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Interstate Water From Oklahoma
Tarrant Regional Water District's and Other Efforts to Bring Water from Oklahoma

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Tarrant Regional Water District (Tarrant) is one of the largest raw water suppliers in Texas, servicing consumers in the Northeast Texas area, including the cities of Fort Worth, Arlington, Mansfield and the Trinity River Authority. Tarrant has teamed with the other two large water providers in Northeastern Texas (Dallas Water Utilities and the North Texas Municipal Water District (NTMWD)) to secure water from Oklahoma. The Region C, Texas Water Plan, provides that these three providers will have a total demand for 2,768,255 acre-feet of water by 2060, of which only 1,070,716 acre-feet of demand is considered currently available.

On January 12, 2007, Tarrant filed suit against the members of the Oklahoma Water Resources Board (“OWRB”), in their official capacities in Federal Court in Oklahoma¹. Concurrently, three Applications for appropriative water rights were filed with the OWRB seeking 125,000 acre-feet annually from Cache Creek, 25,000 acre-feet from Beaver Creek and 310,000 acre-feet from the Kiamichi River, all being tributaries of the Red River located within Oklahoma, for a cumulative total of 460,000 acre-feet annually.

Subsequently, additional applications were filed by NTMWD and Upper Trinity Regional Water District. As if Oklahoma did not seem overwhelmed enough, the Town of Hugo, Oklahoma had been trying for several years to sell water which it claimed; Hugo actively sought purchasers in Texas, including Tarrant, NTMWD and Dallas. The Town of Hugo went so far as to solicit requests for proposals in the spring of 2008. To the author’s knowledge, all Texas entities that were approached declined to respond to the Request for Proposals except the City of Irving. The City of Irving then entered into a contract for the purchase of 25,000 acre-feet of water which the Town of Hugo had existing permits for, with certain rights to additional waters which were the subject of a pending application for water rights². Since the execution of a purchase contract

¹ 07-CV-00045-HE, Federal District Court, Western District of Oklahoma (the “Federal Action” or “Tarrant’s Federal action”).

² In 2002, the Town of Hugo filed an application for a water permit for 200,000 acre-feet of water for resale. An Oklahoma State statute (82 O.S. 105.10(c)) provides that permits may remain pending for more no more than three (3) years if an applicant files a request to extend the pending status. A failure to request such an extension results in the application be deemed withdrawn. Oklahoma takes the position that Hugo’s application was deemed withdrawn; Hugo’s position is that the application is not deemed withdrawn arguing circumstances of estoppel, equities and the

potentially subjects the parties to a contract to civil, and potentially criminal, state enforcement proceedings, the Town of Hugo filed an action in Federal Court asserting the unconstitutionality of Oklahoma's embargo on essentially the same grounds as those raised in the pending Tarrant suit. The City of Irving intervened in that suit as co-Plaintiff. The Oklahoma Defendants in this case filed a responsive pleading to the Complaint in the form of a Motion to Dismiss on essentially the same grounds as they had asserted in the Tarrant case. Before the Motion to Dismiss had been decided (and hence, before the Court ruled on whether it had proper jurisdiction over the parties and subject matter), the Plaintiff's filed a Motion for Summary Judgment. As of the date of this writing these Motions had not been decided.

Because these matters are currently in litigation, this paper largely consists of and is confined to the verbatim language of the Briefs and Pleadings, which are, of course, of record. This paper will primarily address the Tarrant Case since all issues and arguments contained in the later filed Hugo Complaint are subsumed within the arguments, defenses and claims made in the *Tarrant* case³.

The Tarrant case seeks declaratory judgment of the invalidity, under the Supremacy and Commerce Clauses of the United States Constitution, of Oklahoma's Anti-Export Laws, including Attorney General Opinion No. 77-274; and that given Oklahoma's obligations under the Red River Compact (Supremacy Clause) and the Commerce Clause, no adverse action may be taken against Tarrant's pending OWRB Applications based solely upon the fact that Tarrant is a nonresident of Oklahoma or seeks to deliver or use the appropriated water outside of Oklahoma. In addition, the Complaint seeks a permanent injunction forbidding Defendants, as the members of both the Oklahoma Water Resources Board and Water Conservation Storage

definition of the term "pending". These arguments cannot be the subject of Federal jurisdiction so presumably a State proceeding to determine the viability of the Hugo application will be forthcoming.

³ The exception is that the Tarrant case raises issue of the constitutionality of the Oklahoma Embargo under both the Commerce Clause and the Supremacy Clause of the US Constitution; the factual circumstances of the Hugo case do not support an argument under the Supremacy Clause so that proceeding is confined to Commerce Clause issues.

Commission, from enforcing the Anti-Export Laws or abiding by Oklahoma Attorney General Opinion No. 77-274. The Complaint also seeks a temporary restraining order and preliminary injunction forbidding Defendants from denying or dismissing Tarrant's OWRB Applications referenced herein for an appropriation of water in Oklahoma, on the basis of Oklahoma's Anti-Export Laws, including Oklahoma Attorney General Opinion No. 77-274, pending the Court's determination of the merits of the controversy. Tarrant and the Defendants entered into a stipulation which provided that the Defendants would not act upon the pending OWRB applications pending the conclusion of the proceedings, which effectively granted (*mooted* the need for) Tarrant's request for a temporary restraining order and preliminary injunction. Oklahoma filed a Motion to Dismiss as a responsive pleading. The basis of this Motion was that the Complaint should be dismissed upon four grounds: 1) That the Defendants have Eleventh Amendment immunity from suit; 2) As to the Red River Compact, no case or controversy is present; 3) Indispensable Parties require dismissal; and 4) Abstention.

On October 29, 2007, Judge Heaton issued a 15 page written Order finding against the Oklahoma Defendants as to all grounds. The Oklahoma Defendants appealed the decision to the 10th Circuit Court of Appeals, which heard argument May 12, 2008. The Briefs in the Case are available upon request from the author.

On appeal to the 10th Circuit, the Oklahoma Defendants (Appellants) confined their appeal to two issues:

1. Whether the District Court properly determined Defendants were not entitled to Eleventh Amendment Immunity; and
2. Whether the District Court properly declined to abstain under the *Younger* abstention doctrine.

Plaintiff (Appellee), in addition to responding to these issues, argued that a decision declining to abstain under the Younger doctrine does not constitute a final decision allowing for an interlocutory appeal.

On October 27, 2008, the Tenth Circuit Court of Appeals issued its published opinion affirming the District Court's Order, finding in favor of Tarrant as to all issues on appeal and dismissing the appeal. The Court found that a case or controversy existed, that the Oklahoma Defendants did not enjoy 11th Amendment Immunity and that the District Court's refusal to abstain was not an appealable final interlocutory order. Of particular importance was that the Court refused to accept the Oklahoma Defendants' argument that invalidating the anti-export laws would encroach on Oklahoma's "ownership interests" in natural resources. The Court may have been telegraphing the Oklahoma Defendants when it stated...*"It is also well-established that Oklahoma does not enjoy an 'ownership interest' in water resources located in the State"*, citing *Sporhase v. Nebraska*, discussed in detail below.

As of the date of this writing, the Oklahoma Defendants had not announced whether they intended to seek an appeal of the 10th Circuit Court's Ruling, but the likelihood of the granting of a writ of certiorari under these circumstances (the Circuits are not split on the issues appealed) is remote and likely will not delay the proceedings before the District Court⁴.

I. THE FACTUAL BACKGROUND

Oklahoma has an abundance of surface water. OWRB reports that the approximate total allocated stream water use in Oklahoma is 2.6 million acre feet per year, only about 7.6% of the estimated 34 million acre-feet of unused water flowing *out* of the state each year through Oklahoma's two major river basins, the Red River and Arkansas River.

