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THE *EL PASO* CASE: RECONCILING *SPORHASE* AND *VERMEJO*

Within a period of seven months, three important interstate water cases have been decided—two by the Supreme Court of the United States, and one by the Federal District Court for New Mexico.

In July 1982, the Supreme Court decided *Sporhase v. Nebraska* which dealt with the transfer of groundwater across a state line from Nebraska to Colorado.¹

In December 1982, the Supreme Court decided *Colorado v. New Mexico* which dealt with a dispute over an interstate stream, the Vermejo River, which flows from Colorado to New Mexico.²

In January 1983, a federal district court decided *El Paso v. Reynolds* which deals with the transfer across the state line from New Mexico to Texas of groundwater which is part of an interstate stream.³

How do we reconcile the three cases? How do they fit into the jigsaw puzzle of interstate water disputes?

The first groundwater case—*Sporhase*—said the commerce clause of the U.S. Constitution applied, so that Nebraska could not forbid the export of groundwater across a state line into another state.⁴ The *Vermejo* case declared that the doctrine of equitable apportionment governs interstate streams, whereby waters of the stream are divided so each state is allocated a fair share of the stream.⁵

In the *El Paso* case, the water-short city of El Paso, Texas, sought to acquire 296,000 acre feet of groundwater in New Mexico so as to transfer it out of New Mexico into Texas, and asked the federal district court to strike down the New Mexico statute that forbade the export of New Mexico groundwater.⁶

1. *Sporhase v. Nebraska*, ___ U.S. ___, 102 S.Ct. 3456 (1982).

2. *Colorado v. New Mexico*, ___ U.S. ___, 103 S.Ct. 345 (1982).

3. *City of El Paso v. Reynolds*, CIV. NO. 80-730 H.B. (D.N.M. Jan. 17, 1983) (hereinafter referred to as Memorandum Opinion).

4. ___ U.S. ___, 102 S.Ct. 3467 (1982).

5. ___ U.S. ___, 103 S.Ct.

6. Memorandum Opinion at 6. In pertinent part the statute reads:

No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act prohibits the transportation of water by tank truck from any underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas. . . . The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet. § 72-12-19 N.M. STAT. ANN. (1978).

The court in the *El Paso* case followed the *Sporhase* case and the theory of the commerce clause, which meant New Mexico cannot forbid the export of groundwater and cannot lay exclusive claim to any of the water below Elephant Butte Dam in southern New Mexico.

VERMEJO AND THE EL PASO CASE

In cases like the *El Paso* case, instead of being beguiled by the *Sporhase* case and the commerce clause, the court should follow the *Vermejo* case and the doctrine of equitable apportionment. Why? Because equitable apportionment "governs" interstate streams and because the groundwaters of the Rio Grande are inextricably a part of an interstate stream. Under equitable apportionment, each state is allocated a fair share to have and to hold and to manage rationally. Allocation avoids wasteful competition, or races to the bottom of the aquifer which may occur when no party has the security of having an allocated share of the water and is thereby encouraged to act under the law of the street theory of "he wins who uses the mostest firstest."

However, the court in the *El Paso* case should not be blamed, because the case as brought by El Paso was argued under the wrong theory in the wrong court. Under the U.S. Constitution, disputes over interstate streams are to be decided by the Supreme Court of the United States, not by a federal district court, and under the federal common law these disputes are governed by equitable apportionment, not by the commerce clause.

The fact that the case was brought under the wrong theory almost inevitably led to an unfortunate, but by no means permanently irretrievable decision in the trial court.

