No. 11-889

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,
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 OLEN PAUL MATTHEWS AND MICHAEL PEASE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Olen Paul Matthews, Ph.D., J.D., is a Professor of Geography at the University of New Mexico. He has taught and written about water management for many years. His research expertise includes trans-boundary natural resource conflicts. Michael Pease, Ph.D., is an Assistant Professor of Geography at Central Washington University. He also teaches classes in water management. His research expertise includes a broad spectrum of water management issues. Together they are the co-authors of *The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries*, 46 Natural Resources Journal 601 (2006). Both have an academic interest in this case but no other interest.[1]

SUMMARY OF THE ARGUMENT

The Commerce Clause, U.S. Const., art. I, § 8, cl 3, creates a "federal free trade unit… protecting interstate movement of goods against local burdens and repressions." *H. P. Hood v. DuMond*, 336 U.S. 525, 538-39 (1949). State statutes that discriminate against out-of-state interests thus impair free trade. The Oklahoma statutes in question are clearly discriminatory, and would violate the Commerce Clause absent congressional consent. Such consent must be "expressly stated," *Sporhase v. Nebraska*, 458 U.S. 941, 959-60 (1982), "unambiguous," *Maine v. Taylor*,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their counsel or the Fort Worth (TX) Chamber of Commerce made any monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

477 U.S. 131, 139 (1986), and "unmistakably clear," and must also reflect that Congress "affirmatively contemplate[d] otherwise invalid state legislation," *South-Central Timber Devel., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

The Red River Compact's boilerplate provision deferring to state water law does not pass this test, and was clearly rejected as such in *Sporhase*. The compact language simply recognizes state jurisdiction over water rights. Congress often defers to state law on water rights while retaining broad power over commerce and navigation. In addition, the compact clearly grants "equal rights" to the "runoff" from a specific segment of the river. "Equal rights" means the compact intends that water be shared in some way. "Runoff" is defined by an entire watershed or subbasin, not just the flows originating on one side of it. Because the Texas boundary at issue in this case ends on the south bank of the Red River, the only way Petitioner can obtain its "share" of "runoff" is to acquire a water right within Oklahoma's boundaries under Oklahoma law. Oklahoma's discriminatory statutes prevent Texas entities like Petitioner from obtaining rights to compact waters explicitly allocated to them.

We first provide an historical perspective on the transboundary conflicts that plague water management. We then place the controversy in this case in that historical context. We finally argue that the Tenth Circuit's decision upholding Oklahoma's discriminatory statutes fails to follow this Court's precedents and would substantially upset the balance between federal and state law, creating havoc for water managers.

ARGUMENT

Water management in this country has a long and complex history. The discussion below covers three aspects of water policy evolution in order to put the current conflict in context. First, we explain that States and the federal government share jurisdiction over water resources, creating a complex mix that often leads to conflicts. Language in 37 statutes and interstate compacts deferring to state water allocation laws proves this point. See *Sporhase*, 458 U.S. at 959. These statutes and compacts grant States a limited role within an overall management structure. Second, when jurisdictional conflicts arise between States three methods exist for their resolution—equitable apportionment, interstate compacts, and congressional apportionment. This case involves a compact, but the other methods help explain the role compacts play. Third, resolution of these conflicts takes place within the constraints imposed by the Commerce Clause, U.S. Const., art. I, § 8, cl 3. Since *Sporhase,* jurisdictional conflicts must address those concerns.

I. SHARED FEDERAL AND STATE JURISDICTION OVER WATER

Federal water management initiatives before 1900 were limited in scope. Clearly the federal government had jurisdiction over interstate commerce, including navigation. *Gibbons v. Ogden*, 22 U.S. 1 (1824). During this country's first century many goods were shipped by water, and navigation was clearly commerce. Because commerce is a constitutionally designated power, federal laws on interstate commerce were "supreme" over conflicting state laws.

Federal expenditures on navigation improvements were common in the early 1800s and became a regular part of the federal budget especially after 1870. For example, the Rivers and Harbors Act of 1879, 21 Stat. 37, created the Mississippi River Commission to improve navigation on the river, and the Rivers and Harbors Act of 1899, 33 Stat. 403, prevented excavations or filling that would affect the navigable capacity of navigable waters and also prohibited the discharge of "refuse" into navigable waters without a permit.

Even though navigation was clearly a matter of federal regulation during the 1800s, federal authority to build flood control levees and reservoirs, drain wetlands, or fund reclamation projects was questioned. During this period indirect means were used to accomplish these purposes. See generally Armstrong, Ellis L., Michael C. Robinson, Suellen M. Hoy, *History of Public Works in the United States 1776-1976* (Amer. Public Works Assoc. 1976). Levees and reservoirs were built to improve navigation, but they also prevented floods. Since States could not afford to drain swamps and wetlands, the federal government granted them public lands they could sell to finance such projects. See, *e.g.*, the Swamp Land Acts of 1849 (9 Stat. 352), 1850 (9 Stat. 520), and 1860 (12 Stat 3). By the end of the 19th century federal power had been extended to tributaries of navigable waters and other sources affecting a water body's "navigable capacity." *United States. v. Rio Grande Dam & Irrig Co*. 174 U.S. 690 (1899). As western States developed laws allowing streams and rivers to be depleted (or even dewatered) for irrigation, state "irrigation" could conflict with federal "navigation".

