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Water Law - Sporhase v. Nebraska

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WATER LAW— *SPORHASE v. NEBRASKA*

WATER LAW—COMMERCE CLAUSE—The U.S. Supreme Court holds that a Nebraska statute prohibiting the export of groundwater to a state not granting reciprocal rights to transport water into Nebraska violates the Commerce Clause of the Constitution. *Sporhase v. Nebraska*, ___ U.S. ___, 102 S. Ct. 3456 (1982).

INTRODUCTION

One of the most serious problems facing the arid West is the scarcity of water. The lack of precipitation in this area of the nation has forced the western states to depend heavily on groundwater resources. In recent years, due to the West's continued dramatic growth in population, the demand for water in many areas has exceeded the supply.

The Ogallala Aquifer provides the water for the high plains of Texas, New Mexico, Colorado, Oklahoma, Kansas, and Nebraska. The aquifer is overdrafted resulting in a steady depletion of recoverable water.¹ Overdrafting eventually will result in complete exhaustion of the aquifer. This depletion could cause serious economic problems for many western states.²

Compared to other western states, Nebraska is rich in groundwater.³ Therefore, while most states with more limited groundwater supplies have enacted relatively comprehensive laws which provide a basis for resolving major groundwater policy issues, Nebraska has postponed major legislative decisions. However, recent rapid development of Nebraska groundwater has created user conflicts forcing law makers to consider water policy issues. In response to this growing concern over the depletion of groundwater, Nebraska undertook a systematic revision of its water management and conservation laws. A major element of the revision was a Nebraska statute requiring any person intending to withdraw water from a well located in Nebraska to apply to the Department of Water Resources for a permit to do so.⁴ The permit would be granted only if two basic conditions were met. First, the person seeking to remove groundwater

1. Overdrafting is the extraction of groundwater in excess of the net recharge of the aquifer over a long period of wet and dry years constituting a climatic cycle. *Ground Water Manual*, Government Printing Office 4 (1981).

2. Recently Congress authorized a study of the Ogallala Aquifer, based upon the depletion caused by the increase in the use of irrigation in the West. Pub. L. No. 94-587 § 193, 90 Stat. 2943 (1976), codified as 42 U.S.C. § 1962d-18 (1976). In Nebraska 72% of irrigation water withdrawals comes from groundwater. Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917, 985 (1980)ff. Eighty-seven percent of groundwater in Nebraska is used for irrigation. The source of irrigation well and irrigation acreage figures is the well registration data compiled in the Nebraska Natural Resources Commission Data Bank Information System (NRC Data Bank). *Id.* at 918.

3. *Id.*

4. NEB. REV. STAT. § 46-613.01 (1978).

from Nebraska had to show that the withdrawal was reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare. This was referred to as the "conservation" requirement. Second, the state in which the water was to be used had to grant reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska. This was termed the "reciprocity" requirement.⁵

Sporhase, a farmer, owned contiguous tracts of land in Nebraska and Colorado. He applied to the Colorado Ground Water Commission to appropriate water to irrigate his land in Colorado.⁶ Colorado denied the application on grounds that the aquifer at the proposed location was overappropriated. Sporhase then invested a large sum of money to install underground pipelines and irrigation equipment to pump water from a well located in Nebraska, only a few feet from the Nebraska-Colorado state line, to irrigate his agricultural land in Colorado. The Department of Water Resources, upon receipt of a complaint, informed Sporhase that he was exporting water out of Nebraska into Colorado in violation of the Nebraska statute requiring a permit and that the Department intended to enforce the law against him.

Nebraska sued Sporhase in the Nebraska State Court to enjoin him from irrigating the Colorado land from his Nebraska well. Sporhase defended, contending that the Nebraska statute violated the commerce clause of the U.S. Constitution and therefore should not be enforced. Both the Nebraska District Court and the Supreme Court upheld the constitutionality of the Nebraska statute, including the mandatory reciprocity requirement.⁷

On appeal, the U.S. Supreme Court, in a 7-2 decision, rejected the State's argument of public ownership of groundwater and held that groundwater is an article of commerce and therefore subject to Congressional regulation. Once this issue was decided, the Court had no difficulty in concluding that the reciprocity requirement of the Nebraska statute violated the commerce clause by imposing an impermissible burden on interstate commerce.

