Interstate Water Allocation: A Contemporary Primer for Eastern States

Robert Haskell Abrams

Follow this and additional works at: https://lawrepository.ualr.edu/lawreview

Part of the Property Law and Real Estate Commons, and the Water Law Commons

Recommended Citation
Available at: https://lawrepository.ualr.edu/lawreview/vol25/iss1/5

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.
INTERSTATE WATER ALLOCATION: A CONTEMPORARY PRIMER FOR EASTERN STATES

Robert Haskell Abrams*

Interstate water allocation law in the United States is roughly 100 years old at this point in history. To date, with a few notable exceptions, the states of the American West have made the law. This is to be expected because allocation becomes vital as a means of providing predictability and security of right under conditions of scarcity and competition for use of the limited supply of water. Throughout its history, the American West has known water scarcity. By comparison, the American East has had only limited, episodic experience with water scarcity to date and even less recent experience with interstate water allocation.

By most quantitative measures, the issue of scarcity remains a West-only problem. Numerous contemporary examples belie that appearance. Arkansas, for instance, is a water rich eastern state that is experiencing substantial declines in aquifer water levels and numerous competing demands for its surface flows. Importantly, Arkansas has as a neighbor, Texas, a state with a huge water appetite and a reputation (deserved or not) for seeking to slake its water thirst on a grand scale from any and all sources. Absent interstate allocation, Arkansas may risk having Texas or other states initiate use of water that otherwise would be available to meet Arkansas's water needs. This article examines interstate water allocation law and suggests a course of action to states that are at risk of losing water to their sister states.

The principal thesis of this article is that allocation matters. It matters because, absent allocation, states that want to conserve their water resources for either future intrastate use or for present in situ use are at risk of having sister states use that water in other inconsistent ways. Interstate allocation also matters because, if there is not a negotiated agreement, water use is sufficiently similar to a zero sum game in that there will be winners and losers and the winning strategy is easily identified. Under the most recent and detailed United States Supreme Court precedent, states engaged in present development and use of the water will win the greater entitlements.1 The goal of this article is to set forth the legal underpinnings of those conclusions and then suggest to states favoring present conservation and in situ uses how they can best avoid being the losers.

This article proceeds from several premises about water allocation law and biases regarding entitlements that should be stated at the outset. First,


155
despite the combination of the commerce power and the Supremacy Clause that together allow the national government to propound a meaningful water policy with allocative features, the national government has not done so and is unlikely to do so any time soon. Accordingly, the initiative has fallen to the states. Second, the originally stated central principle of equitable apportionment, the right of all states riparian to a watercourse to share fairly in its benefits, properly conceives the principle on which interstate allocations should be based. The modern Supreme Court has lost sight of this principle. Third, solutions that minimize diversions, including conservation and limiting environmentally disruptive water use, ought to be the norm in water use. Ironically, advancing this norm may require that states seeking to improve conservation engage in a race to use water in order to secure a measure of control over the allocated water source. This tactic is correct under the law as it stands; it is the law of equitable apportionment that needs to be returned to its roots to facilitate maintenance of riparian systems.

I. WATER ALLOCATION AND AMERICAN FEDERALISM

In the United States, as elsewhere, water bodies often form geopolitical boundaries or flow across those boundaries. As such, those waters themselves are not wholly within the jurisdiction and control of a single sovereign, a condition that has the potential to spawn conflict over the use of the water. Where there is such a conflict, eventually there must also be an allocation of the water between the competing parties.

The American federal system offers the possibility of national control and policy making in relation to interstate water resources. The interstate commerce power and the Supremacy Clause undoubtedly grant Congress a basis to determine how interstate waters are to be used and allocated. Similarly, the grant of original jurisdiction to the United States Supreme Court in state versus state disputes establishes a forum capable of adjudicating such cases.

Though not part of a comprehensive national water policy, the American federal system has developed four distinct, reasonably well-articulated ways to allocate water between states. These are (1) equitable apportionment by the United States Supreme Court; (2) interstate compact; (3) congressional apportionment; and (4) in cases that require adjudication in ad-

2. U.S. Const. art. I, § 8, cl. 3.
3. U.S. Const. art. VI, § 1, cl. 2.
4. Justice Holmes, in an interstate water pollution case, explained this grant as a substitute for belligerency that would be the means of dispute resolution among the states in the absence of such a federal power. See Missouri v. Illinois, 200 U.S. 496, 521 (1906), superseded by statute on other grounds as stated in Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).
vance of the aforementioned forms of allocation, common law judicial decisionmaking.

