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 *AMICI CURIAE* CITY OF OKLAHOMA CITY AND OKLAHOMA CITY WATER UTILITIES TRUST IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the allocations of surface water as approved by Congress in an interstate compact, Congress's stated basis for authorizing and funding a federal reservoir project, and the plenary authority exercised by a State over its surface water resources can all be ignored to allow a State to access another State's internal water resources in disregard of statutes regulating that resource.

2. Whether a dormant Commerce Clause analysis can be used to define and restrict the scope of the plenary authority over surface water resources that was expressly delegated to the States by Congress.

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BRIEF OF *AMICI CURIAE* CITY OF OKLAHOMA CITY AND OKLAHOMA CITY WATER UTILITIES TRUST IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The City of Oklahoma City, an Oklahoma municipal corporation ("OKC") and the Oklahoma City Water Utilities Trust ("OCWUT") (collectively referred to as "OKC") have relied on water located in southeastern Oklahoma to ensure a reliable municipal water supply for their service area in central Oklahoma. OKC has acquired water and has pending permits to acquire water for its municipal water supply from several tributaries to the Red River, the Kiamichi and Muddy Boggy Rivers, located in southeastern Oklahoma and allocated to Oklahoma as part of Reach II of the Red River Compact ("Compact"). Prior to use in OKC, the water appropriated from Reach II is stored in Atoka Lake and in Sardis and McGee Creek Reservoirs. Sardis and McGee Creek Reservoirs were funded and authorized by Congress for the express purpose of providing OKC with a municipal water supply.

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[1] Pursuant to Rule 37.6, OKC and OCWUT affirm that no counsel for a party authored this brief in whole or in part and that no person other than OKC and OCWUT and its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), OKC and OCWUT have obtained the blanket written consent of all parties to the filing of this brief, and copies of those written consents were filed with the Clerk of the Court on February 12 and February 19, 2013.

Tarrant Regional Water District ("Tarrant") claims that the Compact authorizes it to ignore Oklahoma's statutes regulating the allocation of its internal water resources and access Texas's allocation of Compact water within Oklahoma's boundaries.[2] Tarrant's contention is based on the drought conditions in Texas and its erroneous statements that Congress authorized and funded Sardis Reservoir to provide north Texas with a municipal water supply. In essence, Tarrant is asking this Court to rewrite the express terms of the Compact, to ignore Oklahoma's plenary authority over its internal surface water resources, and to modify the basis for Congress's funding and authorization of Sardis Reservoir because of Tarrant's opinion that north Texas needs the water more than Oklahoma. Resolution of Tarrant's claim that it is entitled to access Texas's allocation of Compact water without being subject to Oklahoma's plenary authority over its internal surface water resources has a direct impact on OKC's municipal water supply in southeastern Oklahoma that it has developed, invested in, and relied on since the 1950s.

The Water Shortage in Central Oklahoma

The majority of Oklahoma's water supply comes from precipitation that falls within its borders. *Oklahoma Comprehensive Water Plan* ("OCWP"), *Supplemental*

[2] Tarrant is claiming a surface water appropriation from Reach II. No claims for ground water are involved in this case.

Report: Climate Issues & Recommendations, 2 (Dec. 2010) ("*Climate Report*").[3] Oklahoma is divided by the 100th meridian, which creates drastic variations in the amount of precipitation received across the State. R.L. Nace & E.J. Pluhowski, *Drought of the 1950's with Special Reference to the Midcontinent*, 8 (Geological Survey Water-Supply Paper 1804) (1965). The eastern portion of Oklahoma typically receives fifty-six inches of precipitation per year, while the western portion only receives seventeen inches per year. *Climate Report*, at 3. OKC receives approximately thirty inches of precipitation per year.

In the 1950s, Oklahoma experienced a severe drought during which OKC faced critical water supply shortages. Nace, *supra*, at 1, 79. As a result, OKC began to investigate the feasibility of exporting water from southeastern Oklahoma to alleviate its shortages. *Id.* Beginning in the mid-1950s, numerous studies were prepared and submitted to the federal government that analyzed the feasibility of transporting water from southeastern to central Oklahoma. *See, e.g.,* G.B. Treat and F.J. Wilson, *Navigation and Water Supply Studies, Southeast and Central Oklahoma* (prepared for the Army Corps of Engineers ("COE")) (Nov. 18, 1958) (containing a series of

[3] The 2012 Oklahoma Comprehensive Water Plan was finalized and approved on October 17, 2011. The various reports that were included in the OCWP are available at http://www.owrb.ok.gov/supply/ocwp/ocwp.php.

engineering reports that describe several options for transporting water from southeastern to central Oklahoma); Project HOW, Action Conference, A Blueprint for Industrial Development, Water Supply Navigation (July 10-11, 1958) (discussing water projects designed to transport water from southeastern to central Oklahoma); *Oklahoma's Long-Range Water Requirements* (prepared for the Bureau of Reclamation) (Jan. 1965) (summarizing Oklahoma's increasing municipal water demands and the need to find long-term solutions to satisfy those demands). These studies ultimately culminated in Congress's authorization of several federal reservoirs in southeastern Oklahoma to supply OKC with a long-term and reliable municipal water supply. *Municipal and Industrial Water Requirements Hugo, Tuskahoma, and Clayton Reservoirs Kiamichi River Basin Oklahoma: A Report on a Portion of the Southeastern Oklahoma and Western Arkansas Comprehensive Water Resources Study* ("*Water Resources Study I*" or "*Study I*"), app. IV to S. Doc. No. 145 (Dec. 1960) (prepared by the Public Health Service, Region VII); *Water Resources Study, Southeastern Oklahoma and Southwestern Arkansas, Study of Potential Needs and Value of Water for Municipal, Industrial, and Quality Control Purposes* ("*Water Resources Study II*" or "*Study II*") (July 1962) (prepared by the Public Health Service, Region VII) (both stating that the primary justification for the federal reservoirs in southeastern Oklahoma is to

provide OKC with a reliable municipal water supply).[4] *Water Resources Study I* is an appendix to Senate Document 145, which was approved by Congress when it authorized Sardis (previously named Clayton) and Tuskahoma Reservoirs, and modified Hugo Reservoir. Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173, 1187 (Oct. 23, 1962), 1JA65-67.