BACKGROUND

The Court has always recognized conservation of natural resources as a legitimate state function. Water, compared to other resources, holds a special regulated position, especially in the arid states of the West. Competing demands for scarce water resources have resulted in the equitable

5. *Id.*

6. Colorado Ground Water Commission File No. AD-6826.

7. *Nebraska v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981).

apportionment of surface water of interstate streams among the western states.⁸ Implicit in the compacts apportioning interstate water is the assumption that each state has the exclusive right to allocate the waters so apportioned⁹ and likewise prohibit the diversion of apportioned water for use in adjoining states.¹⁰

The legal fiction of "public ownership" of a state's natural resource has been largely struck down as a pretense for discriminatory regulation of the resource. Nevertheless, in some western states, including Nebraska, groundwater is considered to be owned by the state and the "property" interest of a water user or water rights recipient is qualified by the state. Under this theory, water is always subject to state control and never becomes a private possession. When disputes are relatively infrequent, litigation is an efficient means of conflict resolution. However, when water supplies are inadequate to supply all potential users, conflicts are predictably frequent and administrative resolution is more efficient and effective than private litigation.¹¹

The development of western groundwater law reflects the earlier development of surface water law. The doctrine of prior appropriation has been applied to both surface and groundwater. In the states overlying the Ogallala Aquifer, water is a precious and limited resource and prior appropriation dominates groundwater regulation in this area. The right to use groundwater is based on obtaining a state permit to withdraw the water, the physical withdrawal of groundwater, and the use of groundwater for some beneficial purpose.¹²

Although the prior appropriation doctrine has been codified in most western states, some states with relatively abundant supplies of water employ a commonlaw groundwater allocation theory. These states follow what is termed the "English Rule." In Texas, for example, groundwater, once appropriated, is a privately owned resource. The overlying landowner may use all the percolating water he can capture for beneficial purposes on or off his land. The owner may sell the water as he does

8. The Colorado River Compact, approved by Congress in Section 12(a) of the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617; *Arizona v. California*, 373 U.S. 546 (1963)(opinion), 757 (1964)(decree); *Nebraska v. Wyoming*, 325 U.S. 589 (1945)(opinion), 325 U.S. 665 (1945)(decree).

9. *Wyoming v. Colorado*, 353 U.S. 953 (1957). In that decree, Colorado was enjoined from developing more than a total of 49,373 acre-feet of water from the Laramie River and its tributaries. Of this amount no more than 19,875 acre-feet could be diverted "for use in Colorado at any or all points outside of the [Laramie River] basin." The remainder of the water apportioned to Colorado, including any of the 19,875 acre-feet not diverted out of the basin, was limited to use on lands in Colorado specified in the decree.

10. *Colorado v. Kansas*, 320 U.S. 383, 400 (1943); *Weiland v. Pioneer Irr. Co.*, 259 U.S. 498, 502-03 (1922); *Arizona v. California*, 373 U.S. 546 (1963).

11. See Trelease, *Law, Water, and People; the Role of Water Law in Conserving and Developing Natural Resources in the West*, 18 WYO. L.J. 3 (1963).

12. *State v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950); e.g. N.M. STAT. ANN. § 72-1-2 (1978).

other property. Texas does not regulate or otherwise control the use or quantity of groundwater.¹³

Forced uniformity in water regulation is impractical in states with divergent water resources and needs. Indeed, state exercise of control over groundwater without challenge from the federal government constitutes *de facto* recognition of the state primacy in this area. Only in the context of an overriding national interest, such as water pollution control, has federal authority preempted state primacy over groundwater.¹⁴

A statute restricting the export of water from a state, however, promotes "resource isolation."¹⁵ Resource isolation schemes present examples of state regulations which burden interstate commerce. Even though these statutory regulations may serve legitimate local purposes, they do so without regard to less discriminatory alternatives. They burden interstate commerce by preventing certain resources from even entering interstate commerce.¹⁶

Invariably, the Supreme Court has required state laws which effectively isolate natural resources from the national economy to meet a stricter commerce clause test than other state laws. This is especially true when a facially discriminatory statute requires reciprocity by a sister state as a condition on the export of the resource to make its application even-handed.¹⁷ Thus, a statute imposing a reciprocity requirement on the export of water will be closely scrutinized under the commerce clause power. The purpose of the commerce clause is to encourage a national market for all resources or goods and to encourage maximum efficiency in the use of those resources. The Supreme Court, in *Sporhase*, directly addressed the issue of whether the mandatory reciprocity requirement of the Nebraska statute was hostile to this policy.