⁴ Similarly, the Hugo proceeding is in a flux as of the date of this writing with Motions to Dismiss and Summary Judgment pending in light of the appeals court ruling.

Oklahoma has no basis upon which to predict, and has not predicted that it will suffer any water shortage in the near or even distant future. Indeed the OWRB has repeatedly affirmed that Oklahoma has more than sufficient resources to meet its need. Further, the Oklahoma Legislature's edicts for a study by a Joint Committee on Water Planning (82 O.S. (2006 Supp.), §1B(A)) to determine conservation and preservation needs were never implemented; the committee was never organized, never met, and neither performed nor reported conclusions on the work directed. The suit alleges that Oklahoma's embargo of its water resources, described more particularly below, have an unconstitutional economic protectionist purpose of preventing the exportation of Oklahoma water to Texas.

The quantity of water which Tarrant seeks to appropriate within Oklahoma, to meet annual long-range needs of the Texas communities, is a small fraction of the amount of water which is annually discharged from the watercourses located in Oklahoma from which Tarrant wishes to appropriate. This water is discharged, unused, into the Red River, where its water quality is degraded to a degree making it economically infeasible to be diverted and treated to meet potable water standards. This water flows to the Gulf of Mexico where it is lost to beneficial use.

The OWRB Applications filed by Tarrant seek a cumulative total of 460,000 acre-feet annually from three water courses located in southern Oklahoma which, even if granted, will constitute only about 1/9th of the remaining available water (about 4,000,000 acre feet per year) that will otherwise be discharged in the Gulf of Mexico and lost to beneficial use – i.e., Oklahoma will still be annually discharging without use about eight times the quantity of water Tarrant seeks to appropriate from those streams.

II. THE LEGAL BACKGROUND

The Red River Compact (“Compact”) among the States of Arkansas, Louisiana, Oklahoma, and Texas, is approved by Congress pursuant to Art. I, Section 10, Cl. 3, U.S. Constitution (Pub. L.

No. 96-564, 94 Stat. 3305, December 22, 1980). Under the Compact, Texas is apportioned certain stream water, including without limitation waters within Oklahoma that Plaintiff seeks to appropriate. The Compact delineates conditions under which and quantities for which Texas has an equal right of access and use, notwithstanding that the water is located in Oklahoma. Diversions at these points constitute "mainstem" diversions under the Compact -- *i.e.*, they are treated as if the water was taken from the Red River itself. The Red River Compact is a Federal Law. Any State law which contradicts or frustrates the terms and rights under the Compact is preempted under the Supremacy Clause.

THE OKLAHOMA EMBARGO:

Oklahoma has declared a public policy to embargo water which is located within Oklahoma, preventing citizens of other states from acquiring rights to such water. Oklahoma's public policy is expressly and implicitly incorporated into its laws, reflected in an Opinion of its Attorney General, and imposed upon the Defendants who are charged with implementing Oklahoma's laws relating to water resources, and who are required to follow an Oklahoma Attorney General Opinion that has not been superseded by judicial authority.

The Oklahoma Legislature has expressly declared Oklahoma's public policy to prevent nonresidents from acquiring water from Oklahoma. 82 O.S. 2001, §1086.1(A)(3) states:

Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state;

Oklahoma's public policy is similarly reflected in 1977 Okla. Session Laws 1005, S.J. Res. No. 7, declaring -- contrary to governing constitutional doctrine -- that Oklahoma possessed "legal title" to unappropriated water which would otherwise flow out of the state (*i.e.*, "it is possible that by continuing to allow water to flow out of state, Oklahoma's legal title to such water might

become questionable"), and that Oklahoma asserted a "prior right for the State of Oklahoma" over "the unused and uncontrolled water flowing from the state" in a quantity about four times the amount which it has even *currently* appropriated to beneficial uses, or such other amount that Oklahoma might determine it needed to develop a "comprehensive water plan" under OWRB's auspices.

The Oklahoma Attorney General, relying on S.J. Res. No. 7, quoted above, *inter alia*, issued Opinion No. 77-274 on February 28, 1978 to OWRB's then-acting Executive Director, concluding that Oklahoma law would not countenance an appropriation of water located in Oklahoma by an out-of-state user:

Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board. We can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.

Attorney General Opinion No. 77-274 has not been judicially declared invalid or addressed. Under Oklahoma law, Defendants acting in their official capacities as the governing members of OWRB are required to follow an Attorney General Opinion until a court determines otherwise. *Hendrick v. Walters*, 865 P.2d 1232, 1243 (Okla. 1993). Further, Defendants, in their official capacities, as the governing members of OWRB, are powerless to strike down any of Oklahoma's laws for constitutional repugnancy. *Dow Jones & Co., Inc. v. State ex rel. Oklahoma Tax Com'n*, 787 P.2d 843, 845 (Okla. 1990).

Oklahoma's public policy of forbidding acquisition by a nonresident of water in Oklahoma permeates Oklahoma's Anti-Export Laws, which include the following:

- a) 82 O.S. (2006 Supp.), §1B and 74 O.S. (2006 Supp.), §1221.A -- a "moratorium" on the sale or exportation of surface water and/or groundwater outside Oklahoma, whether by contract, state or tribal compact, intergovernmental cooperative agreement, or *exportation by any means* -- effective initially for three years from June 6, 2002, then later extended for five years from November 1, 2004. The legislature

- has expressly excepted from the Moratorium on water exports industry-related sales of Oklahoma water -- *i.e.*, sales which promote Oklahoma's own commerce. 82 O.S. (2006 Supp.), §1B(C)(2).
- b) 82 O.S. 2001, §105.16(B) -- which discriminatorily provides for surface water appropriations exceeding seven years only upon a showing that the proposed use will promote the optimal beneficial use of water "in Oklahoma," thereby preventing appropriation of surface water for a complicated out-of-state use involving lengthy development periods such as meeting municipal long-term needs.
 - c) 82 O.S. (2006 Supp.), §1085.2(2) -- which forbids the OWRB (governed by Defendants) from making any contract to convey title or use of water outside the State, including to any other state or governmental subdivision of any other state, except by an authorizing act of the Legislature.
 - d) 82 O.S. 2001, §1085.22 -- which forbids the Oklahoma Water Conservation Storage Commission (whose *ex officio* members are the members of OWRB, Defendants herein), from permitting the sale or resale of any water for use outside Oklahoma, in conjunction with duties imposed upon such Commission relating to the sale, transfer or lease of water storage facilities.
 - e) 82 O.S. 2001, §1266(9) -- by definition excluding participation of non-Oklahoma political subdivisions in a Regional Water Distribution District under 82 O.S. 2001, §1266 et al., thus depriving such non-Oklahoma political subdivisions of the opportunity and right accorded to Oklahoma subdivisions to, *inter alia*, the acquisition of water rights, and the furnishing, transportation and delivery of water, under 82 O.S. 2001, §1267.
 - f) 82 O.S. 2001, §1324.10(B) -- which forbids the sale or exportation of water by a water district outside Oklahoma without the consent of the Legislature.

Tarrant's suit alleges that Oklahoma's Anti-Export Laws, which constitute an embargo of Oklahoma water preventing the acquisition of such water by nonresident persons or entities, public and private, violate the Red River Compact and additionally have the protectionist purpose and effect of discriminating against interstate commerce in violation of the Commerce Clause.

