

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 THE TEXAS WATER CONSERVATION
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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**BRIEF OF TEXAS WATER CONSERVATION
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER'S
BRIEF ON THE MERITS**

**INTEREST OF AMICUS CURIAE TEXAS
WATER CONSERVATION ASSOCIATION¹**

The Texas Water Conservation Association (“TWCA”) is a statewide association of governmental and private entities in Texas that are active and vitally interested in the water resource field. TWCA’s membership consists of approximately 400 members, including municipalities, river authorities, and water districts, as well as firms and individuals in the engineering, legal, hydrology, and geology fields, and other individuals and businesses active in various phases of water supply, planning, and development.

TWCA’s members are responsible for providing public water supplies to most Texans. The broadly stated purpose of TWCA is to foster the development, conservation, protection, and utilization of the State’s water resources for beneficial use by its citizens. TWCA is also a forum for developing and recommending water policy initiatives, and provides a voice for Texas “water interests” on state and federal issues.

¹ The parties have consented to the filing of this amicus brief pursuant to Rule 37.3. This brief was not authored in whole or in part by counsel for any party, and no party, or parties’ counsel, has made any monetary contribution intended to fund the preparation or submission of this brief.

TWCA supports Petitioner's Merits Brief and Petitioner's request that the Court reverse the decision of the Tenth Circuit, because that decision, if affirmed, would undermine the integrity and efficacy of Texas' state and regional water planning process. More specifically, that decision, if affirmed, would prevent TWCA members from pursuing water management strategies that have been recommended as a result of Texas' state and regional water planning process and which involve obtaining water from Oklahoma. Moreover, that decision, if affirmed, would prevent TWCA members and regional planning groups that are not currently considering water management strategies that involve obtaining water from Oklahoma from doing so.

The purpose of this amicus brief is to describe the history of state and regional water planning in Texas, describe the current water planning process, note the recommended water management strategies which involve obtaining water from Oklahoma, and explain how the integrity and efficacy of Texas' water planning process will be undermined if the decision of the Tenth Circuit in this case is affirmed.



SUMMARY OF ARGUMENT

In large part because of its susceptibility to drought, Texas has a long history of water planning. In recent times, the Texas Legislature has mandated a water planning process "from the ground up" which

begins at the regional level and culminates in comprehensive regional and state water plans that are fully updated every five years. This process has, since as early as 2001, resulted in major recommended water management strategies and projects that involve obtaining water in Oklahoma for use in what is known as water planning Region C (which includes the Dallas/Fort Worth Metroplex) in order to fulfill critical water needs in that area.

The water planning process that has resulted in these recommended strategies took into account the allocation of water to which Texas is entitled pursuant to the Red River Compact (“Compact”). In fact, one of the major and express purposes of the Compact is to allow States to plan. Texas has done so and is far ahead of many other states in doing so – again, largely as a result of its susceptibility to drought.

At issue in this case is the interpretation of critical Compact language involving the allocation of water in Reach II, Subbasin 5. Texas’ water planning process relied on the Compact’s plain language and the only sensible reading of that language in adopting recommended strategies involving obtaining water from Oklahoma. The Tenth Circuit’s interpretation of that critical language, and interpretations urged by Respondents, if adopted, would mean that those recommended strategies would no longer be possible. Accordingly, those recommended strategies and projects and the integrity and efficacy of the state and regional water planning process, depend on the Court’s reversal of the Tenth Circuit’s decision and a

rejection of the interpretation of the Compact urged by Respondents.

◆

ARGUMENT

I. Water Planning in Texas Began Early, and Developed and Increased as a Result of the 1950s Drought

Droughts have long plagued Texas – since well before the first Spanish and Anglo settlers began arriving in the 1700s.² Against that backdrop, and as recounted below, Texas has long recognized and planned for the water supply needs of its citizens.

A. Early Water Management and Development Efforts by the Texas Legislature

The Texas Legislature began assigning responsibility for the management and development of water resources to various governmental entities created under state law starting in the early 20th century.³ In 1904, partially as a result of devastating droughts and floods, a constitutional amendment was adopted authorizing the first public development of water resources. The Legislature authorized the creation of

² Water for Texas 2012: State Water Plan, Texas Water Development Board (“2012 SWP”) at 14. The 2012 Texas State Water Plan is available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf

³ 2012 SWP at 15.

drainage districts in 1905, the Texas Board of Water Engineers in 1913, conservation and reclamation districts including river authorities in 1917, freshwater supply districts in 1919, and water control and improvement districts in 1925.⁴