Similar to the 1950s, OKC is currently experiencing a severe drought and a municipal water supply shortage that is expected to continue through 2013. *United States Drought Monitor: Oklahoma* (Mar. 12, 2013), http://droughtmonitor.unl.edu/pics/ok_dm.png; *United States Seasonal Drought Outlook* (Feb. 21, 2013) (predicting that the drought in Oklahoma will persist or intensify), http://www.ncdc.noaa.gov/sotc/briefings/201302.pdf. Recently, the federal government designated most of the counties in Oklahoma, including the counties in OKC's service area, as natural disaster areas due to the extreme drought. *USDA Designates 76 Counties in Oklahoma as Primary Natural Disaster Areas with Assistance to Surrounding States*, News Release (Jan. 9, 2013), http://www.fsa.usda.gov/FSA/printapp?fileName=ed_20130109_rel_0014.html&newsType=ednewsrel. OKC's reservoirs located in central Oklahoma are at record low levels and OKC has already taken action to reduce water

[4] OKC has sought leave to lodge *Water Resources Study I* and *Water Resources Study II* with the Clerk of the Court.

use in its service areas in anticipation of a continuing extreme drought. Steve Lackmeyer, *Oklahoma City Implements Odd/Even Water Rationing*, News OK (Jan. 18, 2013); William Crum, *Water Released From Canton Lake on its Way to Oklahoma City*, News OK (Jan. 30, 2013); William Crum, *Drought Puts Lake Hefner Boating Season in Jeopardy*, News OK (Feb. 5, 2013).

In addition to needing water to meet its short-term water shortages, OKC needs to acquire new sources of water in order to ensure a long-term municipal water supply for its increasing demands. OKC currently serves 580,000 customers and anticipates an annual one and a half percent increase in water usage. *OCWUT Facts*, http://www.okc.gov/waterrights/utilityfacts.html; *Utilities OKC*, http://www.okc.gov/water/index.html (both last visited Mar. 19, 2013). OKC does not have sufficient water supplies for its projected demands and will need an additional 141,000 acre-feet of water supply by 2060. *Regional Raw Water Supply Study for Central Oklahoma*, 2-6 to 2-7 (prepared for Oklahoma Regional Water Utilities Trust) (Mar. 2009). Beginning in 2020, water demands in the OKC area are forecasted to exceed the available water supply. OCWP, *Central Watershed Planning Region Report,* at 50. Surface water use in OKC is forecasted to increase by twenty-six percent from 2010 to 2060. *Id.* at 54. To alleviate the severe short and long-term water supply shortages in central Oklahoma, OKC has acquired water rights in southeastern Oklahoma and the infrastructure necessary to transport that water to OKC.

OKC's Municipal Water Supply in Southeastern Oklahoma

OKC has existing and pending permits to appropriate water from the Kiamichi and Muddy Boggy Rivers, which are tributaries to the Red River located wholly within Oklahoma. *Map of River Basins of the Clear Boggy Creek, Muddy Boggy Creek, and Kiamichi River*, prepared by the City of Oklahoma City Utilities Department (Oct. 3, 2011).[5] OKC has a permit to appropriate 40,000 acre-feet of water per year from the Muddy Boggy River for storage in McGee Creek Reservoir for subsequent municipal and industrial uses. *Permit to Appropriate Stream Water from the Muddy Boggy and Kiamichi Rivers* (approved Jan. 8, 1974). OKC also has a permit to appropriate 91,667 acre-feet of water per year from the Muddy Boggy River for storage in Atoka Lake. *Permit to Appropriate Stream Water from the Muddy Boggy River* (approved Oct. 14, 1980). The water stored in McGee Creek Reservoir and Atoka Lake is transported to OKC and its service area via a 110-mile pipeline.

OKC has a pending application seeking the appropriation of 136,000 acre-feet of water per year from the Kiamichi River for storage in Sardis Reservoir, which is relatively near McGee Creek Reservoir

[5] OKC has sought leave to lodge the *Map* with the Clerk of the Court.

and Atoka Lake.[6] *Application for a Permit to Use Surface or Stream Water* (filed Mar. 8, 2010). Water stored in Sardis Reservoir will be transported via the 110-mile pipeline to OKC and its service areas for municipal and industrial uses. The water from southeastern Oklahoma is a critical component of OKC's municipal water supply.

OKC's Reliance on the Federal Reservoirs in Southeastern Oklahoma

Prior to Congressional approval, the COE must conduct feasibility and cost-benefit studies of reservoir projects. *See* 33 U.S.C. § 701 (2012); 43 U.S.C. § 390b (2012).[7] Congress initially authorized Hugo Reservoir as part of the flood control plan for the

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[6] In June 2010, OCWUT entered into the Storage Contract Transfer Agreement with Oklahoma to acquire the rights to use the storage capacity in Sardis Reservoir that were previously held by Oklahoma pursuant to a 1974 Contract with the United States.

[7] In the Reclamation Act of 1902, Congress directed the Bureau of Reclamation ("BOR") to develop irrigation supplies through reservoir projects in the western United States. *See* 43 U.S.C. § 371 (2012). Subsequent legislation further authorized the BOR to consider future municipal water demands when studying and constructing reservoir projects. Congress also enacted a series of Flood Control Acts that authorize the COE to construct reservoirs for the primary purpose of flood control. In 1958, Congress enacted the Water Supply Act to include storage for future municipal water needs in any reservoir project constructed by either the COE or the BOR. Water Supply Act of 1958, Pub. L. No. 85-500, 72 Stat. 319 (July 3, 1958); 33 U.S.C. § 701-1; 43 U.S.C. § 390b.