Three months after the OWRB published its March 2002 Report on the joint study it had performed with the U.S. Corps of Engineers, concluding that Oklahoma had an abundance of water, the Oklahoma Legislature enacted a three-year "*Moratorium*" on the export or sale of water from Oklahoma, purportedly to allow a *newly constituted legislative planning committee* to

make a comprehensive study on management of Oklahoma's water resources. 82 O.S. (2006 Supp.), §1B and 74 O.S. (2006 Supp.), §1221.A. The legislature provided that "The work of the Committee shall be finalized no later than January 15, 2005" (82 O.S. (2006 Supp.), §1C), but the planning committee was never organized, never met, and never issued any report. In fact, after the Tarrant case was filed, the Oklahoma Legislature repealed the authority of the Committee and eliminated all reference to the moratorium being predicated on the results of this study. Nevertheless, the year before the Moratorium was to expire, the legislature extend it another 5 years from that date (November 1, 2004), so that now the Moratorium extends to nearly the end of 2009. The 2009 date will apparently further slip as Oklahoma has publicly announced that they will extend the moratorium until after the periodic decennial update of their existing 1995 state water supply plan (which was due to be completed in 2005), which Oklahoma now publicly states will not be completed until at least 2011, a mere four years before the next decennial update of Oklahoma's plan is due.

EMBARGOS AND THE CONSTITUTION:

The Commerce Clause implies a prohibition on the states' discrimination against out-of-state interests. *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 & n.3 (1979); *Granholm v. Heald*, 544 U.S. 460, 472 (2005). Generally, States have the burden of justifying a statute that discriminates against interstate commerce by showing that it "serves a legitimate local purpose . . . and, if so, . . . whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes*, 441 U.S. 322, 336 (1979).

"[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337. "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994).

Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941 (1982) is the seminal decision confirming that the Commerce Clause forbids the states from adopting protectionist laws to bar the exportation of their water resources. In *Sporhase*, Nebraska had discriminatorily restricted by statute the exportation without a permit of its groundwater to other states. Nebraska claimed this was a necessary incident to intrastate water conservation and preservation. Appellants were using well water to irrigate Colorado land, which Nebraska enjoined in its state courts. The U.S. Supreme Court reversed, holding (a) that a state's water is an article of commerce within the meaning of the Commerce Clause (*id.* at 945-54), and (b) that Nebraska's proffered justification of conservation and preservation did not withstand Commerce Clause scrutiny. As to (b), the Court stressed that the ideal of the Commerce Clause was "evenhandedness in regulation" (*id.* at 956), such that Nebraska could impose no more strict limitations on interstate transfers than on intrastate transfers of groundwater. *Id.* The Court recognized that a state was not *per se* prohibited from adopting measures to conserve and preserve water for its own citizens "in times of *severe shortage*," but held that the Commerce Clause was intolerant of "economic protectionism" regardless of a state's right to allocate "*scarce* water resources," and that a state could by a claim of "public ownership" only support a "limited preference for its own citizens in the utilization of the resource." (Emphasis added.) *Id.* at 956. Because of Nebraska's strict and comprehensive conservation regulations, groundwater there was held to carry "indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Id.* at 957. Nebraska had adopted a "reciprocity" provision allowing export of water provided the receiving state would do the same for Nebraska. The Court held that Nebraska had the "burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose" of conserving water (*id.* at 957), and found the provision was not "narrowly tailored to serve that purpose." *Id.* at 958. The Court thus held Nebraska's discriminatory regulation of exported groundwater violative of the Commerce Clause.

The year after *Sporhase* was decided the City of El Paso, Texas sued New Mexico state officials challenging New Mexico's statutory prohibition on exporting state ground water, which obstructed both planned appropriations of water in New Mexico and the purchase of New Mexico water. *City of El Paso v. Reynolds*, 563 F.Supp. 379, 381 (D.N.M. 1983). The court found that New Mexico's embargo of ground water was "an explicit barrier to interstate commerce" and that:

Facially discriminatory, it is subject to the strictest scrutiny. Defendants must demonstrate that the embargo serves a legitimate local purpose, that it is narrowly tailored to that purpose and that there are no adequate non-discriminatory alternatives.

Id. at 388. New Mexico propounded the purpose of water conservation and preservation, as had Nebraska. The court recognized that "New Mexico was a pioneer in ground water management" and reviewed the state's extensive regulations which it found to constitute a "genuine effort to promote optimum utilization of its diminishing water resources." *Id.* at 389. However, New Mexico had demonstrated no water shortage crisis:

They do not maintain that the state is now experiencing a shortage of water for health and safety needs or will do so in the near future.

Id. at 389. Uses for industry, irrigated agriculture, energy production, fish and wildlife, and recreation were held to be "requirements for water related to economic activities" which could not justify New Mexico's embargo. *Id.* at 390. Moreover, the court found that even if the embargo's purpose were to conserve and preserve the water supply for the health of New Mexico's citizens rather than its economy:

[I]t still would be unconstitutional because it is not narrowly tailored to achieve that purpose. As stated before, there is no present or imminent shortage of water in New Mexico for health and safety needs. ... Assuming that such shortages were foreseeable and that New Mexico could constitutionally preserve its water to meet future shortages, the embargo is not a means to that end. The embargo only prevents the transfer of ground water out of the state; it places no restrictions on in-state use.

Id. at 391. The court found that the purpose of the embargo was "to promote New Mexico's economic advantage," and that even if its purpose had been conservation and preservation, the embargo did not significantly advance that purpose and was not "narrowly tailored to achieve that purpose and cannot survive strict scrutiny." *Id.*

While the decision was on appeal, New Mexico's legislature repealed and replaced the offending laws with new laws dealing with out-of-state use of water, and the Tenth Circuit remanded for further consideration. *City of El Paso v. Reynolds*, 597 F.Supp. 694, 696-97 (D.N.M. 1984). The new laws regulated both in-state and out-of-state use of groundwater. After the remand, New Mexico also adopted a "two-year moratorium" on new appropriations of ground water. *Id.* at 697. The court found the new laws also violated the Commerce Clause. The court's analysis of the "moratorium" is of primary interest here. The moratorium was preceded by the appointment of a New Mexico "committee to study the impact on the State's water resources" of the court's first decision. *Id.* at 704. The committee recommended a "five year moratorium on new ground water permits" in the affected geographical region to give the state time to develop hydrological information, negotiate a compact, seek Congressional approval of an embargo, and study the State's entry into the water market. *Id.* at 705. The legislature adopted instead a two-year moratorium which treated in-state and out-of-state applicants alike, but the court found that the moratorium still had the purpose of discriminating against out-of-state applicants and was a *per se* violation of the Commerce Clause. The court noted the "glut of applications for permits" in the wake of its first decision and found that the purpose of the moratorium was to circumvent the "prior appropriation doctrine" by preventing the first-in-time applicants from enjoying priority. *Id.* at 705. The court found that other reasons given for the moratorium were pretextual (the need for hydrological information and the need for clarification on the allocation of surface water between New Mexico and Texas), and that: "[T]he moratorium statute on its face discloses an impermissible, discriminatory purpose" which was substantiated by its legislative

history (indicating its response to El Paso's efforts). *Id.* at 707. Since the "purpose" of the moratorium was "protectionist" the moratorium was found invalid. *Id.*

The court also found that the unevenhanded new state regulation of groundwater was unconstitutional. The court first acknowledged that "[a] state may favor its own citizens "in times and places of shortage" (*id.* at 701), but held:

Of course, this does not mean that a state may limit or bar exports simply because it anticipates that one day there will not be enough water to meet all future uses. Even some of the most water-abundant states predict shortages at some future date.

Id. at 701. The court held that factors for balancing the urgency of a water shortage against burdens on interstate commerce included the projected shortage's "proximity in time ..., the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage" *Id.* at 701. The court undertook an elaborate analysis of New Mexico's regulatory scheme, and concluded that the criteria New Mexico employed for approving in-state and out-of-state transfers of water were discriminatory without being narrowly tailored to the state's conservation interest. *Id.* at 703-704.

