

LEGAL, HYDROLOGICAL AND ENVIRONMENTAL ISSUES  
SURROUNDING THE EL PASO WATER SUIT

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In organizing the program for this year's water conference, we wanted to have speakers talk about some of the more important water litigations taking place at this time. The El Paso water suit certainly ranks high in this regard. A problem we had, though, was to find a knowledgeable speaker who was not involved in the litigation. Most lawyers involved in this suit generally avoid much public comment about it for fear of jeopardizing their case. This is understandable. After several unsuccessful phone calls, I finally decided to make this presentation myself.

To begin, let's back up a few years and look at some of the facts and issues involved in this case. On September 5, 1980, the El Paso Public Service Board filed suit in Federal District Court seeking to overturn a New Mexico law that prohibited anyone from drilling a well in New Mexico and transporting the water for use in another state. The thrust of El Paso's argument was that the New Mexico statute was unconstitutional because it represented an impermissible burden on interstate commerce.

Because of the potential for a surge of speculative drilling in the area, the state engineer about a week later declared the Lower Rio Grande Underground Water Basin and then the Hueco Underground Water Basin. This action effectively put any further ground water appropriations under the jurisdiction of the state engineer. The day after each of these declarations, El Paso filed first for 266 applications to appropriate 246,000 acre-feet a year from the Lower Rio Grande Underground Water Basin and next for 60 applications to appropriate 50,000 acre-feet a year from the Hueco Underground Water Basin. The city of El Paso is thus first in line with their applications seeking a total of 296,000 acre-feet a year.

On April 21, 1981, the state engineer denied these applications on the grounds that New Mexico law does not permit our ground water to be transported out-of-state. U.S. District Court Judge Howard Bratton later declared this case ripe for litigation and the first round of hearings were held here in Las Cruces on January 11-13, 1982.

During this same period, but in another part of the country, another water case was brewing. This case, involving a farmer in Nebraska, eventually would shape the outcome of the El Paso case. Let me tell that story and then come back to the El Paso case.

A farmer named Joy Sporhase owned a farm in southwestern Nebraska as well as adjacent farmland in Colorado. Sporhase wanted to irrigate 140 acres of corn and beans on the Colorado portion of the farm with ground water from a well 55 feet inside the Nebraska state line. Nebraska said no to the request, citing a provision in Nebraska law that prohibits the out-of-state export of ground water to any state that did not have a reciprocal agreement. Colorado law had no such reciprocal arrangement with Nebraska and eventually Sporhase was overruled by the Nebraska Supreme Court. That decision was appealed to the highest court in the land and they agreed to hear the case.

Lawyers for Sporhase based their arguments on a seemingly small technicality, claiming that ground water is an article of commerce and that the Nebraska reciprocity provision was unconstitutional because it burdened interstate commerce. During the legal proceedings, 17 legal briefs were filed with the court in opposition to the position taken by Sporhase. Those who filed these briefs in support of the premise that Nebraska was correct in preventing Sporhase from exporting ground water will give you an idea of the complexity of the issue and the high stakes involved. Three groups in particular should be of interest: farmers, environmentalists and railroaders--strange bedfellows if I do say so myself. Each group had its own reason for opposing the export:

1. Farmers were concerned that out-of-state energy interests would drain water from agriculture.
2. Environmentalists saw out-of-state export as a threat to water-based state fish and wildlife programs.
3. Railroaders saw it as opening the door to coal slurry pipelines--a competing mode of transportation.

It should go without saying that several western states also filed briefs: New Mexico, Colorado, Utah, Nevada, Kansas, North Dakota, South Dakota and Missouri. Arguments here were that water is different than

coal, gas, oil, etc., and should not be subject to the commerce clause analysis.

There was only one "friend of the court" brief filed in support of Sporhase. That brief was filed by the city of El Paso.

The U.S. Supreme Court listened to all sides of the argument and rendered its decision on July 2, 1982. It was an 18-page opinion, accompanied by a six-page dissent prepared by two Arizona justices, Rehnquist and O'Connor. Hundreds of pages already have been written on what the court said in the 18 pages, but let me summarize the opinion this way. The court held that:

1. Ground water is an article of commerce and as such is subject to regulation by Congress.
2. Nebraska's reciprocity provision was unconstitutional because in the court's opinion, it represented an unnecessary burden on interstate commerce.

