ENVIRONMENTAL LAW

STATE EX REL. DOUGLAS v. SPORHASE: PUBLIC OWNERSHIP OF GROUND WATER

INTRODUCTION

In State ex rel. Douglas v. Sporhase,¹ the Nebraska Supreme Court upheld the constitutionality of the Nebraska water permit statute² which allows for transfer of Nebraska ground water across state lines only when a permit is obtained from the Nebraska Department of Water Resources.³ The statute was attacked on three constitutional grounds: (1) that it violated the commerce clause,⁴ (2) that it violated the due process provisions of the fifth and fourteenth amendments,⁵ and (3) that it violated the equal protection clause of the fourteenth amendment by virtue of an unreasonable classification.⁶

Sporhase is important because the Nebraska Supreme Court for the first time stated that ground water is publicly owned.⁷ This article will focus on the court’s reliance on the public ownership theory in rejecting the commerce clause challenge to the statute.

BACKGROUND

While Nebraska law requires that a permit be obtained for the transport of ground water for public water supply purposes,⁸ there is no state law requiring a permit for the transport of ground water within the state for private uses.⁹ However, the use of ground water by private landowners is regulated by common law in Nebraska.

2. NEB. REV. STAT. § 46-613.01 (Reissue 1978). A permit will be issued only if the Director of the Department of Water Resources finds that the proposed transfer: (1) is reasonable; (2) is not contrary to the conservation and use of ground water; (3) is not otherwise detrimental to the public welfare; and (4) the state into which the ground water is proposed to be transferred grants reciprocal rights providing for transfer of ground water from that state into Nebraska. Id.
3. 208 Neb. at 704, 305 N.W.2d at 616.
4. U.S. CONST. art. I, § 8; 208 Neb. at 705, 305 N.W.2d at 616.
5. 208 Neb. at 710, 305 N.W.2d at 619.
6. Id. at 711, 305 N.W.2d at 620.
7. Id. at 710, 305 N.W.2d at 619.
9. See Aiken, Nebraska Ground Water Law and Administration, 59 NEB. L. REV. 917, 986-88 (1980) [hereinafter cited as Aiken], for a discussion of the outlines of such a permit system.
Nebraska has adopted a modified form of the American rule regarding the use of ground water:

[The] owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .

The common law right of reasonable and beneficial use of ground water has been supplemented by statute. Nebraska law sets a priority among ground water users, and provides that in times of shortage, the right of reasonable use can be further limited, or even suspended.

Prior to Sporhase, the only case testing the constitutionality of a state law restricting the interstate transfer of ground water was City of Altus v. Carr. The court in Altus held that a Texas law prohibiting the removal of ground water for use in another state except by legislative authorization constituted an unreasonable burden upon interstate commerce.

**FACTS AND HOLDING**

Joy Sporhase and Delmar Moss, residents of Colorado,
owned and farmed adjacent tracts of land in Nebraska and Colorado. A well, located on the Nebraska tract, was used to pump ground water for the irrigation of crops on both the Nebraska and Colorado tracts. Although the well was registered with the State of Nebraska as required by law, Sporhase and Moss did not apply for the permit required to transport the ground water from the Nebraska well into Colorado. It is clear that such a permit could not have been issued in any event, since Colorado law forbids the transfer of ground water outside its borders and has no reciprocity provision. The State of Nebraska brought an action to enjoin Sporhase and Moss from transporting ground water into Colorado without a permit.

The court rejected all three constitutional challenges to the Nebraska statute. It held that the commerce clause is inapplicable, because ground water is not an article of commerce. It found the instant case distinguishable from Altus, stating that the Altus holding was based on the fact that, under Texas law, ground water is considered to be personal property of the landowner, subject to sale within the state. In contrast, ground water in Nebraska is owned by the public at large, with intrastate transfers permitted only under specially controlled conditions not resembling a free market. The court similarly distinguished Sporhase from three Supreme Court decisions in which state restrictions on the interstate transportation of natural resources other than water were invalidated, since the natural resources in those cases were historically considered as articles of commerce, unlike Nebraska ground water.

The due process challenge was disposed of in a similar fashion. The court stated that ground water is owned by the public, and that the landowners have "no private property right in the

17. 208 Neb. at 704, 305 N.W.2d at 616.
18. Id.
19. Id.
20. See note 2 supra.
21. Id. at 704, 305 N.W.2d at 616.
22. Id. at 707, 305 N.W.2d at 618. See Neb. Rev. Stat. § 46-613.01 (Reissue 1978) and note 2 supra.
23. 208 Neb. at 704-05, 305 N.W.2d at 616.
24. Id. at 710, 305 N.W.2d at 619.
25. Id. at 708, 305 N.W.2d at 618.
26. Id. at 710, 305 N.W.2d at 619.
27. Id. at 708, 305 N.W.2d at 618.
29. 208 Neb. at 709-10, 305 N.W.2d at 619.
water itself. . . ." Since Sporhase and Moss had no private property right, the due process clause was inapplicable.

