

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

TARRANT REGIONAL	§	
WATER DISTRICT,	§	
Plaintiff,	§	
	§	Case No. CIV-07-00045-HE
v.	§	
	§	
RUDOLF JOHN HERRMANN, et al.,	§	
Defendants.	§	

**STATE OF TEXAS’S MOTION FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT**

The State of Texas submits this Motion for Leave to File an *Amicus Curiae* Brief, and Brief in Support, in the above-captioned matter, and would respectfully show as follows:

There is no statute, rule, or controlling case that defines a federal district court’s power to grant leave to file an amicus brief, and allowance of such briefing is solely within the court’s discretion. *See Waste Management of Pennsylvania v. City of York*, 162 F.R.D. 34, 36-37 (M.D. Pa. 1995); *see also Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007). However, an *amicus curiae* brief should be allowed when it will “offer insights not available from the parties” or provide a “perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Kempthorne*, 471 F. Supp.2d. at 311 (internal quotations and citations omitted). Moreover, *amici* may be allowed to file briefs in trial court

proceedings when “they provide helpful analysis of the law [or] they have a special interest in the subject matter of the suit.” *Bryant v. Better Business Bureau*, 923 F. Supp. 720, 728 (D. Md. 1996).

In the instant matter, State of Texas seeks leave of this Court to file the attached *amicus curiae* brief in response to a Memorandum Order and Opinion issued by this Court on November 18, 2009 [Doc. No. 134], which dismissed a number of claims made by Plaintiff Tarrant Regional Water District (“Tarrant Regional”) based on what appears to be a belief by the Court that Tarrant Regional is not a lawful appropriator of water to which Texas has been granted equal access under the Red River Compact (“Compact”). State of Texas seeks to file an *amicus curiae* brief in this matter to make clear that Tarrant Regional is a proper permittee of Texas’s water rights, including rights granted to Texas under the Compact; as a result, it is being directly harmed by Defendants’ administration of Oklahoma statutes that conflict with and burden those rights.

The Court should grant the State of Texas leave to file the attached *amicus curiae* brief, as the State of Texas is in the best position to provide a “helpful analysis of the law” that governs Texas water rights, to the extent that law is implicated by the claims made by Tarrant Regional in the instant suit. *See Bryant*, 923 F. Supp. at 728. Further, the State of Texas has “a special interest in the subject matter of th[is] suit,” because, as set forth in Tarrant Regional’s Complaint, the Defendants are enforcing certain Oklahoma water laws in a manner that discriminates against the State of Texas’s citizens and political subdivisions. *See id.*

CONFERENCE WITH PARTIES' COUNSEL

The undersigned certifies that counsel with the Office of the Attorney General of Texas has conferred with counsel of record for Plaintiff and Defendants in this matter regarding whether or not they are opposed to the instant motion. Counsel for Plaintiff is not opposed to the instant motion. The undersigned has contacted his Oklahoma counterpart and has left a message but has not heard back as of the time of this filing. The Office of the Attorney General of Texas has conferred with Oklahoma Assistant Attorney General M. Daniel Weitman who has advised he is opposed to this motion. He agreed to confer with his First Assistant but would recommend opposition. For these reasons, we consider Defendants opposed to this motion. If we learn otherwise, we will advise the Court.

RELIEF REQUESTED

For the foregoing reasons, the State of Texas respectfully requests that the Court GRANT the instant Motion and allow the State of Texas to file the *Amicus Curiae* brief, a copy of which is attached hereto as Exhibit 1.

Respectfully submitted,

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¹ The State of Texas recognizes that under LCvR83.3(a) an attorney who represents a party must be associated with local counsel. Because the State of Texas is not a party in this matter, local counsel has not been retained for this submission. Should the Court require appearance of local counsel for this motion, the State of Texas respectfully requests this motion remain pending and the state be allowed a reasonable time to secure local counsel.

Certificate of Service

I certify a true and correct copy of the foregoing document was served on the following counsel of record via regular U.S. Mail on February 17, 2010.