Red River. Flood Control Act of 1946, ch. 596, 60 Stat. 641, 647 (July 24, 1946). Following the initial authorization, the COE completed additional studies to determine how to allocate flood control and water supply storage in Hugo Reservoir and other reservoirs authorized for flood control on the Red River. As part of the modification to Hugo Reservoir, Congress authorized Sardis and Tuskahoma Reservoirs in 1962 for multiple purposes including municipal water supply storage, flood control, and recreation. 1JA65-67 (76 Stat. 1173). Unlike Sardis Reservoir, Tuskahoma Reservoir has not been constructed.

Sardis Reservoir was authorized by Congress "substantially in accordance" with the recommendations from the COE. 1JA66 (76 Stat. at 1187). The COE's findings and recommendations are contained in Senate Document 145, which has the force of federal law. S. Doc. No. 145, 87th Cong., 2d Sess. (Sept. 24, 1962), 1JA106-112. The feasibility studies related to the modification of Hugo Reservoir and the authorization of Sardis and Tuskahoma Reservoirs indicate that the reservoirs were initially considered as a source of municipal water supply for north Texas; however, that area was removed from consideration after further study.[8] *Water Resources Study I*, at 1, 4.

[8] The feasibility studies for the federal reservoirs in southeastern Oklahoma occurred at the same time that the signatory States were negotiating the terms of the Compact. Congress authorized the States to negotiate a Compact to allocate the water of the Red River in 1955. Pub. L. No. 84-346, 69 Stat. 654, 654 (1955). Feasibility studies for the reservoirs began in 1956 and continued to 1962. 1JA107-108 (S. Doc. No. 145 at 20-21).

Based on a cost-benefit analysis, a study of future municipal demands, and a study of available water supply, the reservoirs were specifically authorized by Congress to primarily provide water to OKC.[9] *See* 1JA108-109 (S. Doc. No. 145 at 21) (concluding that approximately ninety percent of the water supply benefits from Sardis Reservoir would accrue to the OKC metropolitan area, with approximately ten percent of the water supply benefits to be provided for the area near the reservoir within Oklahoma).

Congress based its exclusion of water demands from north Texas on the *Water Resources Study I*, which contains an extensive analysis of the future municipal water demands in the areas surrounding Hugo, Sardis, and Tuskahoma Reservoirs, including OKC and north Texas. Regarding the municipal water demands of north Texas, *Study I* concludes that sufficient water could be obtained from the basins *located in Texas* to satisfy the municipal demands of north Texas. *Water Resources Study I*, at 49.[10] A cost-benefit analysis of using the reservoirs in

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[9] State or local interests are also required to give reasonable assurances that they will contract for storage to satisfy anticipated future demands. 43 U.S.C. § 390b. OKC has provided reasonable assurances for Sardis Reservoir. Storage Contract Transfer Agreement, *supra* note 6. Tarrant has not provided any reasonable assurances for the federal reservoirs located in southeastern Oklahoma.

[10] This finding is consistent with the fact that almost half of the Reach II, Subbasin 5 Red River drainage basin is located in Texas, while only a small portion of that basin is located in Oklahoma. Map of Reach II, Fig. 3, Red River Compact Commission (May 12, 1978), 2JA305 ("*Reach II Map*").

southeastern Oklahoma to supply water to north Texas demonstrates that "[t]he costs of transmission from out-of-basin sources [in southeastern Oklahoma] [is] estimated to be higher than development within the basin." *Id*. In addition, *Study I* finds that water sources within Texas could adequately supply water until the year 2000. While north Texas would need additional water sources after 2000, "such supply could be more advantageously obtained from alternative sources than from the Kiamichi River projects." *Id.* at 4. *Study I* also determines that Sardis Reservoir is located most favorably to provide a municipal water supply for OKC. *Id.* at 5. Accordingly, "[n]o economic value attributable to the study projects for providing storage to meet the demands of the Texas area has been found. It is unlikely that further refinement will alter this conclusion." *Id*. at 1. Thus, *Study I* expressly rejects the water demands of north Texas as a basis for authorizing Sardis, Hugo, and Tuskahoma Reservoirs. *Id.* at 4.

A second study confirmed these findings. *Study II* was prepared to consider streamflow regulation as part of the purpose of the reservoirs in southeastern Oklahoma. *Water Resources Study II*, at 6. *Study II* notes that while the reservoirs could "influence the economy" of northeastern Texas, the OKC area had a "very substantial need for additional water in the future" and concludes that the OKC "metropolitan area is, and will probably continue to be, the largest population center in this study area." *Id.*

OKC's Reliance on the Reach II Allocations

The provisions of the Compact allocating water in Subbasins 1 and 5 of Reach II are relevant to OKC's municipal water supply and Tarrant's claims. The general purpose of the Compact is to allocate water from the Red River and its tributaries between Arkansas, Louisiana, Oklahoma, and Texas by dividing the Red River Basin into reaches and subbasins within each reach. Pub. L. No. 96-564, 94 Stat. 3305 (1980), 1JA7-51. The Compact recognizes each State's unrestricted authority to regulate within its boundaries "the appropriation, use, and control of water . . . " 1JA12 (§ 2.10(a)). In addition, the Compact expressly recognizes Oklahoma's "free and unrestricted use of the water" of all the tributaries of the Red River located wholly in Oklahoma. 1JA23-24 (§ 5.03(b)). Each State "may use the water allocated to it by this Compact in any manner deemed beneficial by that [S]tate." 1JA10 (§ 2.01).

Reach II is divided by the Compact into five subbasins. With the exception of Subbasin 5, the Compact allocates water based on State boundaries. Subbasin 1 "includes those streams and their tributaries above existing, authorized or proposed last downstream major damsites, wholly in Oklahoma and flowing into Red River below Denison Dam above the Oklahoma-Arkansas [S]tate boundary." 1JA22 (§ 5.01(a)). Oklahoma is apportioned the water in Subbasin 1 and has "unrestricted use" of that water. *Id.* (§ 5.01(b)).