In 1949, then-Senator Lyndon Johnson wrote to the U.S. Secretary of the Interior, requesting that the federal government help guide Texas in achieving “a comprehensive water program that will take into account the need of the people of my State.”⁵ Four years later, a U.S. Bureau of Reclamation’s report – *Water Supply and the Texas Economy: An Appraisal of the Texas Water Problem* – divided the state into four planning regions and evaluated existing and projected municipal and industrial water requirements up to the year 2000. The appraisal identified “problem areas,” presented water supply plans as potential solutions, made a number of observations on state and federal policy, and recommended that Texas consider forming a permanent water planning and policy agency.⁶

B. The 1950s Drought

From 1950-56, Texas experienced the worst statewide drought in its recorded history. By the end

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

of 1956, all but one of Texas' 254 counties were classified as disaster areas. This drought was the driest seven-year period and is still considered Texas' "drought of record" upon which most water supply planning in the state is based. The 1950s drought was unique in that a majority of Texans felt the impacts of a reduced water supply. Small and large cities alike faced dire situations. The 1950s drought cost the state hundreds of millions of dollars.⁷

C. State Water Planning from 1957-1997

The Texas Legislature established the Texas Water Resources Committee in 1953 to survey the state's water problems.⁸ As a result of the committee's recommendations, the Legislature passed a resolution authorizing \$200 million in state bonds to help construct water conservation and supply projects and created the Texas Water Development Board ("TWDB") to administer the funds from the bond sale.⁹ Then, during a special session, the Legislature passed the Water Planning Act of 1957, creating the Texas Water Resources Planning Division of the Board of Water Engineers, which was assigned the responsibility of water resources planning on a statewide basis.¹⁰ Texas voters subsequently approved

⁷ *Id.* at 16.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.* at 16-17.

a constitutional amendment authorizing TWDB to administer a \$200 million water development fund to help communities develop water supplies.¹¹

In 1960, the Texas Governor requested that the Board of Water Engineers prepare a planning report with projects to meet the projected municipal and industrial water requirements of the state by 1980.¹² Work quickly began on statewide studies to develop the first state water plan. The first plan – entitled *A Plan for Meeting the 1980 Water Requirements of Texas* – was published in 1961. The plan described historical and present uses of surface and groundwater by municipalities, industries, and irrigation; summarized the development of reservoirs; estimated the 1980 municipal and industrial requirements of each area of the state; provided a plan for how to meet those requirements by river basin; and discussed how the plan could be implemented.¹³

Later plans were developed by the State and adopted in 1968, 1984, 1990, 1992, and 1997. All of the plans have recognized the growth of Texas' population and the need to develop future water supplies. Earlier plans placed more reliance on the federal government, while later plans have increasingly

¹¹ *Id.* at 17

¹² *Ibid.*

¹³ *Ibid.*

emphasized the importance of conservation and natural resource protection.¹⁴

The 1984 State Water Plan was the first to address water quality, water conservation and water use efficiency, and environmental water needs in detail. While previous plans were organized by river basin, the 1990 State Water Plan projected water demands, supplies, and facility needs for eight regions in the state. The 1997 State Water Plan – developed by TWDB through a consensus process with the Texas Parks and Wildlife Department and the Texas Commission on Environmental Quality – divided the state into 16 planning regions.¹⁵

II. The Current System: Regional and State Water Planning (1997-present)

A. Planning “From the Ground Up”

In the mid-1990s, Texas suffered an intense 10-month drought. Reservoirs and aquifer levels declined sharply and farmers suffered widespread crop failure, with estimated economic losses in the billions of dollars. Some cities had to ration water for several months and others ran out of water entirely.¹⁶ The drought of 1996 lasted long enough to remind Texans of the importance of water planning.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Id.* at 19.

When the Legislature met in 1997, the Lieutenant Governor declared that the primary issue would be water. After lengthy debate, Senate Bill 1 was passed to improve the development and management of the water resources in the State.¹⁷ Among provisions relating to water supplies, financial assistance, water data collection and dissemination, and other water management issues, the bill established the regional water planning process: a new framework that directed that water planning be conducted “from the ground up.”¹⁸

Senate Bill 1 outlined a new process where local and regional stakeholders were tasked with developing consensus-based regional plans for how to meet water needs during times of drought. TWDB would then develop a comprehensive state water plan – based on the regional water plans – every five years.¹⁹

