 7, 8

**BRIEF OF *AMICUS CURIAE* NORTH TEXAS
COMMISSION IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICUS CURIAE*

The North Texas Commission (“NTC”) is a 501(c)(6) non-profit corporation that is a coalition of businesses, cities, counties, chambers of commerce, economic development entities, and higher education institutions in the North Texas Region.¹ The NTC was created on July 29, 1971, by a group of civic leaders from across North Texas who chartered the NTC as a non-profit, membership-supported organization that would work to promote the North Texas Region to maximize the visibility of the area as an ideal place to live and do business. Throughout its history, the NTC has worked to address regional problems and opportunities while focusing on ways to unify the North Texas Region.

Today the NTC represents the entire 12-county Dallas-Fort Worth-Arlington Metropolitan Statistical Area. The NTC works to ensure a model business environment and quality of life for the more than six million citizens that make up the Dallas-Fort Worth Metroplex (“Metroplex”). NTC is the only organization in North Texas that brings together the leadership of the public, private, non-profit, and higher education sectors to address regional concerns.

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Consent to the filing of *amicus curiae* briefs, in support of either party or of neither party, was filed with the court by the Petitioner on February 19, 2013.

One of the most pressing regional concerns for the future of the North Texas area is water supply. Based on estimates of future supply and demand, the North Texas area will not have enough water to meet the needs of its people, its businesses, and other enterprises without obtaining additional water sources in the near future. Extensive economic losses are likely to occur if the area's water supply needs cannot be met.

To address water supply issues, the State of Texas is divided into sixteen regional water-planning groups that develop regional water plans. After approval of the Texas Water Development Board (the State agency in charge of water planning), the plans are incorporated into the State Water Plan. The Metroplex area is included in Region C. The Texas 2012 State Water Plan states the following with regard to future population and water demand increases in Region C:

Approximately 26 percent of Texas' population resided in Region C in the year 2010. By 2060, the population of the region is projected to grow 96 percent to 13,045,592. Projections indicate that by 2060 Region C water demands will increase 86 percent.

Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 46 (2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/02.pdf.

The 2011 Region C Water Plan identified water from Oklahoma as a recommended strategy to help meet this increase in population and water demand:

Raw water from Oklahoma would cost about \$2.09 per thousand gallons and would have

relatively low environmental impacts because of the use of existing sources. Water from Oklahoma is a recommended strategy for Irving (25,000 acre-feet per year), North Texas Municipal Water District (50,000 acre-feet per year), the Tarrant Regional Water District (50,000 acre-feet per year) and the Upper Trinity Regional Water District (15,000 acre-feet per year), with a capital cost of \$941,080,000.

Region C Water Planning Group, *2011 Region C Water Plan*, at 4D.14 (2011), http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf (“Region C Plan”). Obtaining water from Oklahoma has also been a recommended strategy in the 2001 and 2006 Region C Water Plans. *Id.* at 4D.13.

As the North Texas area continues to experience rapid growth and declining water supplies, obtaining water from other sources is crucial to ensure public health, safety, welfare, and economic development in the area. The NTC is charged with working to improve the business environment and quality of life for the Metroplex area; therefore, NTC has an interest in this case as its outcome directly affects NTC’s current and future efforts.

SUMMARY OF ARGUMENT

It has been well established that the North Texas area is going to experience increased growth and water demand over the next 50 years. Existing Region C water supplies cannot address these increases. The North Texas area has already implemented significant water conservation and reuse practices to improve water use efficiency. However,

the future water demands of the area cannot be addressed through conservation alone, and must be satisfied by acquiring new water supplies, preferably from areas experiencing a water surplus, like water from Oklahoma.

The Region C water supply problem has been compounded by recent decisions from the Fifth Circuit Court of Appeals that have thwarted previous attempts to increase the water supply in the North Texas area. Efforts to increase water supply through development of Fastrill and Waters Bluff Reservoir were prevented by these recent holdings and amplify the importance of the decision in this case.

The holding by the Tenth Circuit in the underlying case not only obstructs another effort by the North Texas area to obtain additional water supply, but it also misinterprets the law. The Tenth Circuit erred because the plain language of the Red River Compact explicitly grants Texas its equal right to the water within Reach II, Subbasin 5 of the Red River Basin, clearly providing Tarrant Regional Water District (“TRWD”) the right to water from the Kiamichi River in Oklahoma. For these reasons, we support the arguments of the petitioner in this case and contend that the Tenth Circuit’s decision should be reversed.