Finally, the court held that the statute was not violative of the equal protection clause since it operates equally on all members of the class designated, and is related to the legitimate state interest in preserving Nebraska ground water for the beneficial use of its own citizens.

ANALYSIS

The Commerce Clause

The Nebraska court distinguished the holding in the Altus case by relying upon differences between the states' laws regarding the ownership and use of ground water. In Texas, the ground water is owned by the private landowner, with full rights of sale within the state. In Nebraska, ground water is publicly owned, with the private landowners having only a limited right of use. While the Altus court clearly supported its holding by reference to the private ownership of water in Texas, there is language in the opinion indicating that the holding rested on a broader basis.

The Nebraska Supreme Court suggested that in states where ground water is publicly owned, the interstate transfer of water may be completely prohibited or conditioned as the state sees fit, without violating the commerce clause. As authority for this proposition, the court cited Hudson County Water Co. v. McCarter, in which the Supreme Court upheld the constitutionality
of a New Jersey law prohibiting the transfer of its surface water out of the state.

However, the continued vitality of *Hudson County Water*, based on a theory of public ownership of natural resources, is doubtful. In two more recent decisions, the Supreme Court has rejected arguments that state ownership of natural resources in the form of wildlife permit a state to confine those resources to its own borders or to give its own citizens preferential access to them. The Court stated: “The whole ownership theory, in fact, is now generally regarded as but a fiction expressive of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”

Even if one accepts the Nebraska court's position that *Sporhase* is distinguishable from *Altus* and the other natural resource cases because ground water is not an article of commerce within the State of Nebraska, it does not follow that the commerce clause need not be considered at all. In this respect, the court's reasoning is questionable. That the commerce clause reaches not only interstate commerce itself, but also that which affects interstate commerce, has been recognized by the Supreme Court since the landmark case of *Wickard v. Fillburn*. The *Wickard*...
ard decision, unlike the present case, involved an active use of the commerce clause by Congress, but the basic principle of Wickard has been acknowledged by the Supreme Court in a recent “dormant” commerce clause case involving a state's regulation of its natural resources. The “affecting commerce” scope of the commerce clause was recognized by the Altus court as well.

The commerce affected by the permit requirement in the instant case is not water itself, but agriculture. A single farming operation conducted on contiguous parcels of land in two states provides a clear and literal example of interstate commerce. The practical effect of the permit requirement in this case is to prevent appellants Sporhase and Moss from using ground water pumped from the Nebraska well to irrigate the crops located on Colorado soil. Since the Nebraska law directly affects interstate agricultural operations, it should be subject to scrutiny under the commerce clause.

When a state regulation of natural resources is involved, the appropriate test under the commerce clause is to balance the strength of the state interest against the burden the regulation places upon commerce. This balancing process takes the form of a three-part inquiry. The court must determine:

1. whether the challenged statute regulates evenhandedly with only “incidental” effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;
2. whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative

Id. at 125.

47. Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981). Montana contended that its coal severance tax was not subject to the commerce clause because the severance of coal was an intrastate activity. Id. at 2951. The Supreme Court rejected the argument, stating that it has “long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny. . . .” Id. at 2952.

48. 255 F. Supp. at 839-40; see note 39 supra.

49. See notes 16-23 and accompanying text supra.

50. An interesting comparison can be made between Sporhase and Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978), in which the Court held that a New Jersey law which prohibited the importation of most solid or liquid wastes from outside of the state violated the commerce clause. The Court stated that “a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders.” Id. at 627. The Court noted that the scarce natural resource (land) and the article of commerce involved (solid and liquid wastes) were not the same, but concluded that this distinction was without consequence. Id. at 628. In Sporhase, there is a similar distinction between the scarce natural resource (ground water) and the commerce involved (interstate agricultural operations).

means could promote this local purpose as well without
discriminating against interstate commerce.\textsuperscript{52}

Since the Nebraska statute allows the transfer of ground water
across state lines only upon receipt of a permit,\textsuperscript{53} but does not re-
quire a permit for transfer of ground water intrastate, it appears to
discriminate against interstate agricultural operations. However,
it must be remembered that the intrastate transfer of ground water
is limited to the beneficial use of ground water on the owner's over-
lying land.\textsuperscript{54} Even this limited right can be further limited, or even
suspended, during times of shortage.\textsuperscript{55}