In a third landmark water rights decision under the Commerce Clause, a Texas three-judge district court granted an injunction and declaratory judgment to the City of Altus, Oklahoma, barring enforcement by the Texas Attorney General of a Texas statute which thwarted Altus's efforts to acquire Texas groundwater by lease. *City of Altus v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966). The Texas statute prohibited the withdrawal of underground water for transportation outside state boundaries without specific legislative authorization. *Id.* at 830. Although the stated purpose of the Texas statute was to "conserve and protect the water resources of the State" (*id.* at 838), the statute was adopted immediately after the City of Altus had contracted to purchase the lease (*id.* at 832); the court found that the purpose and effect of the statute was only to conserve Texas' water resources "for her own benefit to the detriment of her sister States," and that:

In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant;.

Id. at 839-40. The three-judge court held this violated the Commerce Clause. *Id.* at 840.

City of Altus was discussed in *Sporhase*, where the Supreme Court indicated that its summary affirmance there did not "necessarily adopt the court's reasoning," but that the Court now agreed with the holding therein that a state does not escape Commerce Clause scrutiny by asserting public ownership of its water resources. *Sporhase, supra*, 458 U.S. at 949-52.

The Tarrant suit alleges that Oklahoma has no "severe shortage" of stream water, *Sporhase, supra*, 458 U.S. at 956, and is not among the "arid Western States" the Court there addressed in responding to *amici* who demonstrated a vital state interest in preserving "scarce water resources." *Sporhase, supra*, 458 U.S. at 952-53. Oklahoma is abundant in water resources, as the OWRB has repeatedly confirmed in its own studies discussed above. Moreover, even if Oklahoma had such a shortage, it has not adopted a comprehensive regulatory scheme that is tantamount to state assertion of public ownership of stream water, as did Nebraska (described in the footnote).⁵ Oklahoma enjoys no limited preference for its own citizens in the utilization of its stream water.

Further, Oklahoma's declared public policy, confirmed by legislative declarations and an Attorney General Opinion, is to prevent exportation of water from Oklahoma -- and indeed its Moratorium was adopted in direct proximity and response to Texas' prior attempts to acquire water from Oklahoma. Oklahoma's Anti-Export Laws generally are prompted by the same legislative purpose, as acknowledged by Oklahoma Attorney General Opinion No. 77-274,

⁵ Nebraska's regulations over groundwater are described at 458 U.S. at 954-55. Groundwater in the location in controversy had been statutorily declared "inadequate ... to meet present or reasonably foreseeable needs for beneficial use of such water supply" and administrative regulations had been adopted rationing groundwater and requiring installation of "flow meters on every well within the control area," while limiting both intrastate and interstate transfers. *Id.*

which binds Defendants as public officials. Oklahoma's purpose to discriminate is both expressly declared and demonstrated. Moreover, Oklahoma openly reflects its economic protectionist purpose in its Moratorium, expressly providing an exception for industrial uses of Oklahoma water, *i.e.*, transactions which promote Oklahoma's local commerce. 82 O.S. (2006 Supp.), §1B(C)(2). Similarly, 82 O.S. 2001, §105.16(B), by prohibiting outright the use of surface water for periods exceeding seven years except for proposed beneficial uses "in Oklahoma," embargoes water resources for the very kinds of out-of-state uses where the water is most needed – to fulfill municipal long-term needs, fulfilled through construction projects requiring lengthy development periods. Oklahoma's embargo is deliberate and unconstitutional *per se*, under the Commerce Clause standards discussed above.

Finally, aside from the purpose of Oklahoma's Anti-Export Laws and Oklahoma Attorney General Opinion No. 77-274, the discrimination against out-of-state interests appears on the face of the laws, rather than being an incidental result of some nondiscriminatory provision. The Anti-Export laws on their face prevent the exportation of Oklahoma water. Such laws are condemned virtually *per se*, *Oregon Waste Systems, supra*, 511 U.S. at 99, and in any event cannot be justified here by reference to the promotion of a legitimate state interest, given that Oklahoma has no "severe shortage" of water resources (*Sporhase, supra*, 458 U.S. at 956) -- let alone one that the laws are narrowly tailored to serve with a demonstrable absence of less restrictive alternatives.

The federal courts have been uniformly intolerant of water embargoes like Oklahoma's and have struck them down wherever they arise, even when the state has purported to justify the embargo by invoking the familiar "conservation and protection" incantation. The purported legislative purpose of conserving natural resources for the welfare of the regulating state's own citizens was long ago held illegitimate on its face, in a case striking as unconstitutional an Oklahoma law.

West v. Kansas Natural Gas Co., 221 U.S. 229, 250-256 (1911).⁶ See also *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 598-600 (1923), *aff'd*, 263 U.S. 350 (1923).

Oklahoma stands on starkly weaker foundation than any of the states whose laws have been stricken. Oklahoma's facially and purposefully discriminatory laws seek to hoard water that not only is unneeded to meet a state water crisis -- but that is not applied to any foreseeable beneficial use and hence is destined for discharge into the Gulf of Mexico -- all to the irreparable injury of millions of people occupying her sister state to the south.

III. A POLITICAL AND MORAL SIDE BAR: Partnerships Created out of Necessity Are Easily Forgotten.

Oklahoma has an abundance of Reservoirs in Southern Oklahoma (Hugo, Sardis, Broken Bow and others) that would never have been constructed if it were not for Oklahoma having solicited the assistance of Texas and representations made to the US Congress and American people that if constructed, such water would be shared with Texas. That statement might come as a shock to most Oklahomans...it also might make some Texans a bit indignant.

The reservoirs I speak about are not Oklahoma reservoirs, they are Federal reservoirs. They belong to the residents of all 50 states...not Oklahoma. Federal Reservoirs and Federal water projects are funded by appropriations from the Federal Treasury. Before an appropriation can be made, the US Army Corps of Engineers (or Bureau of Reclamation, if it be a BuRec project)

⁶ In *West*, the Court found Oklahoma's purpose of conserving natural gas resources for future purchasers and use within Oklahoma to promote the welfare of the state was illegitimate under the Commerce Clause. *Id.* at 254-255.

If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

performs a feasibility study and submits its recommendations directly to the House of Representatives.⁷ The Corps then defends its findings to committees considering authorization of the projects. The congressional committees and Congress rely heavily on these studies and the Corps' justifications and requires that the projects it authorizes follow the Corps' plan.⁸ The Corps' reports and justifications, through the authorizing legislation, dictate the uses to which a federal reservoir can be put.

The Corps can only report that a project is justified and should be funded from the Federal Treasury if the benefits exceed the costs.⁹ The Corps' study and analysis, therefore, justifies the expense to the American people of the construction of Federal reservoirs. Regardless of the state in which they are built, federal reservoirs are funded from the Federal Treasury based on the representations and justifications made to Congress.

Prior to 1958, the Corps could not utilize future demand for municipal supplies in its cost-benefit analysis. However, the Water Supply Act of 1958¹⁰ empowered the Corps to include storage for “present or anticipated future demand” and to use the value of that future demand to justify construction of a project.¹¹ Water supply storage for municipal needs in Clayton (now Sardis) and Hugo Reservoirs was justified and authorized based on anticipated future demand from Oklahoma City and *North Texas municipalities*.¹² At the request of Oklahoma Legislators, representatives from Dallas and Fort Worth appeared before hearings and submitted written

⁷ See Flood Control Act of 1936, codified at 33 U.S.C. § 701

⁸ See, for instance, Flood Control Act of 1962, Public Law 87-874, 76 Stat. 1187 which states, “The project for the Clayton and Tuskahoma reservoirs, Kiamichi River, Oklahoma, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 145, Eighty-seventh Congress...”

⁹ See Flood Control Act of 1936, codified at 33 U.S.C. § 701(a)

¹⁰ See the Flood Control Act of 1958, P.L. 85-500, Title III, codified at 33 U.S.C. § 390(b)

¹¹ 33 U.S.C. § 390(b) (Emphasis Added)

¹² See Senate Document 145, 87th Congress, 2d Session at 15, 19.

evidence of demand to justify water storage capacity for the Oklahoma Reservoirs (*see attached letter from Fort Worth Dated August 23, 1956*).