As directed by the Legislature, TWDB designated 16 regional water planning areas, taking into consideration river basin and aquifer delineations, water utility development patterns, socioeconomic characteristics, existing regional water planning areas, state political subdivision boundaries, public comments, and other factors. Although TWDB is required to review and update the planning area boundaries at

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

least once every five years, no changes have been made to date.²⁰

Each regional water planning area has its own planning group which is responsible for developing a regional water plan every five years. Regional water planning groups are required to have at least eleven interests represented, including the public, counties, municipalities, industries, agriculture, environment, small businesses, electric-generating utilities, river authorities, water districts, and water utilities. Planning groups must have at least one representative from each interest, and can designate representatives for other interests that are important to the planning area. Planning groups also have non-voting members from federal, state, and local agencies and have members that serve as liaisons with planning groups in adjacent areas.²¹

The regional water planning process consists of ten tasks:

- describing the regional water planning area;
- quantifying current and projected population and water demand over a 50-year planning horizon;
- evaluating and quantifying current water supplies;

²⁰ *Ibid.*

²¹ *Ibid.*

- identifying surpluses and needs;
- evaluating and recommending water management strategies to meet those needs;
- evaluating impacts of water management strategies on water quality;
- describing how the regional plan is consistent with long-term protection of the state's water, agricultural, and natural resources;
- recommending regulatory, administrative, and legislative changes;
- describing how sponsors of water management strategies will finance projects; and
- adopting the regional plan.²²

B. Evaluation and Recommendation of Water Management Strategies

After identifying surpluses and needs for water in their regions, regional water planning groups evaluate and recommend water management strategies to meet the needs for water during severe drought. If existing supplies do not meet future

²² *Id.* at 20.

demand, they recommend specific water management strategies to meet water supply needs.²³

A water management strategy is a plan or a specific project to meet a need for additional water by a discrete user group, which can mean increasing the total water supply or maximizing an existing supply. Strategies can include development of new groundwater or surface water supplies; conservation; reuse; demand management; expansion of the use of existing supplies such as improved operations or conveying water from one location to another; or less conventional methods like weather modification, brush control, and desalination. Factors used in the water management strategy assessment process include:

- the quantity of water the strategy could produce;
- capital and annual costs;
- potential impacts the strategy could have on water quality, water supply, and agricultural and natural resources; and
- reliability of the strategy during time of drought.²⁴

The water management strategy evaluation process also considers other factors applicable to individual regions including difficulty of implementation,

²³ *Id.* at 187.

²⁴ *Id.* at 188.

regulatory issues, regional or local political issues, impacts to recreation, and socioeconomic benefits or impacts. Upon conclusion of a thorough evaluation process, planning groups recommend a combination of water management strategies to meet specific needs in their regions in the event of a repeat of the drought of record.²⁵

C. Development of the State Water Plan

After planning groups adopt their regional water plans, they are sent to TWDB for approval. TWDB then begins development of the state water plan. The state water plan incorporates information from the regional water plans, but it is not merely the sum of the regional plans. The state water plan serves as a guide to state water policy; it also explains planning methodology, presents data for the state as a whole, identifies statewide trends, and provides recommendations to the Legislature. Prior to adoption of the final state water plan, TWDB releases a draft for public comment, publishes its intent to adopt the state water plan in the Texas Register, notifies the regional water planning groups, and holds a public hearing in Austin.²⁶

²⁵ *Id.* at 189

²⁶ *Id.* at 20.

D. The 2012 Texas State Water Plan

The 2012 State Water Plan is the third plan developed through the regional water planning process.

In response to issues identified in the 2007 State Water Plan, the Legislature made several policy changes that impacted water planning. In 2005, the Texas Legislature passed Senate Bill 3, which created a process to address environmental flows and designated unique reservoir sites and sites of unique ecological value. The Legislature also provided appropriations to allow \$1.2 billion of funding to implement water management strategies recommended in the 2006 regional water plans and the 2007 State Water Plan. Priority was given to entities with the earliest recommended implementation date in the state and regional water plans and which have demonstrated significant water conservation savings or would achieve significant water conservation by implementing a proposed project.²⁷

E. Texas is Well Ahead of the Curve in Water Planning

As the above discussion demonstrates, Texas is well ahead of most other states in the area of state and regional water planning.

²⁷ *Id.* at 21.