Many consider the opinion to be very narrowly construed. The court, however, did add language to clarify their reasoning. Let me summarize a few:

1. State ownership of its own ground water is a legal fiction.
2. States should not assume that congressional silence in deference to states' rights in water management means that Congress has given states blanket authority to impose impermissible burdens on interstate commerce. (In other words, before a state can legally place burdens on interstate commerce, Congress must expressly and affirmatively authorize them to do so.)
3. A demonstrably arid state conceivably might be able to marshal evidence to justify even a total ban on exportation of water.

There were some other statements in the opinion that suggested a state can impose restrictions on water export that could discriminate in favor of its own citizens. However, these restrictions (statutes) must regulate even-handedly to achieve a legitimate local public interest.

Furthermore, the effects of such a statute on interstate commerce must be only incidental. The court said "to conserve and preserve diminishing sources of ground water" is unquestionably legitimate. It also said that a state's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens--not simply the health of its economy--is at the core of its police powers.

Let's turn back to the El Paso case. As I said, the U.S. Supreme Court rendered its decision on July 2, 1982, and in view of its relevance to the El Paso case, Judge Bratton on July 14, 1982, asked if both sides in the El Paso case would like to prepare additional arguments. New arguments were heard in another hearing on September 13-14, 1982, in Albuquerque. Five months later on January 17, 1983, Bratton made his decision and ruled in favor of El Paso. His ruling held that:

1. New Mexico's statute is invalid.
2. The Rio Grande Compact is not relevant to this case.

Bratton went on to indicate that New Mexico was not able to prove that the embargo statute served a legitimate local purpose nor was it narrowly tailored to meet that purpose. He did say that the embargo did serve a legitimate local purpose for health and safety requirements, however, outside of fulfilling human survival needs, water is an economic resource. Most of you are aware of this decision, but let me point out that it did not grant El Paso a drop of water--it simply struck down our old law.

As most of you know, the 1983 New Mexico Legislature repealed the embargo statute and passed a new law that does allow for the export of ground water. New Mexico also appealed Bratton's decision to the 10th Circuit Court of Appeals. Earlier this year that court remanded the case back to Bratton's court for "fresh consideration" in view of the fact that the old law was repealed and a new one enacted. As you know, Bratton heard arguments on April 24, 1984, in Albuquerque relating to El Paso's challenge to our new law and also a two-year moratorium on ground water development here in the Mesilla Valley. I'll not get into a discussion of the moratorium other than to say, as a nonlawyer, that El Paso is now on far weaker legal grounds than before.

Before going any further, let me touch on the new law. The law says that out-of-state use of New Mexico water is permissible but will require a permit from the state engineer after he determines that:

1. The use will not impair existing water rights.
2. The use is not contrary to the conservation of water in the state.
3. The use is not otherwise detrimental to the public welfare of New Mexicans.

The law also lists six factors the state engineer must consider:

1. The supply of water available in New Mexico.
2. Water demands of New Mexico.
3. Whether there are water shortages in New Mexico.
4. Whether the water applied for could be feasibly transported to alleviate water shortages in New Mexico.
5. The supply of water available to the applicant state.
6. The demands on the applicant's supply in the state where the water will be used.

I stated before a legislative committee last fall that "protection of the public welfare is the cornerstone" of the new law and somehow that statement cropped up in an El Paso brief filed on March 19, 1984, as somehow supporting their argument against our new law. I question the relevance of El Paso quoting me, since I have absolutely nothing to do with administration of water rights in this state.

After this long discussion of how the case got to this point, the question is, what does it all mean? First, it's clear that El Paso is very serious in their efforts to obtain ground water in New Mexico.

Secondly, it's clear that our state has a legitimate interest in protecting the health, safety and well being of its citizens. One may argue over what constitutes public welfare, and indeed this may be an important legal argument. However, I don't think anyone arguing the New Mexico side of the case believes that economic protectionism is implied when defining public welfare. Framers of the U.S. Constitution, in creating the commerce clause and also the privileges and immunities clause, had great foresight in our federal system of government. They

did not want, nor do we want, this country to be broken up into economic fiefdoms creating economic balkanization of the union. Our forefathers believed that fragmentation of individual states created by imposing burdensome measures on interstate trade will weaken the economy of the nation. I don't believe New Mexico's water policy conflicts in any way with these concepts. Our policy is simply to assert the state's legitimate police powers, which were also given to us by that same constitution.