Bills leading to the enactment of the Water Supply Act of 1958 were passed by Congress and vetoed twice.¹³ The Act was finally signed into law on July 3, 1958.¹⁴ One month after the first veto, in September of 1956, Oklahoma's Senators Robert S. Kerr and A.S. Mike Monroney, and Congressman Carl Albert spoke at a public meeting in Hugo, Oklahoma.¹⁵ The meeting had been called by the Corps as part of a commissioned study on modification of Hugo Reservoir to include water supply storage.¹⁶ The objective of the meeting was to determine local peoples' desire for improvements over Hugo Reservoir's original flood protection-only design. Representatives from Dallas and Fort Worth were invited to the meeting to express the anticipated future demands of those cities and their proposals for obtaining water from Oklahoma reservoirs.¹⁷

At this meeting, Senator Kerr spoke of reintroduction of the vetoed legislation and his optimism that it would become law in the next legislative session.¹⁸ Kerr predicted that, once the legislation passed and the Corps could utilize the economic value of storage for future demand, every project in southeastern Oklahoma could be built and that,

...[c]ommunities both here and within central Oklahoma, and, yes, there in north Texas, will be knocking at the doors of the Army Engineers and of those able to supply that water, standing in line

¹³ See House Report No. 1894, 85th Congress, 2d Session, at 2.

¹⁴ See P.L. 85-500

¹⁵ See 1956 Public Hearing Transcript.

¹⁶ This public meeting was the first step for the Corps to begin a re-examination study of the Kiamichi Watershed and Hugo Reservoir as authorized by a resolution of the Committee on Public Works, United States Senate, adopted 28 January 1955. (See Letter, District Engineer, Colonel John D. Bristol to Representative Carl Albert of November 29, 1957 which states "...following the public hearing at Hugo, Oklahoma, in September 1956, we have continued our studies of the Kiamichi River Basin to see if it is possible to develop reservoir projects...upstream from...Hugo Reservoir that would provide control of floods...together with storage for water supply.")

¹⁷ See 1956 Public Hearing Transcript, *supra*. Note 1, at 8.

¹⁸ 1956 Public Hearing Transcript at 21. In reality, the bill was vetoed again and not overridden. Final passage of an amended version did not occur until July of 1958.

with the money in their hands, or the contract of purchase in their hands, saying, 'We are ready to help provide economic justification and economic compensation for these reservoirs.'

United States Senator from Oklahoma, Robert S. Kerr; Hugo, Oklahoma; 1956¹⁹

The legislation was finally signed into law in 1958 as Title III of the Flood Control Act of 1958, Public Law 85-500. This legislation gave the green light for these reservoirs to be built to the larger size to allow for water supply storage. Accordingly, water supply storage was added to Hugo Reservoir by the Flood Control Act of 1962 "substantially in accordance with Senate Document (S.D.) 145, Eighty-seventh Congress."²⁰ In Senate Document 145, submitted to Congress on September 24, 1962, the Corps used future demand from north Texas municipalities to analyze the costs and benefits of additional water supply storage in Hugo Reservoir. Thus, congressional authorization of water supply storage in Hugo Reservoir was based on the Corps' justification in S.D. 145 and the representations in that report that the Kiamichi River would be a source of supply for north Texas municipalities. The Corps, in S.D. 145, relied on the statements made at the 1956 public hearing for its recommendation.²¹

The extent of sworn testimony by the Oklahoma Congressional contingent in seeking funding for these Federal reservoirs is extensive and shows that, at one time, forward thinking Congressional leaders on both sides of the Red River acted in partnership, in the best interests of the region, to secure needed water supplies.²² So here we are, some sixty Sooner-Longhorn games later, the reservoirs have been built, taxpayers from all 50 states have paid the cost of these reservoirs and Oklahoma has not only forgotten this regional partnership, but it has adopted a moratorium

¹⁹ 1956 Public Hearing Transcript at 21.

²⁰ Flood Control Act of 1962, P.L. 87-874, 76 Stat. 1186.

²¹ See Senate Document 145, 87th Congress, 2d Session at 19.

²² The Congressional record contains a plethora of statements and representations to Congress and the American people that if funded, waters from the reservoirs in Oklahoma would be available to satisfy municipal demands in both Oklahoma and Texas. Attached to this paper are but a few of the Statements.

without-end, content in the knowledge that the water is flowing wasted to the Gulf rather than having Texans have any benefit.

Sometimes all that it takes is a reminder...a recital of history...for open-minded and forward thinking politicians on both sides of the Red to benefit both states by doing what is right.

IV. CONCLUSION

Oklahoma and Northeast Texas are wed at the hip financially. What is good for one is good for the other. Southern Oklahoma's largest trading partner is the Dallas-Fort Worth Metroplex. Massive resorts such as the new Chickasaw Winstar Resort lie just over the Red River in Oklahoma with interstate exits oriented to the South, not North. Oklahoma is blessed with abundant rainfall and prolific watersheds, which it will never use, less than 100 miles from the Metroplex that receives less than half that annual precipitation.

When Oklahoma needed the support of Texas to secure funding for its numerous reservoirs and watershed projects, it solicited Texas's assistance with express representations that the benefits and waters would be shared. These representations were made under oath to the American people. The time has come for Oklahoma to recall this partnership and to repeal its Embargo for the mutual benefits of both states' citizens.

In the face of a failed negotiated attempt in 2000-2001 to secure water from Oklahoma, the Oklahoma Legislature adopted a never ending water embargo. Tarrant has filed suit to remove unconstitutional barriers to interstate commerce in water resources. At least one other party has filed a similar suit. The Tarrant suit also alleges that the Red River Compact preempts contradictory Oklahoma legislation and policies. The lessons enunciated by the Federal Courts respecting the Commerce Clause and water have not been learned. States continue to perpetuate territorial claims to water resources. John Wesley Powell, who many call the father of western water development, had a vision that proper governmental and land use planning would be

undertaken on a watershed basis. Despite this logic, arbitrarily drawn state boundaries criss-cross watersheds. Rather than develop watershed planning on a basin approach, some States persist in establishing barriers to that which they cannot control or possess, water²³.

The founding fathers drafted the Commerce Clause to prevent any state from levying any tax, duty, embargo, or impost against the free transfer of articles of commerce, mindful of the feudalism and barriers against trade that existed throughout Europe. The founding fathers feared that loyalties to a State identity might obscure loyalties under the Constitution, counseling in the *Federalist Papers* against such as misguided in that they purport to protect economies when they result in barriers to trade, dissention and conflict.

In penning these provisions in the Constitution, the founding fathers sought to prohibit and discourage offensive economic protectionism of the type represented by Oklahoma's Embargo.

²³ Both the States of Texas and Oklahoma purport to endorse the prior appropriation doctrine. For those who profess to believe in the prior appropriation doctrine, this doctrine's maxim is to encourage maximum beneficial use of the resource. Hoarding vast quantities of the resource to prevent beneficial use merely because the use would occur in another jurisdiction is at odds with the doctrine.

SELECTED EXCERPTS FROM CONGRESSIONAL RECORDS

The Corps used anticipated future demand from Texas municipalities to justify water development projects in Oklahoma. Legislators from Oklahoma urged the Corps to use such future demands as justification for modifying Hugo Reservoir to include water supply storage:

Let's don't worry too much about whether Fort Worth or Dallas might take some of our water, or Oklahoma City, because if these projects are built to the size I pray God we will build them – let's think big thoughts and build them to that size – they will be able to supply it.