ARGUMENT

Respondents, particularly in their Supplemental Brief, suggest that TRWD, its main customer Fort Worth, and by implication the rest of the Metroplex including other amici curie (North Texas Municipal Water District, Upper Trinity Regional Water District, and City of Irving), have plenty of other options for additional water supply that they should utilize before pursuing water from Oklahoma. Respondents

state that “[t]he Tenth Circuit’s decision hardly consigns Fort Worth to drought or prevents petitioner from pursuing the many alternative sources it seeks.” Resp. Supp. Br. 6. Indeed, Respondents suggest that TRWD would be unable to obtain a permit from the Oklahoma Water Resources Board (“OWRB”) because of failure “to establish ‘a present or future need for the water’ in light of ‘all stream water sources’ and groundwater potentially available to petitioner.” *Id.* In light of the uncertainty of the availability of additional supplies discussed below and the quantity of water needed for the Metroplex and other parts of the state, the ability to obtain water from Oklahoma is a very important component of Texas’ State and Regional Water plans.

I. TEXAS AND THE METROPLEX NEED OKLAHOMA WATER

Texas has been developing its water resources through State Water Plans since the early sixties. Project planning has evolved over time from considering reservoir construction and massive multistate water importation projects to the 2012 State Water Plan that includes significant commitments towards water conservation, water reuse, and water desalination to supply water for municipal, agricultural, and industrial needs while providing substantial protection for the environment.

Today, Texas has developed most of its available reservoir sites and currently has little unappropriated water available for new use, making water efficiency essential. See Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 26-27 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/01.pdf. If sufficient additional

supplies are not developed through efficiency improvements (e.g. conservation and reuse) and new water supplies, the negative impact to the Region C area economy will be extensive. Models show that Region C businesses and workers could lose approximately \$5,176,000,000 in income in 2020, with that total increasing to an estimated \$49,721,000,000 by 2060. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 184 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/06.pdf. The State Water Plan states that TRWD, Dallas, and Fort Worth are the wholesale water suppliers with the largest 2060 water needs. *Id.* at 178.

Obtaining water from Oklahoma has been a recommended strategy for North Texas Municipal Water District, TRWD, and Upper Trinity Regional Water District since the 2001 State Water Plan. The City of Dallas and the City of Irving have evaluated obtaining Oklahoma water for some time as well. Oklahoma water is considered an alternative for Dallas and both an alternative and recommended water strategy for Irving in the 2012 State Water Plan. *See* Region C Plan at 4D13-14. The elimination of the Fastrill Reservoir site, *supra*, from the City of Dallas future water supply is likely to push water from Oklahoma from an alternative water strategy to a recommended strategy in the next State water planning cycle. *See* Region C Plan at 4E.8; Region C Water Planning Group, *Errata 2011 Region C Plan*, 4 of 13 (2011), www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWP_Errata3.pdf. Obtaining water from Oklahoma not only is cost effective, but it also would have a relatively low environmental impact, considering that new reservoir construction is not needed. *See* Region C Plan at 4D.14.

II. TEXAS AND THE METROPLEX ARE NOT WASTING WATER

The Metroplex has very aggressive conservation and reuse programs that allow utilization of as much water as possible from its existing supplies. These programs maximize the use potential of the Metroplex's existing water supplies.

A. Reuse

Reuse of water generally refers to the use of water that has already been beneficially used and is then treated at a wastewater reclamation plant. Direct reuse occurs when the water is taken directly from the plant and then reintroduced to a distribution system for use at a golf course or industrial site. Alternatively, water leaving a wastewater plant that is reused after being discharged into a watercourse is called indirect reuse. Many Metroplex water suppliers have implemented large-scale indirect reuse projects including TRWD, Trinity River Authority, and North Texas Municipal Water District. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 170 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/05.pdf; Region C Plan at 4B.7-8. TRWD was the first wholesale water provider to use constructed wetlands as a biological filter. Treated wastewater is discharged by TRWD into wetlands for subsequent storage in its lakes for reuse through its existing and to-be-expanded conveyance system. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 196 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/07.pdf; Region C Plan at 3.7-3.8, 4B.7.

Other reuse projects will be developed or expanded by Metroplex water utilities going forward; the State Water Plan states the existing supply of water from water reuse is a baseline of 182,686 acre-feet for 2010 and projects a total reuse of 307,129 acre-feet in 2060 for the Region C planning area. See Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 171 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/05.pdf. When both proposed and existing projects are totaled, Region C is expected to reuse 636,000 acre-feet of water per year by 2060. Region C Plan at 4B.9.

B. Conservation

Water conservation focuses on efficiency of water use and reducing water demands. Municipal water conservation includes such practices as the installation of low-flow showerheads and toilets, water saving appliances (e.g. dishwashers, washing machines), and educating water users about their daily use of water resources. See Texas Water Development Board, *Conserving Water Indoors* (Feb. 2011), <http://www.twdb.texas.gov/publications/brochures/conservation/doc/ConservingWaterIndoors.pdf>; Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 190 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/07.pdf.