Subbasin 5 includes the main stem of the Red River and its tributaries "from Denison Dam down to the Arkansas-Louisiana [S]tate boundary, excluding all tributaries included in the other four subbasins of Reach II." 1JA24-25 (§ 5.05(a)). The northern boundary of Subbasin 5 extends into Oklahoma. The northern boundary ends at the downstream points of the damsites in southeastern Oklahoma, including the Hugo Reservoir damsite. *Reach II Map, supra* note 10. The approximate drainage area of Subbasin 5 is 1485 square miles in Texas and 858 square miles in Oklahoma. *Id.*

When the flow of the Red River at the Arkansas-Louisiana State line is 3000 cubic feet per second (cfs) or more, the States have equal rights to the use of water originating in or flowing into Subbasin 5; provided, however, that States may only use water located within their boundaries, and no State may use an amount of water that exceeds twenty-five percent of the total amount of excess water that is available throughout Subbasin 5. 1JA25 (§ 5.05(b)(1)). The Compact requires each *State* to regulate its water resources to ensure that Louisiana receives its allocation of Subbasin 5 water. *Id.* (§ 5.05(b)(2)). The purpose of Subbasin 5 is to ensure that the upstream States cooperate to deliver reliable flows to Arkansas and Louisiana. *Supplemental Interpretative Comments of the Legal Advisory Committee*, 1JA27-31 (explaining that "[u]pstream [S]tates never questioned that Louisiana needed and is entitled to water;" that the purpose of Subbasin 5 is for "upstream [S]tates [to]

cooperate in assuring reliable flows to Arkansas and Louisiana;" and that Subbasin 5 governs low flow obligations of the States).

SUMMARY OF ARGUMENT

Surface water has long been recognized, by both this Court and Congress, as an important resource that is within the States' plenary authority to allocate and regulate. Congress has delegated to each State the exclusive authority to determine, allocate, and regulate their internal surface water resources. In 1866, Congress expressly recognized the plenary control of the States over their internal water resources. Since 1866, Congress has repeatedly enacted legislation that affirmed its delegation of plenary authority to the States. Subject only to a few limited exceptions, Congress has granted States the plenary authority over surface water resources within their boundaries.

The terms of the Compact do not authorize Tarrant to ignore Oklahoma's plenary authority and access its Reach II, Subbasin 5 allocation from Oklahoma. Tarrant's claim is premised on its erroneous contention that Congress authorized north Texas entities to use water stored in federal reservoirs in Subbasin 1 that is subsequently released to Subbasin 5. Congress never intended, authorized, or funded the federal reservoirs to provide a water supply to north Texas.

A dormant Commerce Clause analysis cannot be used to limit the scope of the plenary authority over surface water resources expressly delegated to the States by Congress. Oklahoma's statutes regulating the export of surface water are consistent with its plenary authority. Because Congress has acted, the dormant Commerce Clause does not apply and cannot be used to invalidate Oklahoma's statutes. This Court has never used a dormant Commerce Clause analysis to define or limit the scope of plenary authority expressly delegated to the States by Congress, and it should not do so in this case.

Tarrant broadly cites *Sporhase v. Nebraska* to support its argument that Oklahoma's statutes violate the dormant Commerce Clause. However, Tarrant disregards the legally and factually distinct issues between the unappropriated surface water at issue in this case and the ground water at issue in *Sporhase*. The only issue presented to the Court in *Sporhase* was whether the existence of the Commerce Clause of the Constitution alone, in the absence of any action by Congress, would invalidate Nebraska's statutes regarding the export of ground water to other States. The *Sporhase* decision does not preclude States from allocating and regulating surface waters in accordance with Congress's express delegation of that authority to the States.

ARGUMENT

I. Congress Has Expressly Delegated Plenary Authority Over Surface Water Resources to the States.

A. Plenary authority over surface water is an incidence of federal sovereignty that must be conveyed by Congress.

Prior to the creation of the States, a large area of the western United States was claimed by Spain. Much of this area was ceded by Spain to France in the Treaty of San Ildefonso. 55 Consol. T.S. 377 (Oct. 1, 1800). Within three years of the area's cession, France ceded the area to the United States in the Louisiana Purchase. Treaty of 1803, 8 Stat. 202 (Apr. 30, 1803). The Louisiana Purchase encompassed over five hundred million acres of land in what are now fourteen States, including Oklahoma. France ceded "to the United States in the name of the French Republic for ever and in full Sovereignty the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French Republic [from Spain]." *Id.* at art. I.

The Louisiana Purchase granted the United States complete sovereignty over those lands and water. Control over water resources is closely connected to the sovereign powers of the government. *United States v. Oregon*, 295 U.S. 1, 14 (1935). As part of its sovereignty, Congress has the exclusive power to regulate water resources and to delegate that authority to the States. *See Kansas v. Colorado*,

206 U.S. 46, 85 (1907) ("[I]f the nation has the right to regulate the flow of the waters, we must inquire what it has done in the way of regulation.").

B. Congress has expressly conveyed its sovereignty over surface water resources to the States.

Throughout the 1800s, Congress enacted a series of statutes designed to encourage settlement in the west by providing incentives to develop and reclaim land through local irrigation projects. *California v. United States*, 438 U.S. 645, 648-50 (1978). *See, e.g.,* Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (opening the public domain in the western United States to homesteading). Prior to 1866, the right to beneficially use water was regulated by local rules and customs. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). This policy of regulating and allocating water in accordance with local rules and customs "was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866." *Id.*

In 1866, Congress passed the Mining Act to expressly confirm the federal policy of deferring to State sovereignty in the determination and allocation of water resources within State boundaries. Mining Act of July 26, 1866, ch. 262, 14 Stat. 251, 253 (*currently codified at* 30 U.S.C. § 51 (2012)). The purpose of the Mining Act was not to federalize State water

law, but instead was to affirmatively acknowledge the federal government's acceptance of "the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899).