A. Allocation by Equitable Apportionment

As part of the complexity of federal and state relations embodied in the United States Constitution, the United States Supreme Court was given jurisdiction to entertain suits by one of the several states against another. In the exercise of this jurisdiction, the Supreme Court is authorized to provide a form of binding resolution to disputes that the states themselves cannot settle as co-equal sovereigns, each unable to bind the other. Using this jurisdiction, the Supreme Court has allocated interstate water pursuant to an equitable apportionment only a handful of times. States, depending on their interests, have stressed positions favoring allocation on the basis of contribution to streamflow, equality of use, and priority in time of use, as well as more complex allocation principles. As reviewed more fully later in this article, the outcomes of the cases have varied as to what allocative principles will be determinative.

B. Allocation by Interstate Compacts

Compacts are special. They are a constitutionally sanctioned mechanism that begins with an agreement of states cast into state legislation, thereafter enacted by Congress. As such, the United States Supreme Court has shown a firm unwillingness to do anything other than enforce compacts according to their terms. This is, essentially, a separation of powers induced deference that arises from the extraordinary pedigree of compacts. Thus, the Court will not exercise discretion—equitable or otherwise—to grant relief from the obligation that compacts confer upon participating states. The Court will adjudicate whether there is a breach of the compact and, if so, devise a remedy for the breach. Notably, both compacts and congres-

5. U.S. Const. art. III, § 2, cl. 2.
6. See Nebraska v. Wyoming, 325 U.S. 589 (1945) (protecting Colorado’s use of the North Platte River even though its uses were out of priority); New Jersey v. New York, 283 U.S. 336 (1931) (demonstrating that interstate water disputes and equitable apportionment are not confined to the West); Wyoming v. Colorado, 259 U.S. 419 (1902) (allowing a “mass allocation” to one state while leaving the rest for downstream states).
7. See infra Part III.
8. U.S. Const. art. I, § 10, cl. 3.
10. See id. at 566; Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 104–05 (1938).
sional apportionments\textsuperscript{11} codify and lend federal power to enforce an allocation of the resource and put the force of the Supremacy Clause behind it.\textsuperscript{12}

C. Allocation by Congressional Apportionment

Historically, congressional apportionment has rarely been used. There are two examples. The first is the highly visible decision in \textit{Arizona v. California},\textsuperscript{13} in which the Court concluded that the Boulder Canyon Project Act had allocated the waters of the lower basin of the Colorado River.\textsuperscript{14} The other example is a recent statute addressing the Truckee-Carson situation.\textsuperscript{15} In the latter case, the congressional action confirmed and reflected a long process of negotiation that reached a consensus between the two states involved and the federal government on behalf of Indian tribes.\textsuperscript{16} Congressional apportionments of this latter type are quite similar to interstate compacts.\textsuperscript{17} They proceed from a basic agreement of the states that precedes congressional action. Congress, of course, has the authority to dictate water allocations to the states even without state agreement. The two precedents for congressional allocation, assuming that they are representative of what is likely to follow, show that congressional apportionment is not a likely means to resolving otherwise unresolved interstate water disputes. Forcing a resolution upon non-agreeing states by congressional apportionment would require a degree of political will that Congress has shown little ability to muster.

D. Allocation by Judicial Decisions in Private Litigation

All of the mechanisms for allocating water described thus far require the participation of the government, the affected states, and either the United States Supreme Court or Congress. Water users at times need resolut-

\textsuperscript{11} See infra Part I.C.
\textsuperscript{12} For the purposes of this discussion, congressional apportionments closely resemble interstate compacts in that Congress acts, raising separation of powers concerns, but the actions are in the nature of ordinary statutes that are the typical grist of the judicial review mill. Realistically, when Congress expressly allocates an interstate water body, it seems likely that the Court will be very deferential, making congressional apportionment similar to compacts for the purposes of this discussion.
\textsuperscript{13} 373 U.S. 546 (1963).
\textsuperscript{14} Id. at 565.
\textsuperscript{16} Id.
\textsuperscript{17} Although large numbers of congressional apportionments are not pouring forth, Congress has several under discussion, usually melding consensual interstate water dispute resolution with the concurrent resolution of tribal (federal) claims to water and federal monetary appropriations for water projects that make water more readily available for use.
tion of disputes in advance of any such overarching interstate allocation. The leading case in this field, although almost a century old, remains *Bean v. Morris.*\(^{18}\) In *Bean*, downstream senior water appropriators in Wyoming successfully obtained relief against an upstream junior appropriator in Montana. Writing for the Court, Justice Holmes noted that, historically, states along a shared waterway "were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within."\(^{19}\) Noting that both states to the controversy were (and remain) prior appropriation jurisdictions and that the same stream later flowed back into Montana, Holmes deemed it "suicide" for Montana to do other than accede to a unified priority system.\(^{20}\) This was true even though doing so in this case would deny any water to Bean, a Montana water user. This position is founded on the belief that the affected state would extend comity to rights created under the laws of a sister state.