Briefly, the decision is unfortunate for several reasons including the fact that it penalizes a state with a progressive water law system (New Mexico) and rewards a wasteful system (Texas). The progressive water law system encourages conservation and requires living within one's groundwater budget,⁷ while the primitive system of Texas encourages waste by not requiring water users to adhere to a budget of existing supplies.⁸

Secondly, the decision is at least subject to serious challenge on the question of whether the 1938 Rio Grande Compact has already divided, by mutual agreement between Texas and New Mexico, the waters below Elephant Butte Dam.⁹

The decision allows El Paso to run an end run around the Rio Grande

7. See DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues*, 22 NAT. RES. J. 1045, 1046-52 (1982).

8. See Johnson, *Texas Groundwater Law: A Survey and Some Proposals*, 22 NAT. RES. J. 1017 (1982).

9. Memorandum Opinion at 10.

Compact and its intended division between Texas and New Mexico of the Rio Grande below Elephant Butte Dam.

The most unfortunate aspect of the decision, however, is that since the case was brought under the wrong theory, it led the court to focus on the wrong theory of federalism.

FEDERALISM, THE COMMERCE CLAUSE, AND EQUITABLE APPORTIONMENT

Both the commerce clause and the doctrine of equitable apportionment are concepts for maintaining the critical inner balance of the federal union. Equitable apportionment is a doctrine which the courts have fashioned to maintain the balance between states by "dividing the pie" of an interstate stream between the states that share it.¹⁰ Thus, the doctrine assures each state of a fair share and prevents any state, simply because it is bigger, more economically advanced, or more aggressive, from taking more than its share of the river.

Under equitable apportionment, the court is called upon to settle a dispute between states "in such a way as will recognize the equal rights of both and at the same time establish justice between them."¹¹

In *Nebraska v. Wyoming*, the court added that equitable apportionment demands "the delicate adjustment" of the interests of the states.¹² In the *Vermejo* case, the Supreme Court said the doctrine of equitable apportionment is a "flexible doctrine which calls for . . . consideration of many factors to secure a just and equitable allocation."¹³

Both the commerce clause and equitable apportionment are tools developed for protecting and maintaining the delicate balance of federalism between the nation as a whole and the individual "quasi-sovereign" states. The commerce clause protects the national union from being economically fragmented and thus weakened by individual states imposing burdensome measures such as taxes or tariffs which would impede commerce.¹⁴

Equitable apportionment, on the other hand, recognizes the "delicate adjustment" of the "interest of quasi-sovereigns"¹⁵ and "equal rights of both"¹⁶ while attempting to establish justice between them.¹⁷

10. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), *modified*, 345 U.S. 981 (1953).

11. *Kansas v. Colorado*, 206 U.S. 6, 97-98 (1907).

12. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

13. *Colorado v. New Mexico*, ___ U.S. ___, 103 S.Ct. 539, 545 (1982).

14. See DuMars & Browde, *State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier*, 60 OREGON L. REV. 7 (1981). See also, Wechsler, *Political Safeguards of Federalism*, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 185 (1963).

15. *Colorado v. Kansas*, 320 U.S. 383, 392 (1943).

16. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).

17. *Id.*

In the delicate balance of federalism, the commerce clause protects the national economy, but in interstate water disputes the Court recognizes the interests of the individual states and uses the doctrine of equitable apportionment to protect the separate interests of individual states.

Why "equitable apportionment"? The most fundamental intent of state qua state is the right to be. The right to exist goes directly to the territorial integrity of the individual state. The "fundamental necessities" of the state are land and water. Without both, a state cannot exist. Land and water are fundamental for existence as a state. There are other resources which may mean the difference between wealth and poverty, such as oil, gas, or coal, but none is a "fundamental necessary" for existence and, perhaps, all other economic development.

Thus, land and water are essential to the integrity of a state. If there is a dispute between two states over interstate rivers and interdependent groundwaters, it is settled by allocating to each a fair share—equitable apportionment. Then that state can plan, allocate, and use its water resources in a rational manner for the future, as well as the present. Otherwise, it loses control of water resources and the ability to manage them prudently over time. A recent article asked "how can New Mexico plan for the future" and manage its water resources "if the demand for water is potentially nationwide and there is no ability to regulate out-of-state demand?"¹⁸

Equitable apportionment takes into account questions like "why should a state more advanced economically be permitted to take water away from a less economically advantaged state, simply because that state's time of development is yet to come?" Should not equity provide for the future uses of states developing at a slower pace?