In 1877, Congress passed the Desert Lands Act in order to sever water from lands in the public domain. Desert Lands Act of March 3, 1877, ch. 107, 19 Stat. 377 (*currently codified at* 43 U.S.C. §§ 321 to 323, 325, 327 to 329 (2012)). While Oklahoma was not listed as a State to which the Desert Lands Act applied, this Court has stated that

> following the act of 1877, *if not before*, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated [S]tates, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.

Beaver Portland, 295 U.S. at 163-64 (emphasis added); 35 Cong. Rec. 6675, 6679 (June 12, 1902) (statement of Rep. Mondell) ("Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water . . . and it has been deemed wise to continue our policy in this regard."). Similarly in 1891, Congress passed an act that stated: "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes

under authority of the respective States or Territories" in order to eliminate "the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of water." Timber-Culture Act of March 3, 1891, ch. 561, 26 Stat. 1095 (*currently codified at* 43 U.S.C. § 946 (2012)); 29 Cong. Rec. 1947, 1952 (Feb. 17, 1897) (statement of Rep. Lacey).

As States were admitted to the Union, Congress granted the newly created States total authority to control the waters located within their boundaries. *California*, 438 U.S. at 662-64. The sovereignty over water retained by the United States was expressly delegated to the western States "on an equal footing with the original States." Enabling Act of June 16, 1906, 34 Stat. 267, 271; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) ("Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then. . . ."). The full powers of local sovereignty granted to the States included the power to allocate and regulate internal surface waters. *Kansas,* 206 U.S. at 92-94. *See also Alden v. Maine*, 527 U.S. 706, 714 (1999) (explaining that the United States Constitution recognizes the States as sovereigns by reserving "to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status"); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991)

("[T]he States entered the federal system with their sovereignty intact").

When Congress enacted the Reclamation Act, it had already expressly delegated plenary authority over intrastate water to the States. *California,* 438 U.S. at 663-64. The Reclamation Act provided that all money received from the sale and disposal of public lands in Oklahoma, as well as other arid States, would be used in the "examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands. . . ." Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (*currently codified at* 43 U.S.C. § 391 (2012)). Section 8 of the Reclamation Act provides that "nothing 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. . . ." 43 U.S.C. § 383. By enacting the Reclamation Act, Congress intended to continue its delegation of plenary authority to the States over the appropriation and distribution of water. 35 Cong. Rec. at 6679.

A key component of all the Acts passed by Congress from 1862 to 1902 is the delegation of plenary authority to the States to allocate and regulate their internal surface water resources. *California*, 438 U.S. at 656 ("Because of the fear that these Acts might in

some way interfere with the water rights and systems that had grown up under [S]tate and local law, Congress explicitly recognized and acknowledged the local law").[11] Thus, each State has the plenary authority to determine how to allocate and regulate its surface water resources. *Kansas*, 206 U.S. at 94 (stating that each State "may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control"). Because the authority over water resources has been delegated to the States, the federal government cannot force a State to regulate its internal water resources in a certain way. *Beaver Portland*, 295 U.S. at 165; *Rio Grande Dam*, 174 U.S. at 703-05.

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[11] Given the lack of knowledge about ground water at the time, the Acts passed by Congress from 1862 to 1902 do not expressly reference ground water. However, as described above, the Acts reference control over flowing streams and the prior appropriation and riparian doctrines governing surface water allocations. *See, e.g.,* 35 Cong. Rec. at 6675-77 (summarizing the events preceding the Reclamation Act and discussing the necessity of States controlling streams). Prior to the relatively recent enactments of ground water statutes, most States, including Oklahoma, followed the common law doctrine that the overlying land owner had a right to the ground water underlying the land. Wells A. Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 Tex. L. 157, 166 (Dec. 1955).

Since passing the Reclamation Act, Congress has continued its express delegation of plenary authority over surface water to the States. The policies underlying the enactment of the McCarran Amendment are a relatively recent example of continued Congressional delegation of authority over surface water to the States. As part of the debate regarding the McCarran Amendment, the Senate recognized the clear plenary authority of States over water within their boundaries and concluded that every water user, including the United States "must be amenable to the law of the State." S. Rep. No. 755, 82d Cong., 1st Sess., 6 (1951).[12]

[12] Congress and this Court have defined limitations on the States' plenary authority over their internal water resources with respect to the reserved rights of the United States, the navigable servitude, and the doctrine of equitable apportionment for interstate streams. *See Rio Grande Dam*, 174 U.S. at 703; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938); *Kansas*, 206 U.S. at 100-01. These limitations are not relevant to the case before this Court.

II. The Express Terms of the Red River Compact Do Not Authorize Tarrant to Ignore the Authorizing Legislation for the Federal Reservoirs in Reach II, to Access its Reach II Subbasin 5 Allocation from Oklahoma, or to Ignore Oklahoma's Plenary Authority Over Water Resources.

A. Congress funded and authorized the federal reservoirs in Reach II for OKC and southeastern Oklahoma.

Tarrant's incorrect assumption that the Compact drafters intended for Texas entities to access water that flowed downstream from the federal reservoirs in Subbasin 1 is contrary to Congress's intent, the terms of the Compact, and Oklahoma's plenary authority. Tarrant notes that the COE considered the feasibility of using Sardis Reservoir in conjunction with Hugo and Tuskahoma Reservoirs to provide north Texas with a municipal water supply. Pet'r's Br. 11-12. However, Tarrant fails to explain or reference the extensive analysis relied on by the COE to conclude that it was not necessary, feasible, or cost effective to use water from Hugo, Sardis, or Tuskahoma Reservoirs to satisfy north Texas's municipal demands.[13] The COE expressly rejected the use of the

[13] Several *amici* also fail to cite the COE's rejection of north Texas's municipal water demands as a basis for authorizing the federal reservoirs in southeastern Oklahoma and premise their reading of the Compact on their erroneous interpretation of the federal authorizing legislation. Brief of City of Dallas, at 8-11; Brief of Upper Trinity Regional Water District, at 23.

reservoirs as a source of municipal water supply in north Texas. *Water Resources Study I*, at 4.