Despite its unique federalism and the possibility of federal domination of interstate water and water policy in general,\(^{21}\) since the framing of the Constitution, United States water law and decisions regarding water allocation are mainly regarded as matters of state prerogative.\(^{22}\) This deference to the states is because the several states were sovereigns that together joined and ceded only a portion of their sovereignty to the nation. A part of the retained sovereignty was the police power and the authority to determine property rights, including water rights.\(^{23}\) Thus, history explains the deference extended to the states in the water policy and water allocation area. The power given to the national government served two roles, arbiter of disputes that the states themselves could not resolve and confirmator of agreements the states themselves had reached. In the latter half of the twentieth century, the power of the national commerce power came to play a third, essentially negative role, that of guarantor of the freedom of movement of articles of commerce that now included water.\(^{24}\)

18. 221 U.S. 485 (1911).
19. *Id.* at 487.
20. *Id.*
21. The relationship of water use to interstate commerce is so strong that even in the era of *United States v. Lopez*, 514 U.S. 549 (1995), it seems unthinkable that federal law setting national water policy would be viewed as beyond Congress's interstate commerce power.
22. There is a distinct exception to this generalization—reserved rights that arise where the federal government withdraws lands from the public domain and reserves the lands for particular federal purposes. Such lands are benefited by rights to then-unappropriated waters in amounts necessary to fulfill the primary purposes of the reservation. See, e.g., Cappaert v. United States, 426 U.S. 128 (1976) (Devil's Hole National Monument); Winters v. United States, 207 U.S. 564 (1908) (Indian reservations).
23. The clearest statements of this position appear in a variety of contexts in which the Supreme Court invokes what is known as the "Equal Footing Doctrine." See, e.g., Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).
24. *See infra* Part III.A.
II. THE EARLY HISTORY OF AMERICAN INTERSTATE WATER LAW

Beginning roughly a century ago, the Supreme Court, led by Justice Holmes and Justice Brewer, announced a very clear picture of how water resources were to be governed. The pivotal dichotomy was whether the waters were intrastate in character or interstate. Intrastate waters were wholly within the power of the state to allocate. In the words of Justice Holmes's *Hudson County Water Co. v. McCarter* opinion:

Leaving [the problems of irrigation] on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer’s view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.26

Interstate waters stood in quite a different posture. Writing the opinion for the Court in *New Jersey v. New York*, Justice Holmes proclaimed:

---

26. Id. at 356–57.
27. 283 U.S. 336 (1931).
A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down undiminished.\(^{28}\)

The view that Holmes espoused has been established as the guiding legal precept of Supreme Court equitable apportionment, the method of adjudication by which states unable to agree on shared use of an interstate water body submit their grievance for judicial resolution. In *Kansas v. Colorado*,\(^ {29}\) Justice Brewer stated:

We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure so far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effect of a flowing stream . . . . One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law.\(^ {30}\)

Taking the early precedents together, there is a first order limitation on the use of water in a shared basin—no single state can command the entire

\(^{28}\) Id. at 342.

\(^{29}\) 206 U.S. 46 (1907).

\(^{30}\) Id. at 97–98, 100.
resource to the detriment of a sister state that is riparian\textsuperscript{31} to that water-course.\textsuperscript{32}

III. INTERSTATE WATER ALLOCATION LAW IN THE LATE TWENTIETH CENTURY

Two things changed in interstate water law in the latter portion of the twentieth century: the ability of a state to control its intrastate waters and the jurisprudence of equitable apportionment cases. Both of these events had a similar effect—they restricted the ability of a state to defeat efforts of sister states to appropriate water, intrastate or interstate. Both events have the unintended consequence of promoting present water use as the basis upon which states can best compete for scarce water.

