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**WATER: Supreme Court wades into bitter Texas-Okla. feud ahead of expected 'flood of litigation' (Tuesday, March 12, 2013)** Jeremy P. Jacobs, E&E reporter

FORT WORTH, Texas -- Housing developments are all that grow these days on a parched brown landscape that sprawls out here in all directions.

Booming population growth and oil and gas development are wringing the last drops of water out of an area in the grips of drought.

But it's a different picture about 100 miles up the highway in southeast Oklahoma. From a helicopter, about 300 feet up, you see lush areas the size of football fields with glistening puddles saturated by the nearby Kiamichi River.

Dan Buhman, an engineer planning north Texas' water supply for the next 50 years, looked down at the green fields and laughed. (Fields near the Kiamichi River appear saturated with water, a stark contrast to North Texas's landscape.) "That's incredible!" he said as the helicopter circled a field. "I don't see people. There is just nobody here. The entire Kiamichi basin is the same. Look for a big town on it. There are none."

The Dallas-Fort Worth Metroplex maintains it has a right to that water under the 1980 Red River Compact among Texas, Oklahoma, Louisiana and Arkansas. Until now, no state has sought to draw water from another using the compact. They haven't needed it. Oklahoma disagrees and has circled its wagons around its water. The more-than-10-year feud has become as deeply ingrained as football rivalries between the two states, and Oklahoma has enacted laws that effectively ban the sale of water to Texas for fear the Lone Star State will suck it dry. Next month, Texas' challenge to those laws will be heard at the Supreme Court in Tarrant Regional Water District v. Herrmann, a case that could have far-reaching implications for precious water resources in the West. Experts say that if the court upholds Oklahoma's laws, it has the potential to undo the more than 25 water compacts on which Western states rely (see related story <<http://eenews.net/Greenwire/2013/03/12/11>>).

The compact language at the heart of the dispute, said attorney Kirsten Nathanson of Crowell & Moring, is of "broad importance." "Similar language appears in many of the interstate compacts in this country," said Nathanson, who's not directly involved in the case. "It would allow states to have statutes similar to Oklahoma's, and that would cause all kinds of disruption in the implementation of these compacts." Bottom line, she said: The court could throw the current water crisis into overdrive. Population growth outpaces infrastructure

A California native, Buhman, 37, is able to view Texas' water challenges from a slightly more objective perspective than the Texans who employ him. Texans' animosity toward Oklahoma runs deep. Dan Buhman, an engineer, consults for Tarrant Regional Water District. He is charged with planning the area's water supply for the next 50 years. Buhman sees

demographics defining the dispute. The Dallas-Forth Worth Metroplex has more than 6.5 million residents; there are fewer than 4 million in all of Oklahoma. Fort Worth, he said, is the fastest-growing U.S. city with more than 500,000 people, and it's the country's biggest that is not on a seaport. "These cities are being built so fast that they can't keep up with it," Buhman said. Consequently, north Texas must double its water supply by 2050.

"Our watersheds are tapped out from a future water availability perspective," Jody Puckett, director of Dallas Water Utilities, said over a breakfast of pastries and pigs in a blanket. Puckett added that the metroplex has looked to develop other water sources within the state's borders. Years ago, it planned to build another lake, Fastrill, on east Texas' Neches River, but that plan was scuttled by the U.S. Fish and Wildlife Service when it obtained a conservation easement in the middle of the proposed lake's footprint. (Texas has no natural lakes; all have been built by the Army Corps of Engineers and the state since the drought of 1950.) The area has enough water to last through 2030, said Jim Oliver of the Tarrant district. But that's sooner than it seems: It takes five years to build a lake -- after going 10 to 15 years in the permitting process. "We've got to have something on the books here pretty quick," he said, looking to Buhman. "No pressure," Buhman joked. 'They could not get over that hump'

There are many reasons the water in southeast Oklahoma appeals to Texas. For one, it's only 125 miles away and less salty than western water, so it would require less treatment. Because it's to the east, it is less susceptible to drought and it is uphill, so it would require less energy to pump into the metroplex. And there are relatively few people in southeast Oklahoma. "There is more water than they will ever use up there," Buhman said. "You could build several New York Cities in southeastern Oklahoma and still never even touch the true amount of water up there." A little more than a decade ago, the district was in negotiations with Oklahoma to buy the water outright, thinking it would be a simple transaction: Oklahoma needed to upgrade its water infrastructure, and Texas was flush with cash from oil and natural gas development.

But the talks broke down, as Oklahoma politicians feared ramifications from cutting deals with Texas to give up its natural resources. "It was just emotional," said Linda Christie of the Tarrant district. "They could not get over that hump." The issue lay dormant for several years until the district in 2007 filed a lawsuit seeking roughly 130 billion gallons of water from the Red River basin. The district argued it has a right to that water under the Red River Compact, which it says expressly allocates to covered states 25 percent of the water in the basin, regardless of state boundaries. If Texas tapped all the relevant Red River tributaries within Texas, the district argued, it could get only 17 percent of the available water, so the intent of the compact was to supersede state lines.

Specifically, the district is seeking to obtain permits from the Oklahoma Water Resources Board to build a dam, pumping station and pipeline on the Kiamichi River just above where it meets the Red River, which separates southern Oklahoma from Texas. It has also sought groundwater from private property owners and Native American tribes in the state. Texas has lost multiple times in court, and after every defeat Oklahoma politicians became more emboldened. After a five-year moratorium on exporting water expired in 2009, the state Legislature passed measures that would require legislative approval of any diversion of water out of the state -- effectively prohibiting it.