United States Senator from Oklahoma, Mike Monroney; Hugo, Oklahoma; 1956.²⁴

Oklahoma's legislators also cited demand from Texas municipalities to justify authorization of the Millwood Reservoir modification to include six upstream Oklahoma and Arkansas Reservoirs (Broken Bow, Pine Creek, Lukfata, DeQueen, Gillham, and Dierks) when testifying before the Flood Control Subcommittee of the Senate Committee on Public Works. The Corps recommended plan was to reduce flood-control storage in the authorized Millwood Reservoir by 25% adding the six upstream reservoirs and 150,000 acre-feet of water supply storage.²⁵ Oklahoma Senators Robert S. Kerr and A.S. Mike Monroney introduced a bill which would add only four reservoirs but gave the Corps discretion to add more later.²⁶ Senator Monroney argued to the committee that sales of water to north Texas municipalities, among others, would pay for Millwood Reservoir and the additional Oklahoma reservoirs:

²⁴ See "Transcript of Public Hearing, Preliminary Examination Report on Hugo Reservoir and Substitute Reservoirs Kiamichi River and Tributaries, Oklahoma Red River Basin Held at Hugo, Oklahoma; September 4, 1956," (hereinafter "1956 Public Hearing Transcript"), at 24.

²⁵ See Report of the District Engineer, Oct. 15, 1955 in "Millwood Reservoir and Alternate Reservoirs, Little River, Oklahoma and Arkansas," House Document No. 170, 85th Congress, 1st Session, at 9.

²⁶ See S. 3483, 84th Congress, 2d Session, excerpted in "Hearings before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-fourth Congress, Second Session on H.R. 12080" Congressional Indexes, 1789-1969, SUDOC: Y4.P96/10:F65/10 (hereinafter H.R. 12080 Hearings) at 185.

...the water for sale to municipalities, such great municipalities as Dallas and Fort Worth...[a]nd others that are desperate for water supply,...will not only reimburse the cost of the upstream dams, but it will carry the cost of the auxiliary dam, the dry dam located at Millwood.

Testimony of Oklahoma Senator, Honorable A.S. Mike Monroney, July 17, 1956.²⁷

Bills leading to the enactment of the Water Supply Act of 1958 were passed by Congress and vetoed twice.²⁸ The Act was finally signed into law on July 3, 1958.²⁹ One month after the first veto, in September of 1956, Oklahoma's Senators Robert S. Kerr and A.S. Mike Monroney, and Congressman Carl Albert spoke at a public meeting in Hugo, Oklahoma.³⁰ The meeting had been called by the Corps as part of a commissioned study on modification of Hugo Reservoir to include water supply storage.³¹ The objective of the meeting was to determine local peoples' desire for improvements over Hugo Reservoir's original flood protection-only design. Representatives from Dallas and Fort Worth were invited by the Oklahoma legislators to the meeting to express the anticipated future demands of those cities and their proposals for obtaining water from Oklahoma reservoirs so that these reservoirs could demonstrate water supply storage demand.³²

At this meeting, Senator Kerr spoke of reintroduction of the vetoed legislation that would enable Lake Hugo's expansion and his optimism that it would become law in the next legislative session.³³ Kerr predicted that, once the legislation passed and the Corps could utilize the economic value of storage for future demand, every project in southeastern Oklahoma could be built and that,

²⁷ See H.R. 12080 Hearings, *supra*. note 3, at 190.

²⁸ See House Report No. 1894, 85th Congress, 2d Session, at 2.

²⁹ See P.L. 85-500

³⁰ See 1956 Public Hearing Transcript.

³¹ This public meeting was the first step for the Corps to begin a re-examination study of the Kiamichi Watershed and Hugo Reservoir as authorized by a resolution of the Committee on Public Works, United States Senate, adopted 28 January 1955. (See Letter, District Engineer, Colonel John D. Bristor to Representative Carl Albert of November 29, 1957 which states "...following the public hearing at Hugo, Oklahoma, in September 1956, we have continued our studies of the Kiamichi River Basin to see if it is possible to develop reservoir projects...upstream from...Hugo Reservoir that would provide control of floods...together with storage for water supply.")

³² See 1956 Public Hearing Transcript, *supra*. Note 1, at 8.

³³ 1956 Public Hearing Transcript at 21. In reality, the bill was vetoed again and not overridden. Final passage of an amended version did not occur until July of 1958.

...[c]ommunities both here and within central Oklahoma, and, yes, there in north Texas, will be knocking at the doors of the Army Engineers and of those able to supply that water, standing in line with the money in their hands, or the contract of purchase in their hands, saying, 'We are ready to help provide economic justification and economic compensation for these reservoirs.'

United States Senator from Oklahoma, Robert S. Kerr; Hugo, Oklahoma; 1956³⁴

The legislation was finally signed into law in 1958 as Title III of the Flood Control Act of 1958, Public Law 85-500. Consequently, water supply storage was added to Hugo Reservoir by the Flood Control Act of 1962 “substantially in accordance with Senate Document (S.D.) 145, Eighty-seventh Congress.”³⁵ In that Senate Document, submitted to Congress on September 24, 1962, the Corps used future demand from north Texas municipalities to analyze the costs and benefits of additional water supply storage in Hugo Reservoir. Thus, congressional authorization of water supply storage in Hugo Reservoir was based on the Corps’ justification in S.D. 145 and the representations in that report that the Kiamichi River would be a source of supply for north Texas municipalities. The Corps, in S.D. 145, relied on the statements made at the 1956 public hearing for its recommendation.³⁶

Relevant Documents

HUGO RESERVOIR

Flood Control Act of 1946, Public Law 79-526, July 24, 1946

Hugo Reservoir was originally authorized by the Flood Control Act of 1946 for flood control purposes “substantially in accordance with House Document Numbered 602, Seventy-ninth Congress, second session, at an estimated cost of \$77,500,000.”

House Document (H.D.) Numbered 602, 79th Congress, 2d Session, May 16, 1946

H.D. 602 is a report by the Army Chief of Engineers to the Speaker of the House of Representatives on flood control projects for the main stem Red River. The Board of Engineers recommends in the report that flood control projects, including Hugo, be authorized for construction. The Governor of Oklahoma at the time, Robert S. Kerr, commented in a letter to the Chief of Engineers that no consideration is given in the report to municipal supplies and recommends that local interests be considered to adjust the size of the projects. (See H.D. 602, Comments of the Governor of Oklahoma, Robert S. Kerr to Lt. Gen. R.A. Wheeler, Chief of Engineers, at page VIII, XI.)

³⁴ 1956 Public Hearing Transcript at 21.

³⁵ Flood Control Act of 1962, P.L. 87-874, 76 Stat. 1186.

³⁶ See Senate Document 145, 87th Congress, 2d Session at 19.

Transcript of Public Hearing; Preliminary Examination Report on Hugo Reservoir & Substitute Reservoirs Kiamichi River and Tributaries, Oklahoma Red River Basin, September 4, 1956.