A. The Dormant Commerce Clause Before and After Sporhase v. Nebraska\textsuperscript{33}

The first change is the extension of dormant Commerce Clause\textsuperscript{34} protection to include water as an article of commerce that cannot be hoarded. This change repudiates the previously described doctrine of state hegemony over intrastate waters that Justice Holmes announced in Hudson County

---

\textsuperscript{31} There is a bit of intentional ambiguity as to the possibility of a non-riparian state being able to insist on the beneficial use of a water body to which it is non-riparian. To date, all states that have obtained allocated rights by apportionment or compact have been riparians. There are, however, occasional cases in which courts have granted protection to water users located in states that are not riparian to the source water body. See, e.g., Erickson v. Queen Valley Ranch, 99 Cal. Rptr. 446 (Cal. Ct. App. 1971). This paper will make no effort to explicate the rights, if any, of a non-riparian state.

\textsuperscript{32} The most recent cases have quoted, but not honored this principle. See New Mexico II, 467 U.S. 310 (1984), discussed infra Part III.B.

\textsuperscript{33} 458 U.S. 941 (1982). In Sporhase, a Nebraska statute required all persons who intended to withdraw groundwater from the state and transport it to another state to first secure a permit from the Nebraska Department of Water Resources. The permit would be granted upon approval of the director of water resources as long as the withdrawal was reasonable, not contrary to conservation or public good, and the delivery state granted reciprocal rights for the same to Nebraska. The Court held that groundwater is commerce that can be regulated by Congress, and that the reciprocity requirement violated the Commerce Clause as an impermissible burden on interstate commerce. Id. at 957–58.

\textsuperscript{34} U.S. CONST. art. I, § 8, cl. 3. The adjective “dormant” is used to describe the situation where Congress, which has constitutional authority to act in the field by virtue of the commerce power, refrains from doing so. Protecting the principle so pithily stated by Justice Jackson in \textit{H.P. Hood & Sons, Inc. v. DuMond}, 336 U.S. 525, 537 (1949), that “our economic unit is the Nation,” the judiciary protects the free flow of interstate commerce by invalidating state and local laws that, among other things, impede the movement of items in interstate commerce.
Unlike the change in equitable apportionment jurisprudence, this change was evident even in the first half of the twentieth century as the Supreme Court began to invalidate protectionist state laws as they applied to natural resources on dormant Commerce Clause grounds. Announced as applying to water resources in *Sporhase*, this doctrine operates to debar a state from enacting laws that discriminate against the export of water to a sister state.

After *Sporhase*, states are not wholly powerless in their efforts to limit water exports. The dormant Commerce Clause doctrine, as explained in *Pike v. Bruce Church, Inc.* allows a state to justify discriminatory regulation where it is strictly necessary due to a compelling governmental interest. The underlying water shortage conditions that satisfy so high a standard, however, are seldom faced by most eastern states when they pass laws that attempt to prevent water exports, nor are export bans the least commercially burdensome way to address the problem. In other contexts, import and export bans have been labeled virtually per se unconstitutional.

Evenhanded regulation is permitted, thus, a state that imposes stringent conservation requirements on its own water users as a condition of holding a water right can impose like conditions on exports. This opens up the possibility that what may amount to *de facto* unequal application of *de jure* evenhanded water allocation statutes can act very much like an export ban. Doctrines of deference to administrative decisionmaking limit the ability of judicial review to discern discriminatory application of facially evenhanded criteria. A possible example of this strategy can be seen in the effort of the State of New Mexico to prevent El Paso, Texas, from appropriating and exporting large amounts of New Mexico groundwater. The history there begins with an export ban that, after *Sporhase*, was invalidated on dormant Commerce Clause grounds. After that, New Mexico added a statute that required diversion not be "contrary to conservation of water within the state" and "not otherwise detrimental to the public welfare of the citizens of New Mexico." The revised statute survived a challenge to its facial

35. *See supra* note 25 and accompanying text.
37. The Court carved out a possible exception for states that are "demonstrably arid." *See Sporhase*, 458 U.S. at 958. This does not include states such as Arkansas or other eastern states whose average rainfall plainly does not allow them to qualify as demonstrably arid.
41. *Id.* at 388.
42. N.M. STAT. ANN. § 72-12B-1(C) (Michie Repl. 1997); *see also* N.M. STAT. ANN.
validity. The state engineer thereafter denied El Paso’s application to export groundwater, and after litigating for a time, the case was settled on terms favorable to New Mexico. Another possible means of limiting water exports is the state taking control of water and making all new large scale water uses the subject of a state-run leasing program. Montana has done this. Here, the state has the same administrative power to grant or deny applications with reference to a multi-factor public interest standard, but the leasing mechanism allows the state to charge a price as a deterrent to overly large uses. In addition, lease terms are limited in duration, bringing the water back under state control for reallocation at a later date.