After 1900 questions concerning federal authority to finance, regulate, or require permits for water projects were largely dispelled. The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, the General Dam Act of 1906, 34 Stat. 386, the Federal Water Power Act of 1920, 41 Stat. 1063, the 1928 Flood Control Act, 45 Stat. 534, the Federal Power Act of 1935, 49 Stat. 847, 16 USC §§ 791a *et seq*., and the Flood Control Act of 1936, 49 Stat. 1570, are examples of Congressional action designed to control different aspects of water use. More recently, federal environmental statutes such as the Clean Water Act (33 U.S.C. 1251 *et seq*.), the Safe Drinking Water Act (42 U.S.C. 300f *et seq*.), and the Endangered Species Act (16 U.S.C. 1531 *et seq*.), influence water management.

As those statutes illustrate, federal power over water is substantial. Nonetheless, States also have powers that they exercise concurrently with the federal government. States generally define water rights. See Beck, Robert E. and Amy K. Kelly, *The Legal Regimes*, § 4.02, in Water and Water Rights (Lexis Nexis 2012). But State-defined water rights are still subject to the superior federal power over commerce and navigation. (*Id*. §4.03) Even though States defined water rights in the 1800s, most water management was conducted at the local level, as municipalities, local districts and the private sector supplied water, built levees, drained swamps, built canals, and removed waste water. When projects were too expensive for local governments or the private sector, States financed them. This was sometimes successful, but not always. See Armstrong *et al*., *supra* at 26; Wallis, John Joseph, *Constitutions, Corporations, And Corruption: American States And Constitutional Change, 1842 – 1852,* 65 J. Econ. Hist. 211 (2005).

In the arid West the demand for irrigation was substantial, but frontier States could not afford such projects, and the few that tried to mount them failed. See Pisani, D.J., *To Reclaim a Divided West: Water, Law, and Public Policy*, *1848-1902*, at 487 (U. of New Mexico Press 1992). State lobbying resulted in the passage of the Carey Act, 43 Stat. 2610 (1894), under which federal lands were donated to States to help defray costs. When this failed western States became advocates of a federal reclamation law. The result was the Reclamation Act of 1902, Pub. L. 57-161, 32 Stat. 388.

By the time the Reclamation Act was passed western States had evolved a system for establishing water rights that was substantially different from that in the East.[2] The western Appropriation Doctrine was originally recognized in California, see *Irwin v. Phillips,* 5 Cal. 140 (1855), and later adopted by other western States. It severed water rights from land ownership, allowed water to be diverted and used in another watershed, and allowed water rights to be sold.

Although the doctrine was applied unevenly in the West, it ultimately gained broad acceptance and was well established by 1902. Many States adopted constitutional or statutory provisions recognizing it. For example, Article 14 of the California Constitution (adopted in 1879) directed that water be regulated and controlled by the State. The Colorado Constitu-

[2] The riparian rights doctrine used in the East evolved in common law to resolve disputes between riparian landowners who share common rights in a river. Riparian rights were originally used in the West as well, but they were incompatible with irrigation needs and the Reclamation Service was opposed to them.

tion, at Article 16, § 5 (1876), declared unappropriated water to be the "property of the public." These provisions significantly departed from the practices in the East, where water rights resided in riparian land owners. Not until the Wyoming constitution and water code (enacted in 1890) did comprehensive water laws emerge. Beck, Robert E. and Owen L. Anderson, Introduction and Background, Ch. 11, § 11.04(b), in *Water and Water Rights supra*. In the Wyoming constitution the State claimed ownership of all the water in the State. Wyoming Const., art 8, § 1. Other state codes evolved in time. Although States claimed water "ownership" for themselves or "the public," they created rules for establishing private rights. These "use" (usufructory) rights are "property" and can be sold under defined circumstances, essentially making water a commodity.

The variations in States' approaches and failures to systematically adjudicate existing rights made it difficult to implement the Reclamation Act. Fear that speculators would claim water rights in areas prior to a federal project led to a push for reform. Parts of Wyoming's comprehensive approach were adopted in some western States. Others adopted the Bien Code System, a model code developed around 1903 by the Reclamation Service because existing state laws were unclear and many water rights went unadjudicated. See Hutchins, W.A., J.P. DeBraal and H.H. Ellis, Water Rights Laws in the Nineteen Western States, at 458-59 (U.S. Dept. of Agr., Natural Resource Economics Div. 1974). These unadjudicated rights created chaos for large projects, and the Reclamation Service encouraged States to adopt comprehensive codes before it approved and funded projects. In the Reclamation Act the deference to state law meant deference to these water codes.

Federal influence over navigation and commerce thus persisted.

States were also motivated to adopt comprehensive codes by the potential for the assertion of federal authority over water rights. As the owner of the public domain, the federal government had a strong claim to water "ownership." See Pisani, *supra* at 64. A federal Irrigation Survey had identified 147 reservoir sites by 1890, *id.* at 163, poising the federal government to become a player in western irrigation. In spite of concerns over federal usurpation, western States pushed for a federal role because they could not afford to go on their own.

The debates leading up to passage of the Reclamation Act of 1902 show there was substantial disagreement over the role of the federal government. The original bill favored western interests by giving the States almost complete power and limiting the federal role to financing. This met with a tepid reception from eastern Senators and Congressmen who favored an expanded federal role. Revisions to the bill were insufficient to move them. Only a threat by President Theodore Roosevelt to veto a pending rivers and harbors bill that largely benefited eastern interests brought the Reclamation Act to a vote. See Pisani, *supra* at 319.

Although the Reclamation Act contains many provisions related to federal responsibility, the key provision was Section 8 (codified at 43 U.S.C. § 383), which recognized that state laws must be honored:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or

> distribution of water used in irrigation, or any vested right acquired thereunder…

43 U.S.C. § 383. This section makes it clear that both state and federal rights are recognized:

> [T]he Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of *the Federal Government* or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Id. (emphasis added). Other federal water management statutes also allow States to establish water rights, although congressionally mandated purposes must still be accomplished.