III. Obtaining Water from Oklahoma is a Recommended Strategy in the 2011 Region C Water Plan and the 2012 State Water Plan

A. Description of Regional Water Planning Area C

Regional Water Planning Area C (“Region C”) covers all or part of 16 counties in North Central Texas.²⁸ The population of Region C has grown from 987,925 in 1930 to 6,347,326 in 2008 and the area is still growing rapidly.²⁹ As of 2008, Region C included 26 percent of Texas’ total population.³⁰

The two most populous counties in Region C, Dallas and Tarrant, have 65 percent of the region’s population.³¹ Region C includes most of the Dallas and Fort Worth-Arlington area. Water use in Region C has increased in recent years, primarily in response to increasing population and municipal use.³²

²⁸ 2011 Region C Water Plan, Freese and Nichols, *et al.* (October 2010) (“2011 Region C Plan”), p. I.1. Region C includes all of Cooke, Grayson, Fannin, Jack, Wise, Denton, Collin, Parker, Tarrant, Dallas, Rockwall, Kaufman, Ellis, Navarro, and Freestone Counties and the part of Henderson County that is in the Trinity Basin. The 2011 Region C Plan is available at: http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf

²⁹ 2011 Region C Plan, p. 1.1.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Id.*, p. 1.13.

Municipal use is by far the largest water use category in Region C, with significant manufacturing as well.³³

B. Recommended Major Water Management Strategies for Region C Include Obtaining Water from Oklahoma

The 2011 Region C Water Plan lists and describes several recommended major water management strategies to ensure a water supply for Region C.³⁴ Those strategies include obtaining water from Oklahoma.³⁵ Texas public entities within Region C that would receive and use water from Oklahoma are: Petitioner Tarrant Regional Water District (“Tarrant”); North Texas Municipal Water District (“NTMWD”); City of Irving; and Upper Trinity Regional Water District (“UTRWD”).³⁶ In addition, obtaining water from Oklahoma beginning in 2060, has been identified as an *alternative* (as opposed to a *recommended*) water management strategy for Dallas Water Utilities (“DWU”).³⁷ Tarrant, NTMWD, and UTRWD are wholesale water providers. City of Irving and DWU are retail water providers.

The regional water planning group for Region C has estimated that water from Oklahoma would cost

³³ *Ibid.*

³⁴ *Id.*, p. ES.10

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Id.*, pp. 4E.4, 4E.9.

about \$2.09 per thousand gallons and would have relatively low environmental impacts because it involves the use of existing sources.³⁸ Alternatives would be substantially more expensive.³⁹ Accordingly, obtaining water from Oklahoma is an important if not critical component of obtaining and ensuring an adequate water supply for Region C.

C. The 2012 State Water Plan Includes Two Recommended Projects Involving Water from Oklahoma

Texas' 2012 State Water Plan likewise identifies two recommended projects involving water from Oklahoma. One project would bring water from Oklahoma to the City of Irving beginning in the year 2030 at an estimated capital cost of approximately \$195 million. The other would bring water from Oklahoma to NTMWD, Tarrant, and UTRWD beginning in the year 2060, at an estimated capital cost of approximately \$756 million.⁴⁰

In addition, like the 2011 Region C Plan, Texas' 2012 State Water Plan identifies the alternative water management strategy of bringing water from Oklahoma to DWU beginning in year 2060, at an

³⁸ *Id.*, p. 4D.14.

³⁹ 2012 SWP at 253 and 254; *see also* Brief for Petitioner at 15.

⁴⁰ *Id.* at 19, 253.

estimated capital cost of approximately \$345 million.⁴¹

IV. Recommended Strategies to Obtain Water from Oklahoma Pre-date the Current State and Regional Water Plans

Obtaining water from Oklahoma was also identified as recommended and alternative water management strategies in the 2001 and 2006 Region C water plans.⁴²

V. The Tenth Circuit's Decision, if Affirmed, Would Undermine the Integrity and Efficacy of Texas' Water Planning Process

A. The Red River and the Red River Compact

As noted by Petitioner, the Red River marks a significant portion of the boundary between Oklahoma and Texas. Disputes over the use and allocation of water in the Red River and its basin led to lengthy and painstaking negotiations among Texas,

⁴¹ *Id.* at 270.

⁴² 2011 Region C Plan, p. 4D.13; 2001 Region C Plan, Freese and Nichols, Inc. *et al.* (Jan. 2001), pp. ES-16, ES-17, 5.52, 5.54, 7.12; 2006 Region C Plan, Freese and Nichols, Inc. *et al.*, pp. ES.10, 4D.16. available at http://www.twdb.state.tx.us/waterplanning/rwp/plans/2001/C/Region_C_2001_RWP.pdf and http://www.twdb.state.tx.us/waterplanning/rwp/plans/2006/C/Region_C_2006_RWP.pdf.