Congress authorized and funded reservoirs in Reach II, Subbasin 1 for the primary purpose of providing OKC with a future municipal water supply. OKC and southeastern Oklahoma, not Tarrant, are the intended beneficiaries of the federal reservoirs. Allowing Tarrant or other north Texas entities to access the water from the federal reservoirs in Subbasin 1 violates the federal authorizing legislation for Sardis Reservoir, as well as the Compact.[14] 1JA10 (§ 2.02) (stating that the use of water in connection with any federal water project must be in accordance with the Act authorizing that project). Tarrant has failed to show any connection between the federally authorized reservoir projects in southeastern Oklahoma and its municipal water demands in north Texas. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1245-46 (10th Cir. 2011). As authorized by Congress, OKC is acquiring water rights in Sardis Reservoir for its municipal water supply in accordance with Oklahoma water laws.

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[14] *Amici* also urge the Court to ignore the authorizing legislation for the federal reservoirs in southeastern Oklahoma and adopt an even broader interpretation of the Compact to allow north Texas entities to access water from the Kiamichi River in Reach II, Subbasin 1. Brief of City of Irving, Texas, City of Hugo, Oklahoma, and Hugo Municipal Authority, at 25-27; Brief of North Texas Municipal Water District, at 9; Brief of North Texas Commission, at 4.

B. The Compact does not authorize Tarrant to access its Subbasin 5 allocation within Oklahoma in disregard of Oklahoma's plenary authority over its internal surface water.

Subbasin 5 encompasses portions of Oklahoma, Texas, and Arkansas in order to divide the total amount of excess water originating in the basin between the States. The boundaries of Subbasin 5 encompass all of the boundaries of the signatory States in order to cover the main stem of the Red River and its drainage areas. *Reach II Map*, 2JA305. In the context of Subbasin 5, Texas is an upstream State with downstream delivery obligations. After extensively analyzing the provisions regarding Subbasin 5 in the Compact, the Tenth Circuit correctly concluded that "[t]aken together, the provisions of § 5.05 stand for the principle that the upstream States control the water within their boundaries, provided they meet their minimum flow obligations to downstream [S]tates and do not take more than an equal share of the excess water." *Tarrant*, 656 F.3d at 1244. Subbasin 5 is designed to ensure that each State regulates its water resources to ensure that a certain flow in the main stem of the Red River reaches the downstream States.

Tarrant interprets Subbasin 5 in isolation as a license that allows it and other north Texas entities to ignore Oklahoma's statutes and access water within Oklahoma's boundaries. If Tarrant is correct and any State can access excess Subbasin 5 water without

regard for the other States' plenary authority, it would be impossible for each State to regulate Subbasin 5 water to ensure compliance with the downstream delivery obligations as required by terms of the Compact. Under Tarrant's logic, State boundaries would not be relevant to determine the delivery obligations and those obligations could be satisfied by any State anywhere in Subbasin 5. Similarly, Tarrant fails to explain how the limitation prohibiting any State from using more than twenty-five percent of excess water will be enforced if State boundaries are ignored and that water can be obtained anywhere by any State.

Interpreting the Compact to allow each State the use of excess water from Subbasin 5 that is within its boundaries when the flow of the Red River at the Arkansas-Louisiana State line is 3000 cfs or more, and precluding any State from using more than twenty-five percent of the total excess, ensures that all States have equal rights to excess water originating in Subbasin 5.[15] Despite Tarrant's arguments, the provisions of the Compact concerning Subbasin 5 operate to protect Texas in a manner that still respects State boundaries. The twenty-five percent provision of Section 5.05(b)(1) operates as a limitation to prevent water-long States from using an

[15] Tarrant emphasizes that the main stem of the Red River does not flow into Louisiana. However, Louisiana is ensured its allocation of water by the delivery requirements imposed on the upstream States.

excess amount of the Subbasin 5 water that is within their boundaries, not to give water-short States an entitlement to ignore State lines and raid nearby States to offset the limited physical supply that may at times exist within their boundaries.[16] Scarcity does not entitle a State to a presumption of access into another State under an interstate compact that is otherwise silent on the issue.

The Compact must be read in light of Oklahoma's exclusive authority to regulate its internal surface waters, which include the Kiamichi and Muddy Boggy Rivers in Subbasins 1 and 5. The general policies and express terms of the Compact confirm Congress's delegation of plenary authority over water resources to the States. Tarrant argues that the language of the Compact at Sections 2.01 and 2.10 deferring to State water laws is "boilerplate" and "generic language that appears in almost every interstate compact." Pet'r's Br. 10, 38. The more reasonable interpretation is that the insertion of this language into "almost every interstate compact" reflects the importance of State plenary authority over water resources.

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[16] Hypothetically, suppose the flow of the Red River at the Arkansas-Louisiana State line is 4000 cfs, resulting in a total net amount of excess flow of 1000 cfs in Subbasin 5. Suppose further that the Subbasin 5 flows are 400 cfs in Arkansas, 400 cfs in Oklahoma, and 200 cfs in Texas. Texas would be entitled to use all of its Subbasin 5 flows, whereas Arkansas and Oklahoma would be required to limit their use of water to 250 cfs each, subject to additional rebalancing between them and Louisiana.