SPORHASE V. NEBRASKA, THE MAJORITY OPINION

The term "commerce" implies that a commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value.¹⁸ Nebraska argued that groundwater is not an article of commerce because it is not a marketable

13. F. TRELEASE, WATER LAW 467 (2d ed. 1974).

14. Federal Water Pollution Control Act, 51, § 101(9) (1972).

15. *West v. Kansas Natural Gas Co.* 221 U.S. 229 (1911)(invalidating an Oklahoma statute prohibiting the shipment of natural gas outside the state); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)(prohibiting West Virginia's attempt to prevent natural gas pipeline companies from shipping natural gas out of the state until all local needs were met).

16. *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970).

17. Colorado does not freely permit transfer of groundwater outside its boundaries. COLO. REV. STAT. § 37-81-101 (1973).

18. *Nebraska v. Sporhase*, 305 N.W.2d at 616.

item freely transferable for value among private parties.¹⁹ Because Nebraska claimed a greater ownership interest in groundwater than in certain other natural resources, it argued that it could legitimately use the grant of the state's police power to conserve this essential natural resource. Nebraska relied on *Hudson County Water Co. v. McCarter* for authority.²⁰ In that case, petitioners challenged a New Jersey statute which prohibited the interstate transfer of surface water located within the state. The Hudson County Water Department had contracted to supply a borough of New York City with water from a New Jersey river. Justice Holmes upheld the statute, ruling the state's interest in preserving its water was well within its police power.²¹

The *Sporhase* Court, however, relied upon *City of Altus v. Carr*,²² a more recent case which invalidated a Texas statute that prohibited interstate exportation of groundwater without prior approval of the Texas legislature on the grounds that such restrictions violated the commerce clause. *City of Altus* should not control in *Sporhase*, however, because the Texas water system is unique in the West. A Texas landowner has the right to sell water, and the transfer of water, a private commodity in Texas, falls under the authority of the commerce clause. In most western states, including Nebraska, landowners have no comparable right because water is not privately owned. Therefore, the *City of Altus* decision that interstate transportation of privately owned water cannot be prohibited because it is an article of commerce is not necessarily inconsistent with the Nebraska State Court ruling that approved the prohibition on interstate transfer of state owned water.

The Supreme Court found that both the Nebraska decision and *Hudson* were proposing a public ownership theory only to rationalize state regulation over transportation of groundwater. The Court noted that the *Hudson* decision was based on *Geer v. Connecticut*²³ which allowed the state to qualify the personal ownership of captured game birds. In 1979, *Hughes v. Oklahoma*²⁴ overruled *Geer* by prohibiting a ban on the interstate transfer of a natural resource, minnows.²⁵

The Court, therefore, faced the issue of whether water, like other natural resources, should be classified as an article of commerce subject to Congressional regulation. Nebraska relied upon its strict regulation of intrastate transfer of water to support its policy that groundwater is pub-

19. *Id.* at 618.

20. 209 U.S. 349 (1908).

21. *Id.* at 354.

22. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

23. 161 U.S. 519 (1896).

24. 441 U.S. 322 (1979).

25. *See supra* note 15.

lically owned and thus not an article of commerce for private trade.²⁶ The Court rejected this distinction between private and public ownership, concluding that the transfer of water in all states is subject to some degree of state regulation which does not depend upon public ownership of the controlled commodity.

