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Tarrant and the Future of Interstate Water Disputes (/full-blog/2013/10/tarrant-and-future-of-interstate-water.html)

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This past June, the United States Supreme Court resolved Tarrant Regional Water District v. Hermann,[1] an interstate water dispute between Texas and Oklahoma. While the unanimous opinion was narrowly tailored to the case, its language implicates a change in the Court’s deference to state law in interstate water disputes.

Specifically, Tarrant calls into question the Court’s last major water rights decision, Sporhase v. Nebraska,[2] where state ground water was held to be an article of commerce subject to federal regulation.[3] The Sporhase decision also established that state water compacts were unquestionably bound by “federal constitutional constraints.”[4]

The conflict in Tarrant surfaced when a drought laden Texan water district, Tarrant, applied for a water diversion permit with its northern neighbor. [5] The image source is [Image Source](https://static.squarespace.com/static/53fe85a0e4b0516a0c4fed1a/54002444e4b0123f9872026/54002448e4b0123f9872092/1409295432787/1000w/) and was found at [the importance of dry river beds](http://conservationbiologynews.wordpress.com/2012/09/14/the-newfound-importance-of-dry-riverbeds/).
The permit requested access to over a quarter-million acre-feet of water from Oklahoma’s Kiamachi River—enough to supply Tarrant’s 300,000 Texan customers. In support of the request, Tarrant relied on the Red River Compact—a congressionally approved contract between Oklahoma, Texas, Arkansas, and Louisiana, which allocated the water of the Kiamachi River (among other interstate waters) amongst the states. Oklahoma, however, refused to act, citing state statutes barring outside use of its water.

Tarrant filed suit in federal court. It first claimed that the Red River Compact allowed Texas access to all of the Kiamachi River, thus preempting any Oklahoma law. Second, Tarrant argued that the dormant Commerce Clause barred enforcement of state statutes preventing non-residents from accessing unallocated state water. Through Justice Sotomayor, the Court dismissed both claims.

First, the Court found the preemption claim unpersuasive, as the compact did not explicitly address access to intrastate water. The Court interpreted the compact’s silence to mean that Oklahoma retained exclusive ownership of all water within its borders. In support of this holding, Sotomayor described water rights as “an essential attribute of [state] sovereignty.” The Court also hastily rejected the Commerce Clause claim, explaining, “[t]he Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated.”

Though Tarrant technically upholds the Sporhase precedent in a note to the opinion, some see Tarrant’s language as stepping away from its highly federal predecessor. While it is still too early to tell exactly how Tarrant will play out in future interstate disputes, the Court’s high deference to state law will certainly be a factor in forthcoming water disputes.

[3] Id. at 952.
[4] Compacts are federally enforced contracts between states that require Congressional approval.
[9] Id. at 2123.
[10] Id. at 2136-37.
[11] Id. at 2132.
[12] Id. at 2132.
[13] Id. at 2132.
[14] Id. at 2137.
[15] Id. at 2133 n.11.