When the Reclamation Act was passed the federal government did not have a system for establishing water rights. States had stepped into this void and were actively granting water rights in 1902 even though their systems were still a bit chaotic. Western Congressmen who supported the Act made sure this power remained with the States. They could established property rights, but those rights could not interfere with federal power over commerce and navigation.

Another example is the Federal Water Power Act, 41 Stat. 1063 (1920). It disavowed any intent to "affect or interfere in any way with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right therein," 16 U.S.C. § 821. Even with this deference States cannot enact provisions that conflict with the Act's requirements. See *First Iowa Hydro-Electric*

Coop. v. FPC, 328 U.S. 152 (1946). Nor can States impose higher minimum stream flow requirements than those allowed by a federal license granted under the Act. Deference to state law does not give States a "veto of the project." *California v. FERC*, 495 U.S. 490, 507 (1990).

As the federal presence in other aspects of water management grew, deference to state laws establishing water rights was provided for in many other federal statutes. But this was a very limited form of deference; the substantial federal presence in water regulation would be untenable if States had the power to veto federal laws. In addition, state laws cannot impose an undue burden on interstate commerce. Federal "deference" to state laws allowing individuals to establish or sell water rights does not imply that the federal government has given up its powers over water.

II. WATER ALLOCATION BETWEEN STATES

John Wesley Powell recognized that dividing watersheds with state boundaries would create water management problems. Powell, John Wesley, *A Report on the Lands of the Arid Region of the United States*, at 31 (Gov't Printing Ofc. 1878). His recommendations were ignored, and States have been at odds ever since. Upstream States can take water from a stream before it reaches a downstream State, potentially causing downstream harm. When States share a common water boundary, they must also share in water allocation. The disputes that result, among competing States and between States and the federal government, raise fundamental questions about shared jurisdiction over water. Three methods are used in resolving these conflicts: equitable

apportionment by the Supreme Court; congressional apportionment; and interstate compacts negotiated between the States and approved by Congress. Although this case concerns a compact, some background on the other methods will help explain the context within which compacts are negotiated.

The first interstate dispute arose between Kansas and Colorado over the Arkansas River. Upstream irrigators in Colorado withdrew water from the river prior to settlements in Kansas. Once settlers moved into that part of Kansas they began to demand a share of the water that was being diverted upstream. Kansas sued Colorado in the Supreme Court under the Court's original jurisdiction. *Kansas v. Colorado*, 185 U.S. 125 (1902). In a later decision, the Court announced that "equitable apportionment" was the standard to be used in resolving interstate water conflicts. *Kansas v. Colorado*, 206 U.S. 46, 47 (1907). Although the standard was established, no water allocation was made because the Court found Kansas was not being harmed. *Id* at 107-108. The Court was reluctant to harm an existing economy by reducing their water supply just so residents in another State could use this same water to improve their own economy. See *id.* at 118; see also *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982). Balancing the harms and benefits to each competing State is part of an equitable apportionment, but this does not mean the Court will rebalance the harm and benefit if there is no net gain. The balancing process makes it hard to show actual harm. As a result, the Court has apportioned water in only three cases: *Wyoming v. Colorado*, 259 U.S. 419 (1922); *New Jersey v. New York*, 283 U.S. 336 (1931); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

The outcome of an equitable apportionment has a degree of uncertainty because the standard is flexible. In the first case where an apportionment actually occurred, *Wyoming v. Colorado*, 259 U.S. 419 (1922), both States followed the appropriation doctrine's temporal priority system. The Court used the priorities of each State's water rights and combined them to allocate the river's average annual dependable flow. Using existing state law seemed equitable, since both States had water rights based on prior appropriation. But in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court developed an extensive list of variables that was "merely illustrative, not an exhaustive catalogue," *id.* at 618, making the process open-ended. Ultimately the Court allocated a percentage of the natural river flow to each State.

Because of the uncertainty preceding an equitable apportionment, the threat of a Supreme Court allocation may be enough to move States to negotiate an interstate compact. The Court prefers this outcome, and has encouraged it. See, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). Three points need to be made about equitable apportionment. First, the outcome is uncertain because equities are decided on a case-by-case basis. Second, and as the Court has suggested, equities can change over time. If equities can change, should a water allocation ever be permanent?[3] Third, the fact that a river originates within a

[3] In *Kansas v. Colorado*, 206 U.S. 46, 117-18 (1907), the Court's decision was "without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river."

State does not automatically give the State or its residents a right to a share of that river's water. *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984).

The second method of allocation, congressional apportionment, has only been used twice, and only after other measures failed. The Boulder Canyon Project Act of 1928, 45 Stat. 1057, apportioned water in the lower Colorado River, while the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, 104 Stat. 3289 (1990), apportioned waters of Lake Tahoe and the Truckee and Carson Rivers. As to the former, on the lower Colorado River it was unclear an apportionment had taken place until the Court decided *Arizona v. Colorado*, 373 U.S. 546 (1963). The Colorado River Compact of 1922, 45 Stat. 1057, divided that river's upper and lower basin, but Arizona refused to ratify it. Without ratification Hoover Dam could not be constructed. To resolve this Congress passed the Boulder Canyon Project Act, allowing the compact to take effect if six of the seven participating States ratified it. The Act also authorized the Secretary of the Interior to enter into delivery contracts with specific allocations between each of the lower basin States. Arizona's recalcitrance thus led to a federal solution. Similarly, California and Nevada tried for 20 years to get congressional approval of a compact for the Truckee and Carson Rivers; because the proposed compact ignored federal interests and Indian water claims, Congress would not approve it. In 1990 Congress specifically apportioned the waters in question in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, 104 Stat. 3289. Although federal allocation has some advantages, state interests still prefer negotiated interstate compacts.