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**IN THE UNITED STATES DISTRICT COURT
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WATER DISTRICT,	§	
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	§	Case No. CIV-07-0045-HE
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	§	
RUDOLF JOHN HERRMANN, et al.,	§	
Defendants.	§	

**BRIEF OF THE STATE OF TEXAS, AS *AMICUS CURIAE*, IN SUPPORT OF
PLAINTIFF’S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF**

NOW COMES the State of Texas, as *amicus curiae*, and files this brief in support of Tarrant Regional Water District’s (“Tarrant Regional”) Request for Declaratory and Injunctive Relief, and would respectfully show as follows:

On November 18, 2009, this Court issued a Memorandum Order and Opinion dismissing claims brought by Tarrant Regional against Defendants that challenge Oklahoma’s discriminatory regulation of certain water that is governed by the Red River Compact (“Compact”) and equally apportioned among the Compact’s four Signatory States: Texas, Oklahoma, Louisiana and Arkansas. (*See* Doc. 134 at 18, holding “the fact that the water to which plaintiff seeks access is governed by the Red River Compact is sufficient, in the circumstances existing here, to preclude the Commerce Clause and Supremacy Claims that plaintiff asserts.”) More specifically, certain water at issue in this suit lies within an area described in the Compact as “Reach II, Subbasin 5.” *See* Compact, Art. V, § 5.05. Under

certain conditions, the Compact's Signatory States have "equal rights" to access any water within Reach II, Subbasin 5. *Id.*

In its November 18, 2009 Order, the Court found that Tarrant Regional lacked standing to pursue a claim that the Compact preempts the challenged Oklahoma laws. (Doc. 134 at 17.) This ruling by the Court appears to have been based on the assumption that, because Tarrant Regional is not itself a Compact signatory, it could not properly assert any claim that implicated the Signatory States' water rights under the Compact, including the allocation of water in Reach II, Subbasin 5. (*See* Doc. 134 at 15 n.16, holding that Tarrant Regional "is not entitled to assert in this proceeding rights which Texas has under the" Compact).

The State of Texas now files this *amicus curiae* brief and respectfully submits Tarrant Regional should be permitted to maintain its Supremacy Clause claim challenging those Oklahoma laws that are impeding its effort to appropriate water to which Texas has been granted equal access under the Compact. As set forth below, Tarrant Regional is an entity permitted under Texas law to seek out and acquire water that Texas has a right to use; this is true even where the acquisition requires importation of the water into Texas. Accordingly, Tarrant Regional, as a lawful applicant for the use of Texas water, possesses a right to acquire water from Reach II, Subbasin 5 that is equal to the right of any lawful user of Oklahoma water.¹

¹ Contrary to what the Court suggests in footnote 16 of its November 18, 2009 Order, the proper "acquirer" of any water that Texas has the right to access and use under the Compact is not the State itself. (*See* Doc. 134 at 15 n.16, noting that "an effort by the State of Texas . . . to acquire water allocated to it by the compact . . . might well give rise to a claim

Tarrant Regional is constituted as a water control and improvement district under the general laws of the State of Texas under authority of Article XVI, Section 59 of the Texas Constitution. *See Tarrant Regional Water District v. Gragg*, 151 S.W. 3d 546, 549-50 (Tex. 2004). As such, Tarrant Regional has the authority to provide for the “control, storage, preservation, and distribution” of water “by any practical means.” TEX. WATER CODE § 51.121(b) and (c). This includes the authority to apply for and obtain permits for water rights. Indeed, Tarrant Regional has acquired and now holds water rights in Texas. *See, e.g., Gragg*, 151 S.W.3d at 550 (describing Tarrant Regional’s impounding of water from Texas’s Trinity River). Moreover, and significantly, Tarrant Regional is specifically authorized to cooperate and contract with any person, political subdivision, state, Indian tribe, or with the United States to obtain a supply of water imported from outside of the State, and it is permitted to construct necessary works to import water from outside the State. *See Act of May 28, 2001, 77th Leg., R.S., ch. 433, §§ 20–22, 2001 Tex. Gen. Laws 831–32.*

Because Tarrant Regional is a proper permittee of Texas’s water rights, including rights granted to Texas under the Compact, it is being directly harmed by Defendants’ administration of Oklahoma statutes that conflict with and burden those rights. Accordingly, to the extent Tarrant Regional has brought this suit to challenge Oklahoma statutes that impede its lawful importation of Compact waters to which Texas has an equal right of use, Tarrant Regional should be permitted to challenge those laws. In light of the foregoing, the

under the compact.”) Rather, water to which Texas has been granted equal access under the Compact may be lawfully “acquired” by individuals or entities—like Tarrant Regional—that have a right to seek use of such water in Texas under Texas law.

State of Texas respectfully requests that the Court reconsider the rulings made in its November 18, 2009 Memorandum Order and Opinion.

CONCLUSION

The State of Texas respectfully requests that the Court VACATE its November 18, 2009, Memorandum Order and Opinion, allow Tarrant Regional to litigate its Supremacy Clause challenge to Oklahoma's discriminatory water laws, and ultimately GRANT Tarrant Regional's Request for Declaratory and Injunctive Relief.

Respectfully submitted,

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