The Tenth Circuit concluded that the "Compact explicitly defers to and recognizes plenary [S]tate authority over water use. . . ." *Tarrant*, 656 F.3d at 1237. Moreover, the Compact "plainly indicates that the [S]tate is not limited in how it uses its apportioned water." *Id.* at 1238. The Tenth Circuit's analysis is consistent with the plenary authority delegated to Oklahoma by Congress to allocate and regulate internal surface water resources. Nothing in the Compact restricts or preempts Oklahoma's plenary authority. In an exercise of the plenary authority granted by Congress and confirmed by the Compact, Oklahoma has enacted statutes regarding the allocation and regulation of surface water resources within its boundaries. Those statutes do not deprive Tarrant of its Compact allocation of water or prohibit out-of-State water users from appropriating water from Oklahoma. Rather, the statutes regulate the allocation of Oklahoma's internal surface water resources in a way that is consistent with the Compact and its plenary authority.

III. The Dormant Commerce Clause Does Not Apply When Congress Has Taken Action to Allow States to Exercise Plenary Authority Over Surface Water Resources.

A. Congress has taken action to allow States to exercise plenary authority over surface water resources.

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . .

among the several States . . . " U.S. Const. art. I, § 8, cl. 1, 3. The original purpose of the Commerce Clause was to give Congress the express authority to regulate interstate commerce to address the conflict of commercial regulations adopted by each State under the Articles of Confederation. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824).

While the Commerce Clause expressly authorizes Congress to regulate interstate commerce, this Court has interpreted the Clause as an implied restriction on permissible State regulation. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). The dormant aspect of the Commerce Clause only applies when Congress has not taken any action or is silent regarding interstate commerce. *Hughes*, 441 U.S. at 326 (discussing cases that define the scope of permissible State regulation in areas of *congressional silence*). When Congress acts, the courts are not free to review State regulations under the dormant Commerce Clause. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982). "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce. . . ." *Id.* at 154. Accordingly, the dormant Commerce Clause operates to ensure the continuance of "the policy of uniformity, embodied in the Commerce

Clause, which presumptively prevails when the Federal Government has remained *silent*." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8 (1986) (emphasis added).

The dormant Commerce Clause does not preclude Congress from acting to delegate plenary authority to the States. Likewise, the dormant Commerce Clause "is not a roving license for federal courts to decide what activities are appropriate for [S]tate and local government to undertake. . . ." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 343 (2007). This is especially true when dealing with areas that States have traditional and primary power to regulate, such as the use of surface water. *See Rapanos v. United States,* 547 U.S. 715, 738 (2006). The dormant Commerce Clause does not give federal courts the responsibility for policy judgments regarding areas of State plenary authority when Congress has acted. *United Haulers*, 550 U.S. at 344-45.

The application of the dormant Commerce Clause to Oklahoma's allocation and regulation of its internal surface water resources would ignore Congress's express delegation of plenary authority over surface water resources to the States. Beginning in the 1860s, Congress acted to grant the States authority to regulate and allocate their surface water resources – first by acquiescence and then by express approval. *Beaver Portland*, 295 U.S. at 154. Congress is entitled to "its wisdom to act to permit the States varying degrees of regulatory authority." *Wardair*, 477 U.S. at

12. To apply the dormant Commerce Clause analysis where Congress has acted, and to apply that analysis to reverse the policy that Congress has decided to follow would "turn dormant Commerce Clause analysis entirely upside down." *Id.* ("For the dormant Commerce Clause . . . only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors.").

Tarrant relies on the dormant Commerce Clause as a way to create a right to water in Oklahoma and to avoid Oklahoma's applicable statutes regarding surface water appropriations. Because Congress has acted to delegate authority over surface water resources to the States and the dormant Commerce Clause analysis does not apply, the relevant inquiry is whether Oklahoma's statutes are a valid exercise of its plenary authority over surface water resources.[17]

B. The Compact and Oklahoma's statutes are consistent with the plenary authority delegated to the States by Congress and recognized by this Court.

Congress expressly delegated authority over surface water resources to the States limited only by

[17] The Respondents have extensively cited to and briefed the validity of the provisions of Oklahoma statutes and OKC does not repeat that discussion here, except to note that it agrees with the Respondents' position.

reserved rights, the navigation servitude, and equitable apportionment. The Compact does not demonstrate Congressional intent to alter its express grant of plenary authority to the States. On the contrary, the Compact explicitly recognizes and affirms Congress's delegation of plenary authority over surface water to the States. While the Compact allocates the Red River and its tributaries between the signatory States, it also provides that the States are free to regulate and allocate their internal water resources. Oklahoma's statutes regulate the water resources within its boundaries, do not prevent Tarrant from accessing Texas's Compact allocation, and are consistent with the Compact and the plenary authority delegated by Congress to the States.

Allowing Tarrant to access Oklahoma's internal surface water resources in disregard of the statutory provisions governing that water "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). The Compact does not authorize the signatory States to cross State boundaries and access each other's internal water resources without complying with the applicable statutory provisions governing the regulation and allocation of that water. Despite the express delegation of authority by Congress and the clear language of the Compact, Tarrant cites to one provision, Section 5.05(b)(1), as conclusive proof that over one hundred years of State authority over surface water

resources should be ignored and that it is entitled to appropriate water in complete disregard of Oklahoma's plenary authority. Consistent with its plenary authority, Oklahoma has made policy choices regarding its internal water resources. It defies logic to interpret one provision in the Compact as proof that Congress intended to displace Oklahoma's policy choices.

IV. *Sporhase* Does Not Support the Proposition that the Dormant Commerce Clause Precludes States From Allocating and Regulating Surface Water Within Their Boundaries.

A. The States' authority over ground water is distinct from Congress's express delegation of plenary authority over surface water to the States.