Interstate compacts are negotiated between interested States and ratified by Congress, making them federal law. Twenty-two water compacts have been approved in the West.[4] The first compacts were drafted and approved in the 1920s: the South Platte River Compact, 44 Stat. 195 (1926), the La Plata River Compact, 43 Stat. 796 (1925), and the Colorado River Compact, 45 Stat. 1057 (1928). These were approved soon after the Court apportioned water on the Laramie River. Subsequent compacts developed a variety of ways for allocating water.

Even though compacts are the most frequently used method for interstate allocation, they have serious flaws. Compact negotiation is generally a compromise process, and the resulting agreements are frequently ineffective. This has been especially true with western compacts, which tend to have a narrow focus. In western compacts the compact commissions have limited authority (only two-thirds even have them), funding is weak or non-existent, groundwater is frequently excluded, water quality (intrinsically linked with water quantity) is ignored, enforcement mechanisms are absent or ineffective, few address how they may be amended, and federal interests are omitted. See McCormick, Z. L., *Interstate Water Allocation Compacts In The Western United States – Some Suggestions,* 30 J. of the Amer. Water Resources Assoc. 385 (1994); McCormick, Z. L., The Use of Interstate Compacts To Resolve Transboundary Water Allocation Issues, Doctoral Dissertation, Okla. St. Univ. (1994). In addition, unanimous consent of all parties is often required before any action is taken.

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[4] Some multipurpose compacts have been negotiated in the East but are not included in this discussion.

Western water compacts also do not allow comprehensive watershed management, an oft-stated goal of water managers. These compacts are negotiated for a limited purpose and are not flexible in resolving subsequent problems. For example, ignoring groundwater that is hydrologically connected to a compact river has caused many problems.[5] Even after compacts are enacted their interpretation is frequently the subject of litigation. In order to have strong and effective compacts, States must give up some authority. But States do not like "intrusions" on their sovereignty and generally resist such limitations. The result is weak compacts.

As most compacts make clear, States want to retain authority over water. Compacts typically include language like that in the Red River Compact, 94 Stat. 3305 (1980). Section 2.10 provides that "[n]othing in the Compact shall be deemed to: (a) interfere with or impair the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water or quality of water…." This means new appropriations or transfers of existing rights must comply with the water law of the State of origin. This language is virtually identical to the language in the Reclamation Act and the Federal Power Act discussed above. It does not grant States unlimited power to regulate water and certainly does not authorize them to infringe on commerce.

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[5] For example, on the Pecos River groundwater pumping caused depletion in surface water supplies, leading to a shortfall in New Mexico's water delivery to Texas. See *Texas v. New Mexico*, 462 U.S. 554 (1983). A similar situation occurred on the Arkansas River. See *Kansas v. Colorado*, 514 U.S. 673 (1995).

Compacts are contracts. *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011). They also require congressional approval, making them federal law. States could not enforce compacts unless they were federal law. But does the mere fact of congressional approval elevate a compact to a showing of congressional consent to burdening interstate commerce? Congress did not negotiate the compact and most western allocation compacts ignore federal interests. If the federal government is not a party to the compact, how can something as important as consent to a burden on interstate commerce be read into it?[6]

III. THE COMMERCE CLAUSE

The first Supreme Court decision interpreting the Commerce Clause restricted a State's power to limit commercial competition; the state law had prevented a federally licensed ship from docking in New York harbor. *Gibbons v. Ogden*, 22 U.S. 1 (1924). Subsequent decisions used a variety of tests to describe the limits of state power. States could regulate local commerce (*Gillman v. Philadelphia*, 70 U.S. 713 (1865)) but not national commerce (*Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U.S. 204 (1894)). They could regulate commerce using their police power, but not if the regulation infringed on something that was national in scope. *Western Union Telegraph Co. v. Pendleton,* 122 U.S. 347 (1887). Although many discriminatory state statutes were

[6] A compelling argument has been made that states can unilaterally withdraw from a compact. See Grant, D. L, *Interstate Water Allocation Compacts: When The Virtue Of Permanence Becomes The Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003). If this is true, how can the federal government be bound?

challenged during this early period, they were usually evaluated under the local versus national criteria. Import bans were a common problem and were routinely struck down, see, *e.g.*, *Railroad Co. v. Husen*, 95 U.S. 465 (1877). After *Guy v. Baltimore,* 100 U.S. 434 (1879), discrimination on its own was sufficient to invalidate state legislation, although other tests continued to be used. Even state statutes that were not facially discriminatory, but had a discriminatory impact, were struck down. *Minnesota v. Barber*, 136 U.S. 313 (1890). Import and export bans were particularly hard to justify. See *Leisy v. Hardin,* 135 U.S. 100 (1890).

Two decisions seemed to create an exception based on "state ownership". In *Geer v. Connecticut,* 161 U.S. 519 (1896), a state statute banning the export of legally killed game birds was upheld. The game birds were considered to be the property of the State held in trust for the people. 161 U.S. at 529. A little over a decade later a ban on water exports was justified using this same theory. *Hudson Cty. Water Co. v. McCarter,* 209 U.S. 349 (1908). These two decisions were used as justifications for export bans in western States where water was claimed to be "owned" in trust for the people of the State. This "state ownership" doctrine was soon limited, and eventually rejected. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), Louisiana claimed ownership of shrimp under the theory that had been advanced in *Geer*. The State required that the heads and shells be removed from shrimp before export. But the Court ruled that Louisiana's requirement was discriminatory because state ownership ended once the shrimp were captured (276 U.S. 12). State ownership was eventually called a legal fiction, and this exception to export bans ended for both wildlife (*Hughes v.*

Oklahoma, 441 U.S. 322 (1979)) and water (*Sporhase v. Nebraska*, 458 U.S. 941 (1982)). "State ownership" will be discussed in greater detail below.