By a resolution of the Senate Public Works Committee adopted January 28, 1955, the Corps was authorized to review H.D. No. 602 and accompanying reports to determine if modifications to Hugo Reservoir were advisable. The Corps generated Senate Document 145 (See below) as its findings from that review. The Corps relied on statements made at the 1956 public hearing to recommend that Hugo Reservoir be modified to include water supply storage. In attendance at the public meeting, were representatives of Forth Worth and Dallas, Texas who expressed an interest in obtaining water supply from Hugo Reservoir.³⁷ Also in attendance were United States Senators from Oklahoma, Robert S. Kerr and Mike Monroney; and United States Representative from Oklahoma, Carl Albert. The Transcript is replete with many colorful quotes, some of which are repeated below:

- Transcript of Public Hearing, Statements of United States Senator from Oklahoma, Honorable Robert S. Kerr, at page 13: *“Thank you very much, Colonel Bristor. Senator Monroney, Congressman Albert, representatives of the Corps, my friends in southeastern Oklahoma, and a hearty welcome to our good friends from across the Red River from Texas. We are certainly glad that they are here.”*
- Transcript of Public Hearing, Statements of United States Senator from Oklahoma, Honorable Robert S. Kerr, at page 17: *“I say to you that in my judgment the difference between getting complete flood control for the Kiamichi Watershed and not getting it will be the availability of the opportunity to sell municipal and industrial water from upstream dams above the previously authorized site.”*
- Transcript of Public Hearing, Statements of United States Senator from Oklahoma, Honorable Robert S. Kerr, at page 18: *“My position is that the waters should be impounded on the basis that meets the wishes of the people of the area. That is Number 1... Number 4, that they be used to meet the needs of the people of Oklahoma, who can secure the means or facilities by which those waters can be transferred to other people and other organizations and other municipalities within the State of Oklahoma, and, then, to the extent that additional water is available, **certainly we would welcome the participation of people beyond our boundaries.** We might have a little clearer concept than that as to their participation in paying for that impounding of water. It just might be that we would say, “Let them pay a little more”, don’t you know? We would not be adverse to that.” (Emphasis Added)*
- Transcript of Public Hearing, Statement of United States Representative, Honorable Carl Albert at page 28: *“We are proud of this country down here where most of us have lived a long time. We want to see our neighbors, Texas and Louisiana, prosper, but we want to prosper also ourselves. We want to – I don’t know, I think we are very*

³⁷ See 1956 Public Hearing Transcript, supra. Note 1, at 8.

generous in being willing for any part of the water to go outside the state if we have any left over. I don't think many states would agree to that, but I think Oklahoma would."

Flood Control Act of 1962, Public Law 87-874, October 23, 1962

The Flood Control Act of 1962 authorized modification of the Hugo Reservoir to include water supply storage and construction of Clayton and Tuskahoma reservoirs substantially in accordance with S.D. 145.

Senate Document Numbered 145, 87th Congress, 2d Session, September 24, 1962

This report by the Chief of Engineers to the Senate Public Works Committee concluded that Hugo Reservoir could be modified to include water supply storage and recommended the addition of Clayton and Tuskahoma Reservoirs as municipal demands required. The report uses North Texas demand as justification for the addition of water supply storage and construction of Clayton and Tuskahoma Reservoirs. The report also cited the 1956 public meeting in Hugo, Oklahoma as representing the improvements desired for the Hugo project.

- S.D. 145, Report of the Division Engineer, ¶ 5(b)(2) at page 15: *"Water supplies for the urban and industrial development in the region are becoming inadequate. The Kiamichi River Basin offers an excellent potential source of future water supply for the central Oklahoma-north Texas region."*
- S.D. 145, Report of the Division Engineer, ¶ 5(c) at page 15 notes that special attention was given in determining future population growth for the possible Kiamichi River Basin water supply demand areas of Oklahoma City, Oklahoma, and Dallas-Fort Worth, Texas, metropolitan areas.
- S.D. 145, Report of the Division Engineer, ¶ 15(a), IMPROVEMENTS DESIRED, at page 19: *"A public meeting was held at Hugo, Oklahoma, on September 4, 1956, in connection with th[is] study...Representatives of Oklahoma City and smaller cities of Oklahoma, and Fort Worth and Dallas, Texas, expressed interest in obtaining future water supplies from the Kiamichi Basin. Addition of water supply storage was requested in the authorized Hugo Reservoir project."*
- S.D. 145, Report of the Division Engineer, ¶ 16(a) at page 20: *"Expanding industrial development and rising population trends in metropolitan areas outside the Kiamichi River Basin, but within reasonable water transmission distance, emphasize the need for additional water supply."*
- S.D. 145, Report of the Division Engineer, ¶ 16(d)(1) at page 21: *"The Cities of Dallas and Fort Worth, Texas, have stated they anticipate a future need for water from southeast Oklahoma, possibly from the Kiamichi River Basin."*

- S.D. 145, Report of the Division Engineer, ¶ 17(a) at page 22, concludes that *“In the formulation of a plan for modifying Hugo Reservoir for flood control, water conservation and related uses...it was concluded that each project should be considered for its maximum economic capability for meeting the immediate and future needs of the area, anticipating continued economic growth beyond 2010.”* This clearly implies planning for Dallas and Fort Worth, Texas as the immediate Kiamichi River basins population and economic capability was in decline and economic projections were conducted for major metropolitan areas in proximity to the basin.³⁸
- S.D. 145, Report of the Division Engineer, ¶ 17(c)(4) at page 23: *“Flood-control-only reservoirs at the Clayton [Sardis] and Tuskahoma sites could not be economically justified. However, flood control in conjunction with conservation storage in these two headwater reservoirs would be economically justified.”*
- S.D. 145, Report of the Division Engineer, ¶ 17(d)(1) at page 23-24: *“The development of the water conservation plan for Kiamichi River recognized that the authorized Boswell Reservoir on the contiguous Boggy Creek to the west and the authorized reservoirs in the Little River Basin to the east of Kiamichi river are additional sources of future municipal and industrial water supply for parts of Oklahoma, Arkansas, and Texas.”*
- SD 145, Report of the Division Engineer, ¶17(d)(2) at pg. 24: *“Development of conservation storage in stages for municipal and industrial purposes in the Kiamichi River Basin is a practical method for meeting long-range water needs.”* This refers to building Hugo Reservoir first, and then Clayton (Sardis) Lake, and then the Tuskahoma Reservoir.
- S.D. 145, Supplement A, Supplemental Economic Data, ¶ 2, SUMMARY OF FINDINGS, at page 204: *“The metropolitan centers of Oklahoma City, Dallas, and Fort Worth, northwest and southeast, respectively, of the Kiamichi River Basin, are going to need additional water supplies to sustain the anticipated growth. Therefore, the reservoirs in the Kiamichi River Basin could provide the water supply for these metropolitan areas.”*
- S.D. 145, Supplement B, Information Called for by Senate Resolution 148,³⁹ ¶ 6(a), (b) PHYSICAL FEASIBILITY AND COST OF PROVIDING FOR FUTURE NEEDS, at page 248: *“Because of the abundant rainfall, this area is being*

³⁸ The Public Health Service had reported that Dallas and Fort Worth could more advantageously provide for their water supply needs after 2000 from sources other than the Kiamichi River. However, as this quote indicates, the Corps concluded that justification should be based on the maximum capability of each project (Hugo Clayton and Tuskahoma) to meet future needs beyond 2010.

³⁹ Senate Resolution 148, 85th Congress, Adopted January 28, 1958.

considered more and more as a source of water supply for central and southeast Oklahoma and northern Texas...The Cities of Fort Worth and Dallas, Texas, have also expressed interest in obtaining water from southeastern Oklahoma.”

- S.D. 145, Supplement B, Information Called for by Senate Resolution 148, ¶ 9, EXTENT OF INTEREST IN PROJECT at page 251: *“The Cities of Antlers and Hugo, Oklahoma, and the Oklahoma Water Resources Board have furnished assurances of intent for sponsorship of approximately one million acre-feet of conservation storage in Hugo, Clayton and Tuskahoma Reservoirs.”*

MILLWOOD RESERVOIR AND UPSTREAM OKLAHOMA AND ARKANSAS RESERVOIRS⁴⁰

Oklahoma’s legislators also testified in committee hearings that demand from north Texas municipalities would justify authorization of the Millwood Reservoir and Alternate Reservoir System.⁴¹ Millwood Reservoir and Alternate Reservoirs were authorized as part of the Flood Control Act of 1958 based on the recommendations of the Corps and assurances provided in the hearings.

