Red River Compact Arguments Favor Oklahoma

Jeremy Brown April 25, 2013

The Supreme Court held oral arguments this week in the dispute between the Tarrant Regional Water District (Tarrant) and the Oklahoma Water Resources Board (OWRB) over rights to water in the Red River basin. (For a transcript, click here. For an audio stream, click here.)

The Supreme Court press corps has dubbed the arguments inconclusive. And the justices at times seemed sort of befuddled. (Kagan: "You read this brief that you submitted, it gives you kind of a headache.")

But according to the standard signifiers of high court leanings – interruptions, types of questions and points made – the OWRB (represented by UT law grad Lisa Blatt) owned the day. (Alito: "When you say Texas has the right to go into Oklahoma, just – just think about that phrase … I mean, it sounds like they are going to send in the National Guard or the Texas Rangers.")

A quick parsing of the tea leaves:

Support for Texas:

- River Access: The justices were sympathetic to Tarrant's argument that the portion of the river at issue (Reach 2, Subbasin 5) lies entirely within Oklahoma's jurisdiction (which extends to the vegetative line of the southern bank) and that the compacting states never would have allocated water to Texas that it could not access. In its argument, the OWRB countered that Texas "can and does" take water directly from the main stem but admitted upon questioning from Kennedy that Texas has access to a portion that is only half a mile to three-quarters of a mile long. Kennedy repeated Tarrant's claims that the water along that section was too saline. OWRB: "They think all the water that their residents drink is salty, but they still are drinking it… Their water planning documents, say this is a – quite a – a drinkable source of water." Breyer later raised the issue again and said that, when the Compact was being negotiated, "they all knew this and so they meant there must be some way for Texas to get the extra; otherwise, why were they saying 25 percent for Texas?" OWRB: "34 percent of the watershed is in Texas, so there is no reason to think anyone thought Texas couldn't get its share … There's no — because there's no evidence there was any discussion about any State and whether — Texas never complained. No one ever said Texas couldn't get its water." OWRB then dismissed Tarrant's computations finding that Texas could not access its full 25 percent within its own borders. Sotomayor: "I understand your point to the Chief that there's been no proof that Texas doesn't get its 25 percent or that it couldn't get it from the main stem or somewhere. I accept that."

- 25 Percent: Tarrant's argument as to the meaning of particular Compact phrasing ("no state is entitled to more than 25 percent," combined with a separate clause providing signatory states with "equal rights," establishes an entitlement) gained some traction – but probably not any more than Oklahoma's argument ("25 percent" merely sets an upper limit). Ginsberg: "This clause, the one that you rely on, is kind of sketchy, isn't it? Doesn't say how they're going to get it, if they're going to pay for it. There's a lot to be filled in." Breyer: "I mean that language doesn't say what happens if in fact there's a State that because of cliffs or something can't get the 25 percent to which it is entitled. It just doesn't say anything about it."

Support for Oklahoma

- Attempted In-State Diversions: The Solicitor General tried to strike a middle ground argument. It argued the Compact allows signatory states to import water but only if they cannot divert from their own soil. Roberts asked what would happen if a state could technically divert in-state but only at much greater cost than diverting out-of-state. The Solicitor General conceded that, in that situation, the protectionist Oklahoma permitting process would not be preempted. (Roberts: "It seems to me that you like some provisions of State law, but not others."

- Priority of Out-of-State Diversions: The justices pressed the Tarrant and the Solicitor General for clarification on the relationship between the Compact and Oklahoma's permitting process. Both counsel explained that, under the Oklahoma permitting regime, Texas sub-jurisdictions have to apply to the OWRB for appropriations permits just as any prospective Oklahoma appropriator would. Multiple times, Kagan tried to make sense of how priority would be determined: would the Texas sub-jurisdictions appropriations take higher priority (to satisfy the 25 percent allocation) or would the appropriations depend only upon the time the respective sub-jurisdictions submitted their applications? OWRB said priority would be based on the seniority of permit applications: "And so, not surprisingly, it's open season for Oklahoma water, all of north Texas has come in and sought a permit and there's priority."

- Eminent Domain: Ginsburg asked who would erect the infrastructure to divert and convey the water from Oklahoma. Tarrant said it probably would, through eminent domain. That piqued Alito: "You were saying that Oklahoma – that Texas has the right to force Oklahoma to take private property in Oklahoma by eminent domain if necessary." Tarrant explained that an Oklahoma statute authorizes a permittee – irrespective of state residency – to exercise eminent domain to obtain water. The OWRB later pounced on the issue: "Eminent domain law in Oklahoma proceeds on the assumption that those are Oklahomans who got the permit, and thus can exercise a core sovereign power, and Tarrant, not surprisingly, would like to come in and do that. And none of this is happening with the normal political checks in Oklahoma. Oklahoma can't vote out of office the Tarrant officials. IT cannot vote out of office the Upper Trinity or the North Texas Municipal Water District."

- Precedential Cross-Border Divisions: In response to a Roberts' query on why the case implicated state sovereignty concerns, OWRB said: "There has never been a cross-border diversion without an explicit statement." The cross-border diversions that have occurred have been premised on "explicit statements and then the essential bells and whistles as to eminent domain, points of diversion, and which choice of law."

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