B. Colorado v. New Mexico (“New Mexico I”) and Colorado v. New Mexico (“New Mexico II”)

The less heralded change in interstate water allocation law occurred in the Supreme Court’s handling of an equitable apportionment case involving Colorado and New Mexico, both prior appropriation states. This case can easily be overlooked. It lacks obvious importance because the result simply applies the doctrine of prior appropriation, the water law of each of the disputant states, on a streamwide basis, something that at least one prior equitable apportionment case had done. Moreover, it was not a case to capture the imagination. As it reached the Supreme Court it involved only 4000 acre-feet of water to be appropriated from the Vermejo River, which flows out of a relatively unpopulated segment of Colorado into New Mexico. The case resulted in what seemed to be a fact dominated dispute between the

§ 72-12-3(E) (Michie Supp. 2002).
44. *See Joseph Sax et al., Legal Control of Water Resources* 768–71 (3d ed. 2000).
45. *See Mont. Code Ann. § 85-2-311* (2001). Mentioning this statute in this context is not meant to imply that Montana has used its water leasing law to evade *Sporhase*.
49. The case was litigated in the Supreme Court on objections to the report of the Special Master that advocated an award to Colorado of only 4000 acre-feet of water. Colorado had obtained a conditional decree in Colorado water court for a diversion of seventy-five cubic feet per second, which is roughly equal to 150 acre-feet per day. Action by the right holder to proceed to divert that water was enjoined by a New Mexico federal court in *Kaiser Steel Corp. v. Colo. Fuel & Iron Steel Corp.*, Civil No. 76-224 (D.N.M. 1976). Notably, the Colorado water court, by the mere fact of granting the conditional decree to Colorado Fuel & Iron Steel Corp., did not extend comity to New Mexico water rights.
majority and a sole dissenter about whether Colorado had met its burden of proof in the case.

Despite appearances, there are three things in the Vermejo River litigation that stand out: (1) the promulgation of a series of inquiries and proof standards that make up an equitable apportionment; (2) the way in which solicitude for current users affected the proof required to sustain a case; and (3) the fact that, when all was said and done, Colorado got no water whatsoever.

1. Specifying the Parameters of the Equitable Apportionment Cause of Action

In the first Colorado v. New Mexico Supreme Court opinion, the Court, in a mere footnote, explained the nature and basis of what it considered to be a prima facie case for a complainant state and the grounds of defense that could be asserted:

Our cases establish that a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it "real or substantial injury or damage." This rule applies even if the State seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit. In Colorado v. Kansas, for instance, Colorado sued Kansas seeking to enjoin further lawsuits by Kansas water users against Colorado users. Although Kansas was the defendant, we granted Colorado an injunction based on Kansas'[s] failure to sustain the burden of showing that the Colorado diversions had "worked a serious detriment to the substantial interests of Kansas."

New Mexico must therefore bear the initial burden of showing that a diversion by Colorado will cause substantial injury to the interests of New Mexico. In this case New Mexico has met its burden since any diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users.

The burden has therefore shifted to Colorado to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment. Thus, with respect to whether reasonable conservation measures by New Mexico will offset the loss of water due to Colorado’s diversion, or whether the benefit to Colorado from the diversion will substantially outweigh the possible harm to New Mexico, Colorado will bear the burden of proof. It must show, in effect, that without such a diversion New Mexico would be using "more than its equitable share of the benefits of a stream." Moreover, Colorado must establish not only
that its claim is of a "serious magnitude," but also that its position is supported by "clear and convincing evidence."\(^{50}\)

Despite the citation to proof standards required in previous cases, the Court's distillation of prior cases, which had been far more open-ended in their approach, into a set of discrete, sequential inquiries each having an allocated burden of proof was novel. That specification transformed what previously had been a search for fairness guided by broad principles of the equality of sovereign states into a less robust inquiry. It changed the case from one of seeking to do equity under all of the circumstances and pursuing the great equitable maxim that "equality is equity" to something more akin to an action at law where an unfair outcome is tolerated as the price of having predictable legal outcomes that assist citizens in planning their activities and investments.