Tarrant broadly cites *Sporhase v. Nebraska* to support its argument that Oklahoma's statutes violate the dormant Commerce Clause. 458 U.S. 941 (1982). While the only issue in *Sporhase* involved ground water, the Court broadly stated that "water is an article of commerce." *Id.* at 954. Although it is not clear whether the Court held that all water is an article of commerce or that ground water is an article of commerce, it is clear that Congress has not *expressly* delegated plenary authority over ground water to

the States.[18] When Congress has not acted, States can regulate natural resources, such as ground water. As determined by the Court in *Sporhase*, the regulation of a resource that Congress is silent about is limited by the dormant Commerce Clause. *Id.* In contrast, when Congress has acted by delegating plenary authority to the States to allocate and regulate internal surface water resources, the dormant Commerce Clause does not apply because the limits on the scope of the authority have already been determined. In this case, the dormant Commerce Clause cannot be applied to invalidate Oklahoma's statutes regarding the export of surface waters in light of over one hundred years of Congressional action regarding the States' authority to allocate and regulate surface waters within their boundaries.

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[18] In the context of determining Colorado's authority to regulate ground water, the Colorado Supreme Court recognized that Congress made no distinction between tributary and nontributary water when delegating plenary authority to the States. *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1269 (Colo. 1998); *Bayou Land Co. v. Talley*, 924 P.2d 136, 145-50 (Colo. 1996). While Congress did not specifically refer to ground water, it is clear that Congress specifically contemplated waters tributary to the natural streams and expressly referenced surface waters. *See supra* note 11. Neither Colorado case involved a dormant Commerce Clause challenge. Since ground water is not involved in this case, it is not necessary to address whether Congress granted plenary authority over ground water to the States as part of its express grant of plenary authority over surface water.

Sporhase did not discuss whether the States' plenary authority over surface water resources would change its application of the dormant Commerce Clause analysis. As part of reaching the conclusion that water is an article of commerce, the Court was concerned with Nebraska's claim that ground water was not an article of commerce because that would result in "curtail[ing] the affirmative power of Congress to implement its own policies concerning such regulation." *Id.* at 953. This concern does not exist when Congress has exercised its affirmative power to implement policies, such as delegating the authority to allocate and regulate surface water resources to the States.

Nebraska argued that "Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce *in ground water*." *Id.* at 958 (emphasis added). In support of its argument, Nebraska referenced several statutes, including the Reclamation Act, and numerous interstate compacts that dealt with Congress's delegation of plenary authority over *surface water*. *Id.* at 959. The Court rejected Nebraska's argument and stated that

> the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress

> consented to the unilateral imposition of unreasonable burdens on commerce.

Id. at 960. The Court's statement must be considered in the context of the issue before the Court – whether Nebraska's statutes regarding ground water were insulated from dormant Commerce Clause scrutiny. As noted by the Court, citations to interstate compacts and federal statutes that address the States' plenary authority over surface water resources do not lead to the conclusion that Congress has acted with regard to ground water, or that statutes regulating ground water have been removed from dormant Commerce Clause scrutiny.[19] In light of Congressional silence on ground water, Nebraska enacted statutes regulating ground water and the Court properly analyzed whether those statutes violated the dormant Commerce Clause.

The issue before this Court is whether Oklahoma's statutes are consistent with the constraints imposed by Congress and this Court on the States' plenary authority over their internal surface water resources. Oklahoma's statutes seek to regulate the export of its internal unappropriated surface water.

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[19] The Court even acknowledged the States' plenary authority over surface water resources by noting that there is "the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts." *Sporhase*, 458 U.S. at 956.

The statutes do not violate the terms of the Compact and are within the scope of the authority delegated to the States by Congress.

Moreover, this case is factually distinguishable from *Sporhase*. The water in Reach II is the subject of a Congressionally approved interstate compact that allocates surface water between several States. The ground water involved in *Sporhase* had never been allocated between States and was not the subject of an interstate compact. The overlying land owners in *Sporhase* appropriated the water for beneficial irrigation use on their land based on their land ownership. The Reach II, Subbasin 5 water involved in this case remains unappropriated surface water that cannot be allocated based on land ownership.

B. *Sporhase* overruled the public ownership theory, but did not address the States' plenary authority over surface water resources.

Historically, States operated under the assumption that they owned natural resources and could thus insulate those resources from a dormant Commerce Clause challenge. *See* Richard S. Harnsberger, et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 Neb. L. Rev. 754, 759 (1991). Wild animals and water were not viewed as articles of commerce because they were owned by the State in common ownership for the benefit of its citizens. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896); *Hudson*

County Water Co. v. McCarter, 209 U.S. 349, 354-58 (1908) (both explaining that the negative community of property, which includes air, water, and wild animals, could never be reduced to private ownership).

A few years prior to the *Sporhase* decision, the Court rejected the public ownership doctrine as a way to insulate statutes from the dormant Commerce Clause. *Hughes*, 441 U.S. at 334-35. In overruling the public ownership theory, the Court in *Sporhase* noted that the rationale underlying the theory still existed but had been recast 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." *Sporhase*, 458 U.S. at 951 (internal quotations and citations omitted).

Public ownership is distinct from a State's exercise of delegated plenary authority over those resources. Under the public ownership theory, a State could define ownership, allow the resource to be the subject of intrastate commerce, and then preclude interstate commerce. On the other hand, exercising plenary authority over surface water resources, subject to the limitations by Congress and this Court, gives the States the authority to allocate and regulate a resource. The exercise of plenary authority over a resource does not involve a State's action as a property owner. Rather, the State acts as a sovereign with the delegated power to regulate the resource. "The [S]tate is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary." *Oklahoma Water Res. Bd. v.*

Cent. Oklahoma Master Conservancy Dist., 464 P.2d 748, 753 (Okla. 1968).

Overruling the public ownership theory is distinct from a determination that States cannot exercise plenary authority over their internal water resources. "Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Hughes*, 441 U.S. at 335. Here, Oklahoma has exercised its plenary authority consistent with the power delegated to it by Congress, the federal authorizing legislation for the reservoirs in southeastern Oklahoma, the Compact, and the Constitution.

CONCLUSION

For all of the reasons stated above, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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