Nebraska also sought to distinguish water from other natural resources by arguing that the state has an overriding interest in conserving a resource essential for the survival of its citizens. The Court found that, although water is indeed essential for human survival, over 80 percent of water supplies are used for agricultural purposes.²⁷ Agricultural markets are nationwide. Therefore, the Court found this case presents an archetypical example of the commerce among the several states for which the framers of the Constitution intended to authorize federal regulation.

Nebraska further argued that its water statute was a legitimate exercise of the state's police power to protect the health of its citizens and to conserve natural resources. To determine the validity of a state statute which affects interstate commerce, the Court must ask what the statute's purpose is and whether there is a close fit between the means and the purpose.²⁸ Nebraska's stated purpose was to conserve and preserve the diminishing sources of groundwater. That purpose was consistently supported by other state water regulations. The first three conditions in the challenged statute promote Nebraska's conservation goals;²⁹ they do not impose an impermissible burden on interstate commerce.³⁰ In the fourth requirement,³¹ however, the Court found an explicit barrier to commerce between the states.³²

The State bore the initial burden of demonstrating a close fit between the reciprocity requirement and the asserted local purpose. The Court found no evidence that the reciprocity restriction was tailored to the conservation and preservation rationale. Therefore, the reciprocity requirement did not survive the "strict scrutiny" reserved for facially discriminatory legislation.

Finally, Nebraska argued that Congress had granted the states permission to engage in what would otherwise be impermissible groundwater

26. Nebraska does allow the transfer of water from rural to metropolitan areas, yet the transferor is permitted to charge only for costs of distribution and not for the water itself. Other states which do not espouse this public ownership theory allow the transferor to charge for the value of the water.

27. *Sporhase*, 102 S.Ct. at 3462.

28. *Pile v. Bruce Church*, 398 U.S. 137 (1970); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

29. The first three requirements are:

- 1) That the person seeking to remove groundwater from Nebraska had to show that the withdrawal was reasonable,
- 2) not contrary to the use and conservation of groundwater, and,
- 3) not otherwise detrimental to public welfare.

30. *Sporhase*, 102 S.Ct. at 3464.

31. NEB. REV. STAT. § 46-618.01 (1978).

32. *Sporhase*, 102 S.Ct. at 3465.

regulation. Congress has deferred to western states' water law schemes in which the states regulate the appropriation and use of water. There are thirty-seven federal statutes and a number of interstate compacts demonstrating Congressional deference to state water law.³³ Relevant sections of the statutes contain language defining the extent of the federal legislation's preemptive effect on state law and mandating that questions of water rights which arise in relation to a federal project are to be determined in accordance with state law. Congress has full authority under the commerce clause to confer such power upon the states.³⁴

The Court, finding that Nebraska's reciprocity scheme was an "unreasonable burden," concluded that where Congress has consented to "unreasonable burdens on commerce," Congress' intent to protect state legislation from attack under the commerce clause is "expressly stated." There was no evidence there "that Congress consented to the unilateral imposition of the unreasonable burden on commerce"³⁵ resulting from the reciprocity requirement of the Nebraska statute; therefore, the statute was unconstitutional under the commerce clause.

THE DISSENT

In dissent, Justice Rehnquist³⁶ chastised the majority for its unnecessarily broad holding that water is an article of commerce. Congress can regulate groundwater if it has a substantial economic effect on interstate commerce even though groundwater is not considered an article of commerce. Labeling water as an article of commerce was an unfortunate extension beyond the facts of this case. Justice Rehnquist argued that the only issue before the Court was "whether the existence of the Commerce Clause of the U.S. Constitution, by itself, in the absence of any action by Congress, invalidates some or all of Section 46-613.01 of the Nebraska Revised Statute which relates to groundwater."³⁷ The Majority approached this problem in a traditional commerce clause analysis in which the State's "interests" were weighed against the interests of the free flow of interstate commerce. In adopting such an approach, Rehnquist felt the Majority ignored past decisions recognizing the traditional authority of a

33. For example, the Reclamation Act of 1902, 32 Stat. 390 reads:

Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . .

Subsequent laws have contained similar language.

34. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980).

35. *Sporhase*, 102 S.Ct. at 3466.

36. Justice O'Connor joined in Rehnquist's dissent. Interestingly, both Justices are from Arizona, a state which will undoubtedly be affected by the majority opinion.