In the 2012 State Water Plan, Region C is expected to pursue strategies that will increase its water conservation savings from the 2010 baseline of 46,780 acre-feet to 290,709 acre-feet by 2060. *Id.* In fact, Region C (when accounting for conservation and reuse) is projected to meet 36% of its water demand without conservation. Region C Plan at ES.8. In other words, with about 25% of the State's popula-

tion, Region C is expected to meet 40% of its water needs with the implementation of municipal conservation and reuse programs. *Id.* Significantly, 23% of Region C's 2060-projected water supply will be from conservation and reuse versus 16% from new water supplies including reservoirs. *Id.* at ES.13.

III. REDUCTION OF POTENTIAL ALTERNATIVE WATER SUPPLIES FOR TEXAS

The State of Texas and the Region C planning area options for utilization of the few remaining viable reservoir sites have been reduced by federal action and may be reduced even more. Efforts to increase the State's water supply through development of these reservoir sites were prevented by federal court action.

A. Fastrill Reservoir

In *City of Dallas, Tex. v. Hall*, 562 F.3d 712 (5th Cir. 2009), the Fifth Circuit upheld the United States Fish and Wildlife Service's ("FWS") acceptance of a one-acre conservation easement within a newly designated part of the National Wildlife Refuge System ("Refuge System") that overlapped with the Fastrill Reservoir site. The Fastrill Reservoir site along the Upper Neches River had been identified in 1961 as a viable reservoir site by the state, was included in the State Water Plan since 1984, and was even designated a unique reservoir site in 2005 by the Texas Legislature. *Id.* at 715. The FWS became interested in the area in 1985 after the Fastrill Reservoir site was included in the 1984 State Water Plan. *Id.* The FWS evaluated the area and considered it a "Priority 1" preservation site in the Bottomland Hardwood Preservation Program. *City of*

Dallas, Tex. v. Hall, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2008 WL 2622809, at *11 (N.D. Tex. 2008). However, FWS did not conclude its studies until more than fifteen years later when it became apparent that the Fastrill Reservoir project was moving forward. *Hall*, 562 F.3d at 715-16. Acceptance of the conservation easement in August 2006 blocked reservoir construction without an Act of Congress “unless (1) the Department of the Interior and the Migratory Bird Conservation Commission determine that such lands are no longer needed for wildlife refuge purposes and the Department is paid the fair market value of the land, (2) the Department acquires other lands by exchange, or (3) such land is transferred pursuant to the terms of a cooperative agreement with a state or local government, by which agreement the land originally became part of the refuge system.” *Sabine River Auth. v. U.S. Dep’t of Interior*, 745 F.Supp. 388, 396 n.6 (E.D. Tex. 1990) (citing 16 U.S.C. § 668dd(a)(3)). This makes resurrection of the Fastrill Reservoir project extremely unlikely.

B. Waters Bluff Reservoir

Fastrill was not the first reservoir site blocked by a conservation easement accepted into the Refuge System. Earlier, the Waters Bluff reservoir site was blocked when, in *Sabine River Auth. v. U.S. Dep’t of the Interior*, 951 F.2d 669 (5th Cir. 1992), the Fifth Circuit upheld FWS’s acceptance of a 3,800 acre conservation easement into the National Wildlife Refuge system within the reservoir site. The Waters Bluff reservoir had been intended to supply over 300,000 acre-feet of water per year to Sabine River Authority’s customers including the City of Dallas. *Id.* at 673. The federal district court in the Waters Bluff case also discussed the Bottomland Hardwood

Preservation Program that was used by FWS to support the decision to include lands in the Refuge System and to block the Waters Bluff reservoir and later the Fastrill reservoir. *See Sabine River Auth. v. U.S. Dep't of Interior*, 745 F.Supp. 388, 403 (E.D. Tex. 1990) (“the purpose of this program is to identify and seek methods for preserving as much of the remaining bottomlands habitats of east Texas as possible”).

C. Other Threatened Water Supply Options

The Bottomland Hardwood Preservation Program has made the future of other potential Texas reservoir projects unclear, including Bois D' Arc Creek and Marvin Nichols Reservoirs that are also expected to supply water to the Region C area, along with other parts of the State. These project sites are located on land that is typically appealing to FWS's preservation efforts set out in the Bottomland Hardwood Program.

Bois D' Arc Creek Reservoir is a proposed reservoir on Bois D' Arc Creek in the Red River Basin, which would provide up to 123,000 acre-feet per year. *See* Region C Plan at 4E.24-25. The Bois D' Arc Creek Reservoir is a recommended strategy for the North Texas Municipal Water District, but “[t]he 1984 Fish and Wildlife Service *Texas Bottomland Hardwood Preservation Program* report classified the Bois d'Arc Creek bottoms in the reservoir as Priority 4 bottomland hardwoods, which are ‘moderate quality bottomlands with minor waterfowl benefits.’” *Id.* at 4D.14.