2. **Placing the Greatest Burden on the State Seeking To Wrest Water Away from Current Users**

Even before the remand to the special master, Justice O'Connor (the author of the later majority opinion) and Justice Powell wrote separately to express their extreme hesitancy to police waste or require diminution of present use in one state to benefit an as yet uninitiated use in the competing state.\(^{51}\) Following remand to the special master, who concluded that Colorado had met the burden set by the Court and was entitled to a decree, the Court reviewed and rejected the special master's key conclusions. Specifically, the majority disagreed with the special master's assessment that Colorado had ample use for the water and that New Mexico could avoid injury by taking reasonable conservation measures.\(^{52}\) This lack of deference to the fact findings of the special master is, in itself, surprising. Normally, the Court treats facts found by a special master as correct unless clearly erroneous, much in the manner of an appellate court reviewing a trial judge's fact findings.\(^{53}\)

---


53. See FED. R. CIV. P. 52(a). Perhaps the Court's action can be considered to be a review of a mixed question of fact and law. This possibility is undercut by a number of points made in Justice Stevens's dissent, where he recounts specific fact findings that the majority refused to accept. See generally *New Mexico II*, 467 U.S. at 324–39 (Stevens, J., dissenting).
While this may appear to be a small point of disagreement about the conclusions to be drawn from facts, what the majority did is at odds with standard practice in western states with regard to water administration. Consider here the New Mexico II majority's own statement regarding the lack of conservation and rigorous administration in New Mexico: "New Mexico's attempt to excuse three decades of non-use in this way is, at the very least, suspect." Normally, in the West, when a water user seeks to confirm a water right in a transfer proceeding, the burden on the issue of non-use is squarely on the party seeking to propagate the water right. The burden is placed this way because it is well-understood that many, if not most, rights claimed are exaggerated by the claimants to secure a priority for a greater amount of water than that actually being used. Applying scrutiny to claimed rights in transfer proceedings protects juniors by ensuring that the transferred right is calculated with reference to the real status quo ante, historic use, instead of unsupported paper claims. The imperative is to decrease the right to actual historic use, and the burden is on the right holder, not the opponent. Even beyond the transfer context, western states are increasing their scrutiny of conservation practices on heavily appropriated streams realizing that the most readily available water to support valuable new uses is to be obtained by loosening the grip of entrenched inefficiency. The New Mexico II majority sets a bad precedent that ignores the need for proof of historic use and rewards inefficiency.

There is little in logic or policy to support the majority in its willingness to allow potentially overstated claims to escape scrutiny. The only fig leaf available to the majority is a variant of the "bird in the hand" adage. The majority claims that its rule is likely to maximize welfare because it protects known values that inhere in existing economies against displacement by speculative potential economies. This theory may sound plausible in the abstract, but it cannot withstand scrutiny. Overstated or wasteful and inefficient uses are, almost by definition, not beneficial uses. In the Vermejo situation, the only New Mexico water user threatened with reduction of its claimed historic supply by the special master's recommended decree was

54. New Mexico II, 467 U.S. at 318.
55. The relevant similarity of an equitable apportionment decree and a transfer proceeding is that each confirm the measure of the right sub judice and protect it against subsequent attack.
56. A forceful and eloquent modern opinion applying this cardinal rule of prior appropriation doctrine is that of Justice Hobbs speaking for the Colorado Supreme Court in Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999).
58. New Mexico II, 467 U.S. at 323–24; cf. Restatement (Second) of Torts § 850A (1979) (listing the "protection of existing values of water uses, land, investments and enterprises" as one factor among nine that are to be considered when determining whether a riparian water use is a reasonable use under the totality of the circumstances).
the Vermejo Conservancy District. Proofs accepted by all sides showed that
the Vermejo Conservancy District ranked as one of the West’s least effi-
cient (and least profitable) irrigation districts.\textsuperscript{59} The Court failed to grasp the
lessons that the western states have painfully learned. Instead of placing
demanding proof burdens on the holders of wasteful, overstated claims, the
New Mexico II majority makes protection of an inefficient existing use the
centerpiece of a decree effectively awarding that poorly used water to the
wastrel in perpetuity.

