Supreme Court to Consider Oklahoma Restrictions on Water Exports

Jeremy Brown January 9, 2013

The Supreme Court has agreed to review a Tenth Circuit opinion holding that Oklahoma water embargo statutes do not violate the Commerce Clause or the Red River Compact.

The case will be the first in more than a quarter-century that the Court has heard regarding protectionist water policies. The outcome will shape the water future of the booming Dallas-Fort Worth metropolitan area and have far-reaching effects on the strategies that states use to manage natural resources in an age of scarcity.

The case stems from a disagreement between a North Texas water wholesaler – the Tarrant Regional Water District (District) – and the Oklahoma Water Resources Board (OWRB) as to rights granted under the Red River Compact (Compact).

The District contents it has the right to access, through diversions on Oklahoma soil, the water apportioned to Texas. It claims Oklahoma statutes interfering with that right violate the Compact and the dormant Commerce Clause.

The OWRB counters that the Compact grants no such right. Rather, the Compact accords its signatory states authority to manage water resources. That authority is broad enough to encompass statutes that discriminate against out-of-state water users. Additionally, because the Compact was congressionally approved at the time of its adoption, it was elevated to federal law and is not subject to the Commerce Clause.

An Oklahoma district court found for the OWRB. The Tenth Circuit affirmed: "Taken together, the Compact provisions using the words and phrases such as 'unrestricted use,' 'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma legislature wide latitude to regulate interstate commerce in the state's apportioned water." That the Compact, by its terms, applies only to "the water of the Red River and its tributaries" did not deter the court from interpreting the Compact as a basis for a generalized authority encompassing all watersheds within the borders of the signatory states.

Across the United States, more than 30 compacts govern the use and allocation of interstate waters, including all major Western rivers. Many include language similar to what the OWRB and the Tenth Circuit cited in support of Oklahoma's protectionist statutes.

If this sort of boilerplate is in a fact sufficient grounds for embargo laws, then Oklahoma and other water-rich states may proceed to horde their water resources, whether out of concern for their public trust obligations or to improve their competitive advantages over their more water-poor counterparts. This sort of Balkanization would set back the limited jurisprudence of water transfers – which has, over the last century, moved slowly in a direction that promotes the marketability of water.

Obviously, North Texas would suffer. A decision upholding the contested statutes would prevent North Texas from accessing a supply regarded as a keystone resource in its long-term water planning and force the region either to locate substitute supplies or tamp down demand – expensive and difficult propositions in a part of the country that, at present, is coping with painful drought and staring down a future of crippling shortfalls.

Other states would suffer, particularly those in the arid West and fast-growing South. (The protracted water wars among Florida, Alabama and Georgia demonstrated that even a verdant area like Atlanta could come close to running out of water.) States that have excess water supplies and that would be inclined to profit from selling usufructuary would lose out as greater protectionism stunted and eroded interstate water markets that are, at this point, still in nascent form.

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