The development of Marvin Nichols Reservoir was a recommended strategy for Region C in the 2001 and 2006 Region C Water Plans, with an estimated yield

of 612,300 acre-feet per year. *Id.* at 4D.8. It continues to be a recommended strategy in the 2012 State Water Plan for TRWD, North Texas Municipal Water District, and the Upper Trinity Regional Water District and an alternative source of water supply for Dallas Water Utilities and the City of Irving. *Id.* at 4E.2. The project would provide a large source of additional water for the Metroplex at a relatively low cost. *Id.* However, “[t]he 1984 U.S. Fish and Wildlife Service *Bottomland Hardwood Preservation Program* classified some of the land that would be flooded as a Priority 1 bottomland hardwood site, which is ‘excellent quality bottomlands of high value to key waterfowl species.’” *Id.* at 4D.8. This classification as a Priority 1 site is the same classification given to Fastrill and Waters Bluff Reservoir, and its abundant water resource potential could be denied for North Texas use.

The threatened nature of these projects has rendered the access to Oklahoma water supplies ever-more essential to ensuring the welfare of projected economic and population growth in North Texas. With the Metroplex’s future water demand greatly exceeding improvements in water efficiency, despite extensive conservation and reuse efforts, some of this demand can only be met by utilizing additional supplies. It is imperative that petitioner’s right to Oklahoma water be upheld and the Tenth Circuit’s judgment reversed.

IV. THE RED RIVER COMPACT GRANTS TEXAS EQUAL RIGHTS TO REACH II, SUBBASIN 5

The Red River Compact was entered into by Arkansas, Louisiana, Oklahoma, and Texas in 1978 and

was ratified by Congress in 1980. *See* Pub. L. No. 96-564, 94 Stat. 3305 (1980). The Compact provides “an equitable apportionment among the Signatory States of the water of the Red River and its tributaries,” and states that “[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state.” *Id.* §§ 1.01(b), 2.01. Section 5.05 of the Compact, which defines and apportions the rights in Reach II, Subbasin 5, states as follows:

The 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.

§ 5.05(b)(1), 94 Stat. 3311. Sections 5.05(b)(2) and (b)(3) further restrict upstream diversions during times of lower flow. *Id.* § 5.05(b)(2), (3).

An interstate compact, like the Red River Compact, is a legal document “that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). The Tenth Circuit erred by not construing and applying the Red River Compact in accordance with its terms.

The Tenth Circuit Court of Appeals held that Section 5.05 of the Red River Compact “does not say that a Texas user is entitled to take Texas’s share of th[e] water from a tributary located in Oklahoma.” *Tarrant Reg’l Water Dist. v. Herrmann*, 656 F.3d

1222, 1245 (10th Cir.2011). This reading ignores the straight-forward language of the Compact. The Compact explicitly states that Texas shall have “equal rights” to water in Reach II, Subbasin 5, and defined certain waters in that subbasin as being, in part, within Oklahoma. By this construction, the Compact clearly allows the petitioner to divert part of Texas’ share of water from within Oklahoma, or anywhere else within Reach II, Subbasin 5. If the intent of the drafters of the Compact was to only allow each Signatory State to ultimately divert water within their borders, they would not have given each State rights to water in locations that are clearly not accessible from that State’s boundary. The United States correctly observes that other sections of the Compact do restrict water use in certain subbasins as only being “within their respective states.” U.S. Br. 13 (citing § 5.03(b), 94 Stat. 3310).

The Tenth Circuit Court incorrectly focuses on the language of Section 5.05(b)(3) as justification for its interpretation. *Herrmann*, 656 F.3d at 1243-45. Section 5.05(b)(3) provides that when the flow is below 1,000 cfs, the upstream States “shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas—Louisiana state boundary.” § 5.05(b)(3), 94 Stat. 3311. This section simply requires the states to allow a certain amount of water to reach the Red River from the tributaries during times of low flow. The Tenth Circuit interprets this section as recognizing each state’s authority to regulate water use “within its boundaries.” *Herrmann*, 656 F.3d at 1243. This section actually

recognizes each state's authority to regulate water use "within its jurisdiction."

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

MICHAEL J. BOOTH

Counsel of Record

TREY NESLONEY

BOOTH, AHRENS &

WERKENTHIN, P.C.

515 Congress Avenue

Suite 1515

Austin, TX 78701

(512) 472-3263

lawfirm@baw.com

Counsel for Amicus Curiae

North Texas Commission

February 26, 2013