Allowing for these common law and statutory regulations of
intrastate ground water use, the permit requirements still affect
the interstate use of ground water more harshly than intrastate
use. The reciprocity requirement\textsuperscript{56} has the practical effect of
prohibiting the beneficial use of ground water for agriculture by a
landowner on his own land, when that land is located in
Colorado.\textsuperscript{57}

The determination of whether Nebraska's permit law discrimi-
nates against interstate commerce is crucial. If it does discrimi-
nate, "the burden falls on the State to justify it both in terms of the
local benefits flowing from the statute and the unavailability of
nondiscriminatory alternatives adequate to preserve the local in-
terests at stake."\textsuperscript{58}

It is not disputed that Nebraska has an important and legiti-
mate interest in conserving and regulating ground water, a scarce
and valuable resource. The question is whether this interest could
not be adequately protected by a law which treated interstate
farming operations the same as those located entirely within the
state—limiting the right to a reasonable and beneficial use on one's
own land, but not to the detriment of others who have rights to the
waters,\textsuperscript{59} with additional controls in times of shortage.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{52} Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
\item \textsuperscript{53} See note 2 and accompanying text \textit{supra}.
\item \textsuperscript{54} See text at note 11 \textit{supra}.
\item \textsuperscript{55} See note 13 and accompanying text \textit{supra}.
\item \textsuperscript{56} See \textsuperscript{NEB. REV. STAT.} § 46-613.01 (Reissue 1978) and note 2 \textit{supra}.
\item \textsuperscript{57} See notes 16-23 and accompanying text \textit{supra}. In light of the holdings in
(1966) and Hughes v. Oklahoma, 441 U.S. 322 (1979), the constitutionality of
Colorado's absolute prohibition of interstate ground water transfers is in serious doubt.
If the Colorado law were held unconstitutional, Nebraska's reciprocity requirement
would become superfluous.
\item \textsuperscript{58} Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
\item \textsuperscript{59} See text accompanying note 11 \textit{supra}.
\item \textsuperscript{60} See notes 12-13 and accompanying text \textit{supra}.
\end{itemize}
The Due Process Clause

The appellants claimed that the permit requirements deprived them of a property right without due process of law, in violation of the fifth and fourteenth amendments. To have a federally protected property right, the claimant must have a legitimate claim of entitlement to the property interest, this claim having its source in state law.

Nebraska common law recognizes the right of a landowner to appropriate ground water for reasonable and beneficial use upon the land which he owns. The court's holding in Sporhase makes clear that this right of reasonable use does not extend to the owner's land which is located in another state. There being no state created property interest in using ground water on land located in another state, a state law providing for such use under specified conditions could hardly be said to constitute a deprivation of a property right.

The Equal Protection Clause

The equal protection clause requires that when a state employs a classification of persons for differing benefits or burdens to achieve its legislative purpose, there must be a sufficient relationship between the classification employed and the governmental purpose. In reviewing economic and social legislation, the courts will uphold a state statute as long as the classification employed is rationally related to some legitimate state purpose.

The conservative of ground water is clearly a legitimate state interest. Nebraska's law allowing ground water to be transported to another state only when its use will be consistent with good con-
salvation practices, and when the other state reciprocates by allowing the use of its ground water in Nebraska, clearly promotes a legitimate state interest. That the law may affect interstate farming operations more harshly than those located entirely within Nebraska would not be a fatal defect. When the test is mere rationality, classifications need not be drawn with precision, and the legislature is not required to address every aspect of a problem at one time.68

CONCLUSION

In Sporhase, the Nebraska Supreme Court stated for the first time that ground water is publicly owned.69 Relying on this theory of public ownership, together with the limited right of use of ground water which the common law has granted to landowners, the court concluded that a Nebraska statute requiring a permit for the interstate transportation of ground water need not comply with the strictures of the commerce clause.70 The court also rejected arguments that the provision violated the due process71 and equal protection clauses of the Constitution.72

The court’s conclusion that the commerce clause is inapplicable to the Nebraska statute is questionable in light of recent Supreme Court decisions rejecting the notion of public ownership of natural resources as a means of avoiding the commerce clause.73 Moreover, the state’s permit requirements for the interstate transport of ground water constitute not only a regulation of ground water itself, but interstate agricultural operations—a fact which should trigger commerce clause scrutiny. If subjected to commerce clause analysis, the provision may fail because it seems to discriminate against interstate agricultural operations without using the least restrictive method of protecting the state’s legitimate interest in conservation.

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69. 208 Neb. at 710, 305 N.W.2d at 619.
70. Id.
71. Id.
72. Id. at 712, 305 N.W.2d at 620.
73. See notes 40-44 and accompanying text supra.