Let me now turn to three important facts in this quest for New Mexico ground water by the city of El Paso. First, El Paso wants 296,000 acre-feet a year. How much is that? It's enough water, at 3,000 gallons a second, to fill a back yard pool in six seconds. And it's 100,000 acre-feet more than the current consumptive use within the Elephant Butte Irrigation District. The second fact is that El Paso claims there are some 60 million acre-feet in storage. That figure probably comes from a USGS report that mentions theoretically recoverable ground water. What is theory and what is reality are two different things. For example, theoretically we could extract all the water we would ever need from the air that blows by Las Cruces every year. All we would need would be a few thousand miles of copper refrigeration coils and condensers, some freon (a few super tankers full), and a compressor powered by a few dozen nuclear power plants. Then we could build a gigantic dehumidifier that produces pure water. The point is that water available for appropriation in a practical sense is far less than what is theoretically recoverable. The ground water in this valley comes from a stream related aquifer. Simply stated, that means the river water and the ground water are connected in such a way that drawing on the ground water in excess of recharge will ultimately reduce the flow of the river.

I like to compare the drawdown to what I call my milkshake model. If you put a straw in the middle of a thick milkshake and suck, you will create a "cone of depression" around the straw. The level of the milkshake will be higher on the sides than in the middle. The more you suck, the deeper that cone gets and the closer it moves to the side of your container. This is similiar to what happens when pumping a water well.

Now picture this situation existing in the Mesilla Valley where you have the Rio Grande passing along the edge of this cone of depression. At some point, the stream will intercept the depression and flow down to fill the depression. Ultimately, if you keep on sucking water from the aquifer, the entire stream will flow into the depression and you will reach an equilibrium whereby what you pump from the well is equal to what flows from the stream into the depression. The total amount of water you sucked out from the time you started until the time equilibrium was reached could be considered the amount of ground water available for appropriation. Two things are important to remember from this situation:

1. There is still a lot of ground water left in the aquifer.
2. The flow of the river has ceased. The water now goes into the ground and out the well.

This means you can only extract a fraction of that in storage before you "dry up" the Rio Grande. To do this in a legal sense, you somehow would have to compensate those who had rights to the flow of the stream. In New Mexico this is handled by conditioning a well permit such that an appropriator has to acquire and then retire surface water rights according to a schedule set by the state engineer. This is to assure that the river keeps flowing the way it did before pumping began.

So, in terms of the second fact I mentioned, there is probably some ground water available for appropriation in the Mesilla Valley, but certainly not 60 million acre-feet. Hydrologists are currently trying to arrive at that number. I should also mention that one has to be very careful in granting a permit to appropriate ground water because if you miss the mark and overappropriate, it may be many years before you know it and then it may be too late to do anything about it. The third fact is that large scale ground water development can create undesirable water quality and environmental consequences. The first consequence concerns salt water encroachment from shallow ground water to the deeper, better quality aquifer. To illustrate, let's go back to the milkshake model. If you had a layer of salt floating on the top of your milkshake and if you suck from deep within your container through the straw, you will get a good quality milkshake--for a while. Eventually you will suck the

depression to the point where salt enters your straw. If you are unfortunate enough to be sucking from another straw in the same milkshake, only from a shallower depth, you would very quickly be sucking salt.

A similar situation would happen in the Mesilla Valley because the shallow ground water is much more saline than water from deeper in the aquifer.

A second environmental consequence is a very real possibility of land subsidence, which would be created by large scale ground water development. Layers of clay material in the aquifer, when dewatered, can shrink. When they do, the overlying land will also sink. There are examples of this phenomenon all over the country. I've seen accounts of well casings sticking out of the ground many feet in the air. The casings didn't get poked up from below. They stayed in place, and the ground sank around them.

I would hazard to guess that it might be in the interest of public health and safety not to have well casings sticking up in the air with the ground sinking around the local prison, fire department or hospital, for example.

I don't think anyone knows for sure at this time how much water can be safely extracted from the Lower Rio Grande Underground Water Basin. I suspect a few million acre-feet may be available. I further expect that what is available can be legitimately claimed by New Mexico for use by New Mexicans to protect our health and safety and provide us with the means to continue living as New Mexicans in an environment we choose to live in.

I view the law as a tool. If you want to remove a head bolt from an engine, you don't use a pair of vice grips; you use a strong socket and breaker bar. If you use vice grips, you are likely to tear up the head of the bolt and make it unusable.

I'm not suggesting that the commerce clause is a bad tool. It's a good tool for some jobs, but not for apportioning water in water scarce states. Congress needs to say that loudly and clearly enough for the



lawyers to understand. Congressional inaction in this case opens the door for lawyers to use their imagination in finding all sorts of tools to remove head bolts from an engine. The lawyers certainly get paid for their efforts, but in the meantime they certainly can mess up a lot of head bolts. Let's hope they don't mess up our water supply.