Equitable apportionment would consider such factors. The *Vermejo* case requires consideration of "proposed uses" and "future use." Also, equitable apportionment requires the consideration of waste and conservation. *Vermejo* clearly declared "wasteful or inefficient uses will not be protected"¹⁹ and that states have "an affirmative duty . . . to conserve . . ." water supplies.²⁰

Such factors are not adequately considered under the commerce clause. A decision based on the commerce clause almost completely undercuts equitable apportionment. For example, under the decision in the *El Paso* case, why should El Paso enter into negotiations to equitably apportion and receive only a portion of the water, when it can obtain all it wants under the commerce clause?

18. DuMars, *supra* note 7, at 1058.

19. Colorado v. New Mexico, ___ U.S. ___, 103 S.Ct. 539, 546 (1982).

20. *Id.*

EQUITABLE APPORTIONMENT AND INTERSTATE
STREAMS

Fortunately, it should not matter whether El Paso is agreeable to entering equitable apportionment negotiations. The Supreme Court in its opinion of December 13th, 1982, clearly states "equitable apportionment is *the doctrine . . . that governs disputes between states concerning their rights to use the water of an interstate stream.*"²¹

It cannot be doubted that the groundwaters of the Rio Grande Basin are inextricably interconnected to the surface flows. The groundwaters are part and parcel of the "interstate stream." They are functionally and hydrologically interdependent.²² The surface flows cannot be managed without also managing groundwater withdrawals. The Rio Grande Basin is like an elongated pool of underground waters over and through which a surface stream flows. If the groundwater pool is pumped down, the surface is likewise drawn down (although the effects may not be immediately visible). This is expressed in the 1938 Rio Grande Compact, by requiring the deliveries of quantities of surface water at Elephant Butte Dam. This, in turn, requires managing the surface flows and the groundwater supply conjunctively as one water system, which they are.²³ Together, they compose the Rio Grande, an interstate stream.

How, then, do we reconcile the *Vermejo* and *Sporhase* decisions, two decisions made within less than six months of each other?

At the very least *Vermejo*, and thus equitable apportionment, "govern" the groundwaters which are interconnected to interstate surface flows. The laws of hydrology dictate that such groundwaters are part of interstate streams and, therefore, the federal law dictates that equitable apportionment governs.²⁴

21. *Id.* (emphasis added).

22. Hydrologic studies have shown

an intimate hydraulic relationship between the Rio Grande and the adjacent groundwater reservoirs. There are extensive sedimentary rocks along the main stem of the Rio Grande, and these rocks form the principal aquifer adjacent to the river. This aquifer is recharged directly by precipitation, by lateral underflow of water from adjacent formations, by seepage of water from Rio Grande tributaries, and in some areas by seepage from the Rio Grande main stem.

Flint, *Groundwater Law and Administration: a New Mexico Viewpoint*, 14 ROCKY MTN. MINERAL L. INST. 545, 551 (1968).

23. Reynolds & Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 NAT. RES. J. 201 (1974).

24. In the management of groundwaters, it is essential to recognize the interrelationships between surface and groundwaters, which frequently are interconnected. Contrary to hydrologic reality, the law frequently has made distinctions which separate surface waters from underground waters and "percolating waters" from definite underground channels. These distinctions fail to recognize the interrelationships between surface and underground waters and have been characterized as attempts to restate the "physical universe." Scientists have criticized themselves and the law on this subject:

Man has coped with the complexity of water by trying to compartmentalize it. The

Further, the doctrine should apply to every transboundary aquifer, that is, any groundwater pool which is divided by a state boundary so as to make it an interstate aquifer. Thus, *Sporhase* should be narrowly interpreted in light of the *Vermejo* case and the many other federal cases dealing with interstate streams.