37. *Sporhase*, 102 S.Ct. at 3467.

state over the state resources necessary for the well-being of its citizens. In the exercise of this authority, the State may regulate a natural resource so as to preclude that resource from attaining the status of an "article of commerce."

The dissent distinguished the cases which invalidated restrictive legislation of a state's natural resources from the case at bar. The Majority relied upon the private market cases of *West v. Kansas Natural Gas Co.*,³⁸ *Pennsylvania v. West Virginia*³⁹ and *City of Altus v. Carr*⁴⁰ to support its conclusions. These cases have three common elements: 1) they involved the sale of a commodity which was privately owned; 2) there was an existing private interstate market for that commodity; and 3) the sole purpose of the state legislation was to protect private in-state business, markets and interests.

In contrast, the Nebraska statute shares characteristics common to water law systems of most of the western states. Water is treated as a public asset. Appropriators are merely given the right to use the water for beneficial purposes. There is no private interstate market for water and the goal of regulation is to protect existing water supplies. The Nebraska law prohibits "commerce" in water to exist, intrastate or interstate. The dissenters concluded that the Nebraska statute was evenhanded, neither discriminating against nor burdening interstate commerce.

CONCLUSION

The Court's announcement that water is an article of commerce has a far-reaching effect on water regulation in the arid western states for two reasons. First, the decision glosses over the public-versus-private ownership distinction of groundwater, a distinction critical in the water dispute between New Mexico and El Paso.⁴¹ Second, while absolute bans on water export have been made virtually impossible, the Court acknowledged as legitimate the conservation component of the statute, even though the conservation requirements applied only to out-of-state users. The

38. *Kansas Natural Gas*, *supra* note 15.

39. *Pennsylvania v. West Virginia*, *supra* note 15.

40. 255 F. Supp. 828, *supra* note 22.

41. *City of El Paso v. Reynolds*, No. 80-730HB (D.N.M. filed Jan. 17, 1983). El Paso sought a declaration that all New Mexico laws which prohibit the export of New Mexico water violate the dormant commerce clause. Texas has chosen to treat water as a private commodity, subjecting it to the constraints of the commerce clause. However, groundwater in New Mexico is publicly owned and subject to elaborate governmental controls. Such a distinction, however, was ignored by Judge Bratton when he ruled in favor of El Paso in January 1983. Shortly thereafter, the New Mexico legislature enacted an emergency amendment to the statute prohibiting the export of water beyond the borders of New Mexico. Senate Bill 295 (Approved Feb. 22, 1983). New Mexico claims now that Judge Bratton's decision is moot. El Paso is challenging the new statute again on grounds that the restrictions impose an impermissible burden on interstate commerce.

Court offered some guidance on when discrimination in a statute governing water export may be tolerated.⁴²

The Court was less sympathetic with the Nebraska statute's reciprocity requirement, but the Court suggested that the burden of demonstrating a close fit between a statute's means and its asserted local purpose is not insurmountable. "A demonstrably arid state conceivably might be able to marshal evidence to establish a close means-end relationship between a total ban on the exportation of water and a purpose to conserve and preserve water."⁴³ Thus, *Sporhase* did not conclusively resolve litigation over water rights in other western states. Other states may argue that their export bans are more legitimate than Nebraska's.

After the *Sporhase* decision, broad or all-encompassing bans on water export will be nearly impossible to sustain. However, the general framework for the regulation of water supplies in the western states is still intact. Interstate compacts and equitable apportionment statutes may well withstand the *Sporhase* decision. Furthermore, a positive effect of the decision is that state legislatures will be more cautious in narrowly tailoring new water legislation to the important goal of resource conservation.

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42. First, legislation aimed at protecting the health of the state's citizens was said to be distinguishable from legislation designed to protect the state's economy. Second, states have a legal expectation (fostered by equitable apportionment decrees and interstate compacts) that state boundaries may legitimately be recognized in the allocation of water. Third, the state's claim to public ownership of groundwater may support a limited preference for its own citizens.

43. *Sporhase*, 102 S.Ct. at 3465.