Hearings Before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-fourth Congress, Second Session on H.R. 12080, 1956 (Hearing Record)

Senator Robert S. Kerr of Oklahoma presided as chairman of the Subcommittee on Flood Control over this hearing on H.R. 12080, the House version of the bill eventually enacted as the Flood Control Act of 1958 which authorized modification and construction of the Millwood Reservoir and alternate reservoirs. Millwood was originally authorized by the Flood Control Act of 1946. On July 17, 1956, Oklahoma Senator A.S. Mike Monroney testified before the subcommittee on the Millwood project. Senator Monroney testified that sales of water to municipalities such as Dallas and Fort Worth would reimburse the entire costs of the project. Senator Monroney argued that the federal government should “bank” the project instead of seeking contribution from local landowners because these water sales benefit the government so greatly. Before Senator Monroney’s testimony, Senator Kerr submitted two reports to the record. One of the reports (from 1950) referred to Dallas demand for water from this area.

- Submission to the record by Senator Kerr of an excerpt of the Arkansas-White-Red River Basin multiple-purpose plan report made in 1955,⁴² Hearing Record at page 178: *“Little*

⁴⁰ The Millwood Reservoir and Alternate Reservoirs Project included Broken Bow, Pine Creek, Lukfata, DeQueen, Gillham, and Dierks Reservoirs. (See House Document No. 170, 85th Congress, 1st Session, *supra*. note 2 at 23.)

⁴¹ See H.R. 12080 Hearings at 168-208.

⁴² See “Development of Water and Land Resources of the Arkansas-White and Red River Basins,” Senate Document No. 13, 85th Congress, 1st Session at 887.

River Multiple-Purpose Plan, Oklahoma and Arkansas...A demand for this excellent water could develop from outside the basin, possibly as far away as the Dallas, Tex., area.”

- Statement of United States Senator from Oklahoma, Honorable A.S. Mike Monroney, Exchange between Senators Kerr and Monroney, Hearing Record at page 190:

Senator Kerr: *“Would it be well at this point to call attention to the fact that if you agree with the conclusion that by this modification, through the sale of water for municipal and industrial consumption over the next 50 years, a very large percentage of the total cost of the flood-control program, including Millwood, would be recovered by the Federal Government, so that actually, they not only would have a more economic program and a more beneficial one, but by the modification, would be able to secure reimbursement for substantial portions of the entire investment?”*

Senator Monroney: *“I would say that that is exactly correct, that by these upstream dams, the hydro [sic] power that will develop, the water for sale to municipalities, such great municipalities as Dallas and Fort Worth.”*

Senator Kerr: *“Oklahoma City.”*

Senator Monroney (continuing): *“And others that are desperate for water supply, that you will not only reimburse the cost of the upstream dams, but it will carry the cost of the auxiliary dam, the dry dam located at Millwood.”* (Emphasis Added)

- Statement of United States Senator from Oklahoma, Honorable A.S. Mike Monroney; Hearing Record at page 192:

Senator Monroney: *“...But certainly, in a program to revise and modernize and make this authorization workable and beneficial, the whole chain of dams as proposed on this chart should be authorized at this time and the cost should not be assessed to the local people because the Federal government will make more money out of the benefits from hydro power and water supply than they would if they tried to compel these small communities to put up the cash in the first place.”*

Senator Kerr: *“Are you familiar with the cost-benefit ratio of 1.47 for this modification?”*

Senator Monroney: *“Yes. I think it will run actually higher than that because I do not think they figured in as much water supply sales or nothing for recreation and no power, so you add those to it and I think you will get a tremendous justification.”*

Senator Kerr: *“I think the Senator is entirely right. I think the actual evaluation of the reimbursable benefits that will certainly flow from the projects from available sources of revenue will make it one of the highest ratio of benefits to cost of any project that I have seen in that part of the country.”*

- Statement of United States Senator from Oklahoma, Honorable A.S. Mike Monroney, Exchange between Major General Emerson C. Itschner, Assistant Chief of Engineers for Civil Works, Senator Monroney, and Senator Kerr; Hearing Record at page 193:

General Itschner: “...*The \$6 million is the additional cost to the Federal Government for the new proposal as recommended by the division engineer, including both a modified Millwood Reservoir without provision of water-supply storage and the six other reservoirs, including water-supply storage, as compared to the present-day cost of the original Millwood Reservoir. Now, the difference between the two, which is quite large, is the amount that local interest would have to contribute for the water supply.*”

Senator Monroney: “*But the water supply would be a salable item, whether it was held in reserve by the Army engineers for resale or whether it was put up by the local community; is that not correct?*”

General Itschner: “*It is contemplated that \$55,781,000 of the cost of the project recommended by the Chief of Engineers, which includes provision of storage for water supply in Millwood as well as the six upstream reservoirs, would be returnable for the sale of water.*”

Senator Kerr: “*From the sale of water?*”

General Itschner: “*Yes, sir.*”

- Statement of United States Senator from Oklahoma, Honorable A.S. Mike Monroney; Hearing Record at page 197:

Senator Monroney: “*These [dams] have hydro and municipal water supply and even attract Dallas and Fort Worth to come up there and get it , so this is, from the standpoint of availability of water for two States, some in Texas and some in Oklahoma, that are suffering and have no other water supply, that these come way beyond the range of the upstream flood-control program which I am co-author of and have been pushing for some 15 years.*”

Flood Control Act of 1958, P.L. 85-500, July 3, 1958

This act included numerous flood control projects and the provision allowing the Corps to use future municipal demand to justify authorization of projects (Title III). The “Millwood Reservoir and alternate reservoirs” on the Little River in Oklahoma and Arkansas was authorized by this act “substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 170, Eighty-fifth Congress.”

House Document 170, 85th Congress, April 29, 1957, A Survey of Millwood Reservoir and Alternate Reservoirs, Little River, Oklahoma and Arkansas

In this report to the Speaker of the House of Representatives, the Army Chief of Engineers recommended that the flood control program for the Red River below Denison Dam should be modified by adding six reservoirs on the Little River and reducing the flood control storage in Millwood Reservoir. The six reservoirs to be added were Pine Creek, Lukfata, Broken Bow, DeQueen, Gillham, and Dierks.

- Comments of the Governor of Oklahoma, letter to Major General Charles G. Holle, United States Army, Acting Chief of Engineers, October 24, 1956 in H.D. 170, at page VIII: *“The State of Oklahoma at this time holds a copy of a request to the district engineer at Tulsa, Okla., from a city in Texas, requesting substantially more storage in the project area under discussion than the total water supply storage provided for in the six upstream reservoirs contained in the report. The expanded use of water and the pressing demands for municipal, industrial and power needs for it persuade us to believe that we cannot overdevelop these projects.”*
- H.D. 170, Report of the District Engineer, ¶ 33 “Conservation Storage Requirements,” at page 22: *“...when the worst drought on record struck portions of the States of Oklahoma and Texas and when representatives of some of the largest cities in these States expressed interest in long-range water-supply plans of major extent, it is considered that potential users of this water should not be limited in location to the Little River Basin, but should include municipalities and industries within a radius of 100 miles or more, possibly as far away as the Oklahoma City or the Dallas and Fort Worth areas.”*
- H.D. 170, Report of the District Engineer, ¶ 61 at page 34: *“Water supply would provide a large portion of the anticipated benefits from the upstream system and the construction of these units would require that a legally constituted agency assume the responsibility for such reservoir costs as would be appropriately chargeable to the purpose of water supply.”*
- H.D. 170, Report of the District Engineer, ¶ 66 at page 35: *“In addition, it is concluded that water supply storage space should be provided in each of the six upstream reservoirs to meet the foreseeable needs of potential municipal and industrial users within the basin and to urban areas not within the basin.”* (Emphasis Added)
- H.D. 170, Report of the District Engineer, ¶ 67 at page 35: *“Studies show that the flood control and water supply benefits of this system of reservoirs exceed the cost.”*