Although discrimination continued to be used as a constitutional test, other tests were used as well. State statutes were unconstitutional if they had a "direct" impact on commerce, but not if the impact was "indirect or incidental." *Munn v. Illinois*, 94 U.S. 113 (1876). States were only allowed to directly interfere with commerce if there was congressional consent. *Brennan v. Titusville,* 153 U.S. 289 (1894). In time the "free flow" of commerce or "barriers" to commerce became additional "tools" for evaluating constitutionality. See, *e.g.*, *South Carolina v. Barnwell,* 303 U.S. 177 (1938); *Edwards v. California,* 314 U.S. 160 (1941). A balancing approach was used in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Through all this the idea that the Commerce Clause created a common market within the United States was in the background but not always clearly enunciated. *H. P. Hood v. DuMond*, 336 U.S. 525 (1949), clearly states this principle. Local businesses should not be protected from competition. State statutes should not discriminate against out-of-state commerce. Protectionist barriers to commerce should not be erected. Goods and services should move freely across state boundaries. "Free trade" within the United States should not be impaired.

In time a two-part test developed See *Pike v. Bruce Church*, 397 U.S. 137 (1970). Facially discriminatory statutes are strictly scrutinized. They are upheld only if: 1. a legitimate local interest exists that is unrelated to the State's economic well-being, and 2. nondiscriminatory alternatives do not exist (at 142). Few state statutes survive this strict scrutiny, but

they can, see *Maine v. Taylor* 477 U.S. 131 (1986). For state statutes that are not facially discriminatory but have a discriminatory impact, a balancing test is used. "Evenhanded" and "legitimate" local purposes are balanced against impacts that are not "incidental" but are "excessive" and "unduly" burden interstate commerce.

Two exceptions developed. One is a state interest exception. The second exception is congressional consent. *Sporhase* addresses both the Commerce Clause and the two exceptions. Several prior decisions are important to understanding the Court's reasoning in *Sporhase*. Bans on the import or export of articles of commerce are facially discriminatory and receive the Court's strictest scrutiny. But in order for this to apply, the state statute must apply to an article of commerce. For natural resources that are commonly sold in an interstate market this is a relatively easy determination. Thus a ban on exporting natural gas from Oklahoma was unconstitutional (*West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911)), as was a West Virginia statute granting its citizens a preference in purchasing natural gas (*Pennsylvania v. West Virginia* 262 U.S. 553 (1923)). In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a New Jersey ban on garbage importation was struck down because the garbage disposal facility was considered an article of commerce. State ownership of wildlife provided the basis for an Oklahoma statute banning the export of minnows, following the logic of *Geer*, but in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), public/state ownership of wildlife was rejected as "'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" 441 U.S. at 334 (quoting *Toomer v. Whitsell*, 334 U.S. 385, 402

(1948)). The Oklahoma export ban was thus an unconstitutional restriction on commerce.

Although the Court did not necessarily adopt the reasoning of the three-judge court in *City of Altus v. Carr* when it summarily affirmed it (see 255 F.Supp. 828 (WD Tex.), *aff'd* 385 U.S. 35 (1966)), it did so when it decided *Sporhase*. At issue in *Altus* was a Texas statute prohibiting groundwater export unless it was approved by the Texas legislature. Part of Texas' argument was groundwater was not an article of commerce, as *Geer* suggested. But in Texas groundwater is considered to be the personal property of the overlying land owners who are free to sell what they pump. The ability to sell the water clearly made it an article of commerce, and the Texas statute was an impermissible burden on commerce. *Altus*, 255 F. Supp. at 830.

In *Sporhase* three questions were answered: 1. Is groundwater an article of commerce? 2. Does the Nebraska statute impose an impermissible burden on commerce? and 3. Has Congress consented to what would otherwise be an unconstitutional statute? In answering the first question the Court confirmed the reasoning in *Altus* even though Nebraska landowners did not absolutely own groundwater as landowners did in Texas. In Nebraska the State claimed groundwater ownership. Groundwater transfers were allowed within the State, and municipalities were allowed to charge a price for delivery. The Court concluded state ownership was a legal fiction and groundwater was an article of commerce. *Sporhase*, 458 U.S. at 959-960. Attempts to distinguish this as a groundwater case ignore the similarities state surface water laws contain. Western States allow the transfer and sale of surface waters under statutory

criteria. These statutes cannot discriminate against out-of-state interests as they too fall under the Commerce Clause.

In answering the second question the *Sporhase* Court applied the test from *Pike v. Bruce Church*. If a state statute:

> "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree."

Sporhase, 458 U.S. at 954, quoting *Pike*, 397 U.S. at 142).

Nebraska's interest in conserving and preserving scarce water resources was a legitimate and important local purpose, but the statute also contained a discriminatory reciprocity provision. This provision would only allow exports to States that did not ban exports. In this case Colorado had a ban on exports; thus applications made in Nebraska to export water to Colorado would be denied. This provision was considered facially discriminatory requiring the strictest scrutiny.

> For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped

> into a neighboring State that does not permit its water to be used in Nebraska.