3. \textit{Awarding a State No Water}

In the end, Colorado gets no use of the river. All of the water is allo-
cated to New Mexico. Colorado’s equities in this matter are substantial. It is
riparian to the Vermejo, and three-fourths of the river’s flow originates in
Colorado. Colorado wants to take the water via interbasin diversion to the
Prugatoire basin, one that was reliably proven to be overappropriated in the
proceedings that led to the granting of a conditional decree to project pro-
ponent Colorado Fuel and Iron Steel Corporation. The fact that the corpo-
tation believes that it will profit from a multi-million dollar interbasin diver-
sion project is itself a testimonial to the value of the water in Colorado.
Unlike the heavily subsidized water provided to the Vermejo Conservancy
District users in New Mexico, this transfer will not be subsidized. Worst
and most damning, the equality of the states as sovereigns entitled to share
in the bounty of the interstate river is set at naught. The century old words
of Justices Holmes and Brewer are put aside, and the central premise of the
Equal Footing Doctrine—the inherent equality of each of the several
states—is drained of meaning. After New Mexico II, a later developing state
or a conservation oriented state has no choice but to reassess its policy. This
is a terrible blow to absorb.

IV. POST-ALLOCATION CLARITY

In the wake of an interstate allocation,\textsuperscript{60} the status of the states in rela-
tion to rights to use of water (and to prevent others from use of water from

\textsuperscript{59} New Mexico II, 467 U.S. at 325 (Stevens, J., dissenting). \textit{But cf.} Tulare Irrigation
Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972 (Cal. 1935) (a classic case that paid
lip service to curtailing wasteful uses but sustaining inefficient customary irrigation practices
that were not among the very worst).

\textsuperscript{60} Allocation, in the sense it is being used here, is only sometimes accomplished by
equitable apportionment, which may not establish quantified allocations for both states in-
volved and frequently establishes only that under present circumstances, the state accused of
overuse is, or is not, overusing the shared basin resource. Private litigation almost never
accomplishes an allocation. \textit{But cf.} SAX ET AL., supra note 44, at 72 (citing complaint in \textit{City
of Virginia Beach v. Champion International Corp.} in which defendant class action tries to
the allocated source) is considerably clearer than it was before the allocation. The allocation has either quantified the amount of water use available to the states or confirmed that the status quo is not violative of the principles the Court now uses in equitable apportionment cases. Even this lesser pronouncement has great significance in light of the Court’s immense solicitude for protecting existing uses from diminution. Allocation gives rise to an umbrella concept that permits a state to confidently grant water rights to users within a state that, in total, do not exceed that state’s allocation. Correlatively, rights granted by the state and exercised beyond the coverage of the allocation umbrella are at risk of being enjoined. The extent of this principle is even more far-reaching than might first be imagined.

The easy case is one in which an allocation is exceeded by an upstream state to the detriment of a downstream state. Such a situation was presented in Hinderlider v. La Plata River & Cherry Creek Ditch Co., in which Colorado, speaking first through its state engineer and subsequently through its judiciary expounding the state constitution, refused to limit water use on the La Plata River in derogation of its delivery obligations to New Mexico under the La Plata River Compact. In reliance on the compact as federal law, ratified by Congress, and the Supremacy Clause, it was an easy matter for the Supreme Court to overturn the state action and insist that the compact be obeyed without regard to any possible objections based on Colorado law.

A somewhat harder case is posed when an out-of-state user applies for a water right for export of some of the water awarded to one state by the allocation. Commentators disagree on the result. The umbrella concept argues strongly in favor of the right of the state holding the allocation to localize its water. When this is done expressly in the compact, there is no question that a state may do so. Even when the allocation is silent, the thrust of an allocation is that it divides the beneficial use between the parties to the allocation. It would be odd indeed if the allocative outcome of a judicial apportionment, congressional apportionment, or the solemn process followed to form an interstate compact, could be undone by the simple act of a would-be water user making application for the interstate export of

establish reasonableness of use in upstream state as against all water users in downstream state).

61. 304 U.S. 92 (1938).
63. See Intake Water Co. v. Yellowstone River Compact Comm’n, 590 F. Supp. 293 (D. Mont. 1983), aff’d, 769 F.2d 568 (9th Cir. 1985) (holding that when it ratified the compact, Congress authorized the veto right of each state over any export from the allocated basin).
water and citing Sporhase to prevent the allocation-holding state from refusing the application.

