



## A Battle for Water

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Oklahoma water law is about to get interesting.

On Jan. 4, the U.S. Supreme Court agreed to review the 10th Circuit's decision in the litigation over water exports from Oklahoma to Texas. For those who may not follow the litigation, Oklahoma enacted statutes prohibiting out-of-state water exports.

Tarrant Regional, a water district in Fort Worth, requested appropriations of water from a number of Oklahoma sources, including the Kiamichi River. Tarrant Regional then sued the Oklahoma Water Resources Board, seeking to force the OWRB to grant the appropriation requests. Tarrant Regional claimed discrimination under the federal "dormant Commerce Clause." U.S. District Judge Joe Heaton ruled in favor of the OWRB. In September 2011, the 10th Circuit affirmed Judge Heaton's decision, holding that the Red River Compact protected Oklahoma's prohibition against water exports.

The litigation focuses on the Red River Compact and its effect on water exports. After Tarrant Regional filed its lawsuit against the OWRB, Oklahoma water officials set about enacting a new set of statutes designed to add greater protection against out-of-state water exports. Some of these new statutes rely expressly on the compact. It appears now that the Supreme Court will weigh in on the proper interpretation of the compact and its effect on Oklahoma's ability to protect its water from export.

In November, the U.S. Department of Justice weighed in on the dispute, filing a friend-of-the-court brief. In the brief, the Justice Department agreed with Tarrant Regional, making two critical points. First, according to the federal government, the Red River Compact is not entitled to the same presumption of pre-emption as federal statutes. The compact is a contract between states, and therefore must be interpreted as a contract rather than as a federal statute. Second, the Justice Department argued that the compact allows states to take portions of their allocation from across state lines.

The Red River has seen its share of battles. The Texas-Oklahoma rivalry has endured for generations. No one should be surprised that cross-border tensions now focus on water.

Faced with a good old-fashioned Texas challenge armed with the dormant Commerce Clause, the OWRB and state Legislature engaged in a smart gambit, with legislation designed to capitalize on the Red River Compact.

Oklahoma and Texas water lawyers now await the Supreme Court's determination as to whether this gambit will pay off. If the Supreme Court sides with Tarrant Regional, the Justice Department and the state of Texas, then the water surplus on the eastern side of the state may soon be opened up to an export market that will see no shortage of buyers.

## Attorneys

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