Oklahoma, Arkansas, and Louisiana, which ultimately led to the Red River Compact agreed to in 1978 and ratified by Congress in 1980. The Compact divides the Red River Basin into “reaches” and further divides those reaches into “subbasins.” The Compact allocates the water in each subbasin to one or more of the signatory states.

As explained by Petitioner in its merits brief, § 5.05(b)(1) of the Compact clearly and unambiguously apportions the water in Reach II, Subbasin 5, and does so without reference to state lines. Specifically, the Compact grants to each of the signatory states “equal rights to the use” of all water “originating in subbasin 5” or “flowing into subbasin 5” with “no state entitled to more than 25 per cent of the excess water.”⁴³

B. An Express Purpose of the Compact is to Provide a Basis for State Planning, and the Compact Indeed Served as that Basis

One of the principal and expressly stated purposes of the Compact is:

[t]o *provide a basis for state . . . planning . . .*
by ascertaining each state’s share in the

⁴³ Tex. Water Code § 46.013 (West 2008), Compact § 5.05(b)(1).

interstate water of the Red River Basin and the apportionment thereof.⁴⁴

Notwithstanding the discriminatory Oklahoma laws that amount to an embargo preventing out-of-state users from obtaining water in Oklahoma, and the decision of the Tenth Circuit affirming those laws, the Compact has succeeded in fulfilling this purpose. The Compact provided a firm basis for Texas to plan to obtain water in Oklahoma for transport to Texas in accordance with allocations set forth in the Compact. Texas' 2012 State Water Plan expressly references the Compact (in addition to the four other interstate river compacts to which Texas is a signatory) stating that these compacts "as ratified by the legislature of each participating state and the U.S. Congress, represent agreements that establish how water should be allocated."⁴⁵

As described above, obtaining water from Oklahoma is among the recommended major water management strategies to supply water to Tarrant, NTMWD, City of Irving, and UTRWD, adopted pursuant to the Texas' water planning process, and set forth in the 2011 Region C Water Plan.⁴⁶ Moreover, these projects to convey and transfer water from Oklahoma to Texas are identified as recommended

⁴⁴ Compact § 1.01(e) (emphasis added).

⁴⁵ 2012 SWP at 29.

⁴⁶ *See supra* at 16.

projects in Texas 2012 State Water Plan.⁴⁷ Since as early as 2001, and in reliance on the express terms of the Compact, Texas has planned on obtaining water from Oklahoma, subject to the terms of the Compact, to meet its critical needs.

C. Texas' Water Planning Process Should Be Able to Rely on the Compact

As noted above, one of the principal purposes of the Compact is to serve as the basis for water planning in the signatory states. Texas' state and regional water planning process rightfully took into account and relied on the Compact in recommending major water management strategies and projects involving water from Oklahoma to meet the needs of Region C. Indeed, the water planning process in Texas should be able to rely on the Compact and its express terms.

D. The Tenth Circuit's or Respondents' Interpretation of the Compact Would Prevent Texas Entities from Pursuing Recommended Strategies Involving Obtaining Water from Oklahoma and Would Undermine the Integrity and Efficacy of Texas' Water Planning Process

Amicus TWCA agrees with and adopts Petitioner's argument that Compact language preempts

⁴⁷ *See supra* at 17-18.

Oklahoma laws that prevent Texas from obtaining its share of Reach II, Subbasin 5, water from Oklahoma.⁴⁸ A conclusion that the Oklahoma laws at issue are not preempted by the Compact would undermine the integrity and efficacy of Texas' water planning process by preventing Texas from exercising its rights under the Compact and enjoying the benefit of the agreement that Texas reached with the other signatory states in 1978 and memorialized in the Compact and which, upon Congressional approval, became federal law. These rights and benefits were relied on by Texas' water planning process when establishing recommended water management strategies and projects involving water from Oklahoma. Oklahoma should not now be allowed to rewrite those terms and this Court should not abet and enable such efforts.

A decision that the Compact does not preempt the discriminatory Oklahoma laws that amount to an embargo on out-of-state users from obtaining water in Oklahoma would thwart and undermine Texas' water planning's reasonable and rightful reliance on the Compact. Texas' water planning process must be able to rely on the Compact as a basis for its long-range water planning.

⁴⁸ Brief for Petitioner at 25-47.

Accordingly, TWCA supports Petitioner's Merits Brief and Petitioner's request that the Court reverse the decision of the Tenth Circuit



CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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February 2013