A variation of the previous scenarios arises when an allocation-holding state is not harmed by overuse in another state. Recent events support the umbrella concept analysis of this issue. In a case involving the Republican River Compact between Colorado, Nebraska, and Kansas, such a claim came to the fore. There, Kansas sued, alleging upstream diversions denied the state of an allocation due to it under the compact. In defense, Nebraska argued that Kansas would not have used the water that Nebraska took in excess of its allocated amount. The special master ruled that Kansas is not required to put its allocation to beneficial use and is entitled to an injunction even absent a showing of injury. \[^{64}\] In reaching that conclusion, the special master relied on Oklahoma v. New Mexico, \[^{65}\] in which the Court observed that “a congressionally approved compact is both a contract and a statute.” \[^{66}\] Together with Hinderlider, this approach to compacts makes it clear that once the rights of states are quantified, that water is wholly under the power of the state to which it has been allocated. The power includes the right to insist that the water remain unused or dedicated to an in situ use such as instream flow or habitat preservation. This total control negates claims based on the dormant Commerce Clause. \[^{67}\]

V. ADVICE FOR STATES THAT DEVELOP MORE SLOWLY OR FAVOR CONSERVATION

After this exploration of the pre- and post-allocation legal waterscape, there are actions that ought to be considered by states riparian to a shared, unallocated water body. The comparison of the legal rules applied before and after allocation strongly encourage in-state users in the pre-allocation setting to utilize as much water as possible from that source as quickly as possible. In a pre-allocation context, there can be no prevention of water exports according to Sporhase, but in a post-allocation context, Sporhase is no longer germane. Thus, in a pre-allocation context, the best way to ensure in-state benefits is to outrace users from other states in putting the water to use. That same strategy is reinforced because it has a good chance of being rewarded in the event that there is an equitable apportionment, as in New

\[^{64}\] Kansas v. Nebraska, No. 126 (United States Supreme Court Special Master’s Memorandum of Decision No. 1 Feb. 12, 2001).


\[^{66}\] Id. at 235 n.5.

\[^{67}\] Cf. Wunniucke v. S. Cent. Timber, 467 U.S. 82 (1984) (holding local favoritism possible, but not found to be authorized by the relevant legislation); Prudential v. Benjamin, 328 U.S. 408 (1946) (finding local favoritism authorized by Congress).
Thereafter, post-allocation law entrenches the larger spoils won by the more aggressive pre-allocation water user.

Water law in general and prior appropriation in particular inspires a race to rights that encourages over-rapid water use. From an ecological and water management perspective, adding pressure to obtain a more favorable allocation in interstate competition for water to the litany of forces already favoring over-rapid development of water resources is unfortunate at best. Worse still, a cynical (but accurate) reading of *New Mexico I* and *II* adds a strong incentive to complement haste with waste in winning the greater allocation of an interstate river. The Supreme Court’s methodology for equitable apportionment cases gives existing appropriations a degree of presumptive validity and insulation from scrutiny on the issues of non-use and waste that they do not enjoy under the law of most states.

Slower developing states or states favoring active conservation will be hard pressed to protect themselves once interstate competition for their available water resources begins in earnest. One avenue to consider is to negotiate an allocation that preserves water for present instream use and future growth. The benefit to the slower developing states is obvious, but even the would-be water-aggressor states obtain the benefit of certainty of right. Litigation over water supply projects makes superfund litigation look speedy and efficient. In the Southeast, this realization is in all likelihood what is bringing Georgia to the bargaining table to try to negotiate an interstate allocation with its downstream neighbors Alabama and Florida. Resort to non-allocational devices related to water quality and instream flow requirements offer a second protective strategy for states that do not make present beneficial use of the water off stream. These devices have not previously been used for this purpose, but have had resource protective effects in other contexts. Under the Clean Water Act (CWA), states that designate uses and water quality standards that are approved by the United States Environmental Protection Agency (EPA) may be able to enforce


69. Relief is granted only when the Court can find a use in one state is unreasonably impairing uses in the other. If no real conflict is present, or if the Court finds the present use in the allegedly overusing state is not unreasonable, the decree will be like that in *Kansas v. Colorado*—the present use is not excessive. 206 U.S. 46, 100 (1907). This does not create any “equity points” on behalf of the complainant state when the