Sporhase, 458 U.S. at 957-58.

Even facially discriminatory legislation can be upheld if one of the two exceptions can be applied. The state interest exception was not directly considered in *Sporhase*. However, holding that the state ownership doctrine was a legal fiction left the exception not viable. *Id.* at 951. The second exception, congressional consent, presented the third issue in the case. Nebraska argued that the language in 37 federal statutes and in interstate compacts deferring to state law represented congressional consent. (The Reclamation Act of 1902, discussed above, is typical of statutes incorporating such language.) In *Sporhase* the Court said "[s]uch language mandates that questions of *water rights* that arise in relation to a federal project are to be determined in accordance with state law." 458 U.S. at 959 (emphasis added). State laws controlling water rights were already in place when these statutes were passed and Congress chose not to create a duplicate federal system. This is all deference to state laws means:

> Although the 37 statutes and interstate compacts demonstrate Congress' deference to state water law, they do not indicate Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred.

458 U.S. at 959-60 (emphasis added)

Congressional consent to a state statute burdening commerce is not easy to obtain. Congressional

consent must be "expressly stated." *Sporhase,* 458 U.S. at 959-960; see also *New England Power Co. v. New Hampshire*, 455 U.S. 331, 332 (1982). Congressional consent must be an "unambiguous statement" *Maine v. Taylor*, 477 U.S. 131, 139 (1986). The intent of Congress must be "unmistakably clear," *Wunnicke*, 467 U.S. at 91, and Congress must "affirmatively contemplate" the legislation at issue before it consents to state provisions that burden interstate commerce, *id.* at 91. Boilerplate language deferring to state law in statutes and interstate compacts does not meet this stiff requirement.

Most western compacts were in place by 1980, as were many of the federal statutes with language deferring to state law. In 1980 many western States had water statutes discriminating directly and indirectly against commerce. The *Sporhase* decision in 1983 made it clear that only "valid" provisions were entitled to deference, and that deference is to the appropriation process under which water rights are established. The federal government chose not to regulate in this very narrow area of water law. States can control the appropriation process and the process for transferring a water right, but state statutes must be constitutional.

IV. *TARRANT V. HERRMANN*

Our analysis of the Tenth Circuit opinion covers three questions. Are Oklahoma's laws prohibiting transport of water facially discriminatory, and if so, do they protect a legitimate local interest with no equally effective non-discriminatory options? If they are discriminatory, has Congress consented to what would otherwise be an unconstitutional burden on commerce? Does language in the compact granting

Texas an "equal right" to "runoff" allow Texas parties to apply for a water right in Oklahoma using Oklahoma law?

A. Oklahoma's Laws Are Discriminatory

The Oklahoma statutes in question are clearly discriminatory. The most objectionable statutes are those that: 1. Require legislative approval for out-of-state uses but not in-state uses, see Okla. Stat. tit. 82 § 105.12A(D); § 1085.2(2);§ 1324.10(B); 2. Prohibit the Oklahoma Water Conservation Storage Commission from granting permits for the sale or resale of water outside the State, see Okla. Stat. tit. 82 § 1085.22; 3. Put additional requirements on water to be exported that are not placed on in-state uses, see Okla. Stat. tit. 82 § 105.12(F); § 105.12A(B); § 105.12(A)(5); and 4. Require that long term water appropriations, such as those needed for municipal development, promote "optimal beneficial use of water" within Oklahoma, see Okla. Stat. tit. 82 § 105.12.(F). State statutes regulating interstate water exports must do so even-handedly and without discrimination. (*Hughes*, 441 U.S. at 331. These statutes are not "narrowly tailored" to protect a local interest. The Oklahoma statutes are clearly discriminatory.

Local interests could include water conservation and public welfare criteria such as public health, which implicate a State's police power. But, the local interest cannot relate to the "health" of the State's economy. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), the court struck down New Mexico's water export statute, saying States could only discriminate "to the extent that water is essential to human survival. Outside of fulfilling human survival needs water is an economic resource." 563 F. Supp. at 389. Subsequently New Mexico amended its stat-

utes, and they were challenged again. Although some of New Mexico's provisions were upheld the court still said that "a state may not limit exports merely to protect local economic interests." *City of El Paso v. Reynolds*, 597 F. Supp. 694, 700 (D.N.M. 1984).

Oklahoma's limitations on water exports are clearly designed to benefit local economic interests. They have nothing to do with water conservation or protecting the health of Oklahoma citizens. The only way they can be upheld is if Congress has consented to what would otherwise be a clear violation of the Commerce Clause. As discussed above, congressional consent must be explicitly stated, unambiguous, unmistakably clear, and affirmatively contemplated.

B. Congressional Consent

Congress has not consented to these discriminatory state laws. Compacts are negotiated between States, sometimes with a federal observer present. Even when the federal observer serves as a facilitator, as was the case with the Red River Compact, the States control the substantive content of the compact, not the federal observer. The resulting contract is then approved by Congress, making it federal law. But, how can Congress "affirmatively contemplate" something it did not help negotiate? Also, did Congress "affirmatively contemplate" the Compact's Interpretive Comments? The Tenth Circuit partially relies on the interpretive comments in deciding Congress consented, see Pet. App. 25a, but it is doubtful Congress even saw these comments since they were not an intrinsic part of the Compact. Even if a few members of Congress from the compacting States were aware of these comments, is this really congressional

consent? Shouldn't the bar for granting an exception to Commerce Clause be higher than that?