In the case before the Supreme Court, the Tarrant district is contending that those laws violate the Constitution's Commerce Clause because Texas is treated differently from in-state entities when trying to get a permit for the water. The compact, which was ratified by Congress in 1980, should pre-empt those laws, the district says. The Denver-based 10th U.S. Circuit Court of Appeals disagreed, in another setback for Texas. In September 2011, the court ruled that although the compact governs regional water allocation, it also gives states considerable discretion over how they regulate and apportion water. Consequently, the ruling says, Oklahoma's laws, which protect its authority over allocating water permits for sources within its state boundaries, were sound [Greenwire <http://www.eenews.net/Greenwire/2011/09/08/archive/16>](http://www.eenews.net/Greenwire/2011/09/08/archive/16), Sept. 8, 2011).

"The Compact apportions water among the four compacting states," Judge Scott Matheson wrote. "It also authorizes the states to regulate the use of apportioned water." He added that the "broad language" of the compact "inoculates the Oklahoma statutes" from a Commerce Clause challenge. But the Tarrant district maintains the court relied on the wrong parts of the compact and didn't properly address the pre-emption issue. "These compacts were really the states negotiating what's fair and an allocation of this resource," Christie said. "Our concern is when an appellate court can come in and read a compact differently from the intent it was entered into; it creates chaos."

The Obama administration agrees with the Tarrant district, in part. Solicitor General Donald Verrilli urged the Supreme Court to hear the case, largely because the 10th Circuit decision poses a significant problem for Texas' rapidly growing population. In court documents, Verrilli wrote that the compact doesn't apply to state lines, and the 10th Circuit "improperly" applied a "presumption of pre-emption" in ruling that the compact granted Oklahoma the authority for its laws. "The better interpretation," he wrote, "is that Oklahoma may not categorically foreclose Texas from diverting water."

Every state for itself

Oklahoma state Sen. Jerry Ellis doesn't see it that way. Ellis, a member of the state's Democratic leadership, represents the southeast corner of Oklahoma and has forged his political identity largely by denying Texas any of the state's water. One of his campaign bumper stickers reads, "Don't Sell Oklahoma's Water." He has introduced several pieces of legislation that would make it harder for Texas to buy water, including one that would have required any transaction to be approved by Oklahoma voters in a ballot referendum. The bill never got a vote. Ellis contends that Texas doesn't want the water for residential use but, rather, for natural gas development.

It takes millions of gallons of water to hydraulically fracture, or frack, one natural gas well, he noted in an interview, and there are more than 16,000 rigs in Fort Worth alone on the Barnett Shale. Moreover, recent studies have found that water use for fracking in Texas has doubled in recent years and is expected to continue to rise. Instead of its relentless pursuit of Oklahoma's water, he said, Texas would be better served by developing infrastructure to use the Gulf of Mexico's water. "Texas needs to get rid of the lawyers and lobbyists; they spend millions on them," Ellis said through a thick drawl. "It needs to take that money that they are using for lawyers and lobbyists and build desalination plants on the Gulf." He added: "Texas needs to take care of itself and let us take care of ourselves." Oklahoma voters appear to be on Ellis' side. Polls last year showed that

two-thirds of voters oppose selling water out of the state. And Ellis is confident that the law is on his side because Oklahoma has won in court three times. He contends that if Texas were successful at the Supreme Court, it would change water quality farther down the Red River. "If you take it out, it could eventually affect the permits for southwest Arkansas irrigation," he said. "If they rule for Texas, they are going to open up a flood of litigation downstream."

But the Supreme Court case comes as Oklahoma is facing other water issues, and there is some sense that mind-sets like Ellis' may be shifting. Oklahoma City, for example, is currently tied up in litigation with local tribes over rights to some water in the state's lakes after Oklahoma nearly defaulted on millions of dollars owed to the federal government.

That has reminded some politicians -- particularly some fiscally minded Republican state legislators -- of how much money Oklahoma would gain by selling water to Texas. "The needle has moved," said Oliver of the Tarrant district. "When we first went up there in 2007, it was not 'No!' but 'Hell, no!' That's changed." Further, former Oklahoma Gov. Frank Keating (R) was close to negotiating an agreement to sell water to Texas during his tenure. Since he left office, he has continued to say it would make sense for Oklahoma to sell its water to Texas under the right circumstances, according to media reports. One of his proposals would give Oklahoma first and second crack at using its water if it needs it, such as during a drought. If the state's water needs are met, Oklahoma could sell to any entity that wants to buy it.

In the meantime, however, Texas' water districts are still looking for other options -- both legal and otherwise. The state has asked the Supreme Court to hear a challenge to another water contract, the Rio Grande Compact, alleging that New Mexico is improperly diverting water that is supposed to flow into Texas. They are also looking to other sources within the state. A new reservoir, the Marvin Nichols, has been proposed, and officials are also looking at ways to tap into east Texas' Toledo Bend lake. Neither of those options is preferred over Oklahoma water, though, because either they are expensive or they pose other significant challenges. The Marvin Nichols Reservoir would cost \$3.3 billion to build and require permits to flood more than 70,000 acres, and that is not a sure bet with federal regulators and environmentalists. Moreover, Toledo Bend is more than 200 miles from Dallas, downhill. Using it, said Puckett, Dallas' water utilities director, could increase the cost to consumers as much as four times. Future water resources for the region weigh heavily on Puckett, and uncertainty strikes fear. "If there is something that keeps me awake at night, it's that piece," she said. "What if we run out of options? I don't know. What's next, the Gulf of Mexico?"