Perhaps *Sporhase* may apply to aquifers which are neither a part of nor tributary to an interstate stream. Thus, *Sporhase* may apply to aquifers which are completely within a state and whose waters are likely to be mined much like oil and gas, or copper, or coal.²⁵ The Supreme Court,

partition committed by hydrologists . . . is as nothing compared with that which has been promulgated by the legal profession, which has on occasion borrowed from the criminal code to term some waters "fugitive" and others "a common enemy." The legal classification of water includes "percolating waters," "defined underground streams," "underflow of surface streams," "watercourses," and "diffuse surface waters"; all these waters are actually interrelated and interdependent, yet in many jurisdictions unrelated water rights rest upon this classification.

Thomas & Leopold, *Ground Water in North America*, 143 SCI. 1001, 1003 (1964) (emphasis added).

The National Water Commission concluded that it is absolutely essential that the interrelationship between surface and groundwaters be recognized. See NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 230-47 (1973). Thomas and Leopold further elaborate:

We have been discussing ground water more or less as if it were separate and distinct from the rest of the hydrologic cycle. Such segregation has been common among hydrologists as well as the general public, and is reflected in legislation, in the division of responsibility among government agencies, in development and regulation. Yet it is clear that this isolation can be maintained only when and where water is being mined from underground storage. Any water pumped from wells under equilibrium conditions is necessarily diverted into the aquifer from somewhere else, perhaps from other aquifers, perhaps from streams or lakes, perhaps from wetlands—ideally, but not necessarily, from places where it was of no use to anyone. There are enough examples of streamflow depletion by ground water development, and of ground water pollution from wastes released into surface waters, to attest to the close though variable relation between surface water and ground water.

Thomas & Leopold, *Ground Water in North America*, 143 SCI. 1001, 1003 (1964).

25. It is desirable, of course, that the groundwater resources be available to future generations in perpetuity; however, the mining of water can be justified as readily as the mining of any of our other mineral resources such as uranium, oil, or coal. It is not practical to operate a groundwater basin on a continuous-yield basis when the amount of water in storage is very large compared with the average annual recharge. An example is the Lea County Basin in southeastern New Mexico where the average annual recharge is 29,000 acre-feet per year and the permitted withdrawals will average about 440,000 acre-feet per year. The great value of the approximately 27 million acre-feet in storage in the basin when pumping began can be realized only by mining. Furthermore, to justify the marketing, storage, and transportation facilities essential to a competent agricultural economy in the area, it is necessary for the withdrawals to exceed the recharge.

While it is possible to justify the mining of groundwater resources, the practice will make it necessary to face serious water supply problems in the future. In some instances, it will be possible to meet these problems only by complete readjustment of the economy of the area. While long range predictions of the value of water in various uses are dangerous, it appears likely that it will not be, in general, economically feasible to import water over appreciable distances for agricultural purposes when the local groundwater resources have been mined out. However, when reduced well yields or excessive

under the commerce clause, has had great difficulty distinguishing water from other resources such as oil and gas which are clearly commodities. Aquifers which are not part of an interstate stream or an interstate aquifer frequently are mined like other resource deposits, and thus might appropriately come under *Sporhase* and the commerce clause.

As for the El Paso dispute, we have a case of the wrong theory being brought in the wrong court. Interstate water disputes come under the original jurisdiction of the Supreme Court and, as the Supreme Court said in *Vermejo*, the governing doctrine is equitable apportionment.

Therefore, the action should not be before the Federal District Court for New Mexico, but the Supreme Court of the United States. The theory of the case should not be the commerce clause, but, rather, equitable apportionment.

The decision of the District Court should be re-examined, and an original action brought in the Supreme Court of the United States asking the Court either to recognize the Rio Grande Compact as having already apportioned the Rio Grande below Elephant Butte Dam or, failing that, asking the Court to now apportion that part of the river equitably.

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lifts make pumping for agricultural purposes uneconomic, the residual water may well supply the municipal and industrial needs of a vigorous non-agricultural economy for many years.

Statement of S. E. Reynolds, State Engineer, Santa Fe, New Mexico, September 30, 1959, quoted in Clark, *Groundwater Management: Law and Local Response*, 6 ARIZ. L. REV. 178, 190 n. 48 (1965).