The language of the Compact and the Interpretive Comments are not unmistakable clear or unambiguous. The Tenth Circuit relied on language in Section 2.01 of the Compact to justify its decision, noting that each signatory State is allowed to use the water allocated to it "in any manner deemed *beneficial by that state*." See Pet. App. 24a (emphasis added; internal quotation marks omitted); 86a. Does this mean that the water use can only benefit the State where the water is allocated? No. It means the State, as part of its allocation process, can define what uses are beneficial, but not in a way that discriminates against out-of-state interests. "Beneficial use" is the basic qualifier for establishing a water right under the appropriation doctrine. If the use is not "beneficial," no right exists. Western States, either legislatively or through court decisions, have defined what uses are beneficial. "Beneficial use" is the basis for all rights under the appropriation doctrine. But defining "beneficial use" requires that the same criteria be applied whether the use is in-state or out-of-state.

Section 2.01 also has a phrase allowing States to "freely administer" apportioned water. See Pet. App. 24a, 86a. This language recognizes that Oklahoma water rights law will apply to the allocation and reallocation of Compact water originating within its boundaries. Even if the place of use was destined to be in Texas, Oklahoma law would still control the allocation process. This would not be the first time water rights have been enforced across a state boundary. See *Weiland v. Pioneer Irrigation Co.* 259 U.S. 498 (1922). In addition, one case has even held that the law of the State where water is diverted con-

trols the right at least until the water crosses the state boundary. See *Turley v. Furman*, 16 N.M. 253 (1911).

The Compact terms "beneficial" and "freely administer" do not give Oklahoma freedom to do anything it wants to. These terms are not unambiguous. In fact, a plain-language reading of these terms can allow Oklahoma laws to control the appropriation process in ways that do not interfere with commerce. Nondiscriminatory alternative interpretations to the compact do exist. If more than one interpretation is possible, the Red River Compact should be interpreted in ways that avoid interference with interstate commerce.

Similarly, Section 2.10(a) of the Compact provides that nothing in the Compact will interfere with "the appropriation, use, and control of water" within a State's boundaries. Pet. App. 87a. The language in Section 8 of the Reclamation Act of 1902 is almost identical: "control, appropriation, use, or distribution of water". 43 U.S.C. § 383. As discussed above, all this provision does is give the State authority over the appropriation process. It does not give it permission to discriminate against interstate commerce. And the Interpretive Comments do not change this but merely confirm it. Each State "is free to continue its existing internal water administration, or modify it in any manner it deems appropriate." See Pet. App. 25a. Again, this is simply recognition that each States' "*valid*" existing laws for establishing water rights and reallocating water are recognized. Certainly the States have the power to amend these laws, but only in ways that are constitutionally appropriate. If a State could modify laws "in any manner it deems appropriate," then according to the

Tenth Circuit's logic a State could pass laws that would interfere with navigation. Interpreting this provision to allow a State to interfere with navigation would be improper, just as it would be to allow a State to impose a burden on commerce. Nothing in this section of the Compact or in the Interpretive Comments reflects permission to burden interstate commerce or to interfere with navigation. Such permission requires unambiguous statements. The language in these provisions can be interpreted in ways that are compatible with the Commerce Clause.

Section 2.10(a) also gives the States authority to regulate water quality within their boundaries. See Pet. App. 87a. To follow the Tenth Circuit's logic, this would allow States to supersede the Clean Water Act. Section 2.10(a) merely recognizes that States have some authority, but does not diminish existing federal authority. Interstate compacts cannot supersede federal statutory or constitutional provisions. *Gibbons*, 22 U.S. at 196. They are negotiated between States with minimal congressional input. On a few rare occasions compacts have been rejected or delayed because federal interests were obviously ignored. Two examples illustrate this point. The Republican River Compact was approved by Congress but initially vetoed by President Franklin Roosevelt because it attempted to limit federal power. Grant, D. L., Water Apportionment Compacts Between States § 46.03, in *Waters and Water Rights* (Lexis Nexis 2010). Also, the Carson Truckee Compact never made it through Congress, and a congressional allocation was substituted. If Congress or the President felt the Red River Compact had posed a limitation on federal power, a similar fate would have resulted.

Clearly, the Oklahoma statutes are designed to assert as much jurisdiction as possible over water. But Oklahoma's statutes cannot discriminate against commerce unless Congress consents. This is extremely important because the Tenth Circuit's interpretation of the Compact can be read in a way that abdicates all federal authority over compact water in Oklahoma. Congress would not choose a Compact as the vehicle for substantially changing the way jurisdiction over water is shared between the States and the federal government. A Compact is a contract, as the Court has said, but the federal government is not a party to it. Congress only approved it in order for it to be enforceable between the States.

C. Texas' Equal Right

The last aspect of the lower court opinion we address is the Compact provision related to Texas' equal share of subbasin 5. Oklahoma must allow Texas parties to establish a water right under Oklahoma's water law even if the use is outside the State. Section 5.05 of the Red River Compact makes this clear. See Pet. App. 88a-90a. The Red River Compact goes into considerable detail to allocate water to the signatory States. Section 2.12 goes to the effort of breaking the agreement into five river segments, and Sections IV-VIII apportion water in both fixed and percentage based allocations. Section 5.05 states the "Signatory States shall have *equal rights* to the use of *runoff* originating in subbasin 5." See Pet. App. 88a-89a (emphasis added). This section designates specific percentages each State should receive based on flow conditions in the river.

The term "runoff" has a specific meaning in the field of hydrology. "Runoff is all water transported out of the watershed by streams. Some of this water may have had its origins as overland flow, while much may have originally infiltrated and traveled through the soil mantel as interflow." Ward, A.D. and Stanley W. Trimble, *Environmental Hydrology* at 119 (2d ed., CRC Press LLC 2004). After a precipitation event water quickly moves as overland flow and subsurface flow (interflow) to the rivers and streams (watercourses) within the watershed. Determining what an equal share is requires a measurement. Runoff from a precipitation event is generally measured at a specific point downstream on a watershed where the cumulative effect of all flowing water can be taken into account. In subbbasin 5 runoff would be measured on the mainstem of the Red River at the downstream boundary of subbasin 5. Runoff includes all parts of the subbasin (watershed) including *all* tributaries. The Red River Compact requires that the *runoff originating* in subbasin 5 be equally shared. How can "runoff" in this portion of the Red River be interpreted to include only the disconnected tributaries originating within Texas? This is not the way runoff is measured. This is hydrologically impossible and a denial of the science associated with the hydrologic cycle. In measuring runoff, a water molecule coming from Texas cannot be distinguished from one originating in Oklahoma.

The geography of the boundary also needs to be considered in understanding what an "equal share" means from a practical perspective. Under the Red River's natural conditions Texas lacks access to the water the Compact grants under section 5.05. The Texas boundary stops on the south "cut-bank" of the Red River, see *Oklahoma v. Texas* 260 U.S. 606

(1923). The cut-bank is above the river's normal flood plain separating Texas' jurisdiction from "wet water" under most natural conditions. The tributaries within Texas' boundaries are the only portion of the watershed over which Texas has jurisdiction. These tributaries are inadequate to supply the "equal right" promised by the Compact.

The only way Texas can get its full share is to appropriate water across the border in Oklahoma using Oklahoma law. This is consistent with the language of the Compact granting Oklahoma jurisdiction over water rights. It makes no sense for Texas law to apply to a water right when the water originates within Oklahoma. Oklahoma can grant such rights and is required to do so within the limits set by the Commerce Clause. Nothing in the Compact allows Oklahoma statutes to place a burden on interstate commerce.

CONCLUSION

Jurisdiction over water can never be exclusive, as Oklahoma seems to desire. Water is mobile, circulating through the hydrologic cycle without regard to political boundaries. The hydrologic cycle describes water movement with terms like evaporation, precipitation, infiltration, overland flow, and subsurface flow, among others. These are natural processes that are impacted every time humans use water. These human uses interfere with the integrity of the hydrologic cycle by changing the pattern of movement or changing water quality. This is especially true of irrigation and municipal uses, which dam rivers and divert substantial volumes for uses far from the water's original location within the hydrologic cycle. If the cycle is looked at as a global cycle, sole jurisdic-

tion never occurs. This means water must be shared in some way. This sharing process can be very difficult, depending on what levels of government are involved and the balance of power between them.

Within the United States the Constitution defines those relationships, making the federal government supreme for those powers enumerated there. The residual powers remain with the States. Western States retained power over water rights allowing water to be bought and sold without regard to land ownership as long as public interests and third parties were not harmed. With the expanding size of projects, jurisdictional conflicts among States, and between States and the federal government, increased. Federal power over water, never well defined in the 1800's, became almost all-encompassing. States in the West retained power over the appropriation process with the consent of Congress. But power over the appropriation process does not include the power to interfere with commerce.

States have a proclivity to enact protectionist legislation that will benefit their own economy at the expense of other States. The fight over water is almost always over who gets the economic benefits, not whether it is needed for human health. If States were allowed to fully pursue economic protectionism, water would never leave their boundaries. When the Supreme Court is presented with protectionist conflicts between States it encourages them to negotiate Compacts. Compacts potentially allow an administrative structure that could resolve disputes and respond to changing conditions. Compacts, however, are not always very flexible, at least those compacts negotiated in the West. States were loath to give up jurisdiction. The result was very weak agreements.

Compacts routinely allow state appropriation laws to stand, as have many federal statutes. Allowing the States to establish water rights within their boundaries is logical even when the water is to be taken across a state boundary for use. It makes no sense to use the law of the State where the water is to be used, although an argument can be made for using both States' laws.

The Commerce Clause creates a national common market within the United States. Moving water, be it in raw form or imbedded in finished products, across a state boundary is part of that national market and is something that has a long history. State restrictions on transboundary movement can only occur if Congress consents. Compacts are often ambiguous and limited grants of power. In this case the Red River Compact contains nothing "unambiguously clear." Congress did not consent to a burden on interstate commerce. Certainly Congress did not "affirmatively consider" whether this was a burden on commerce when the compact was approved.

The Tenth Circuit's decision gives far too much weight to boilerplate language in the Red River Compact. Taken to its extreme, reading compacts and other federal laws to defer to state laws would give them a veto over federal laws. During the drafting of the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. 103-104, 111 Stat. 2219 (1997), some of the drafters saw the compact as a means "by which the requirements of existing federal laws and regulations could be circumvented." Sherk, G. W., *The Management of the Interstate Water Conflicts in the Twenty-First Century: Is it Time to Call Uncle?*, 12 N.Y.U. Env. L. J. 764, 772 (2005). Early drafts would allow the compact allocation to control instead

of federal law. This language was modified, however, because it was deemed "so politically unpalatable that congressional consent would be impossible." *Id.* at 773. The proposed language was explicit, but drafters of the compact felt it could not get congressional consent.

In this case the language in the Red River Compact is not explicit. The Tenth Circuit by implication interpreted the Compact in ways that exceed anything palatable to Congress. Consent to discriminatory state statutes must be "expressly stated," "unambiguous," and "unmistakably clear," and Congress must "affirmatively contemplate" otherwise invalid state legislation. The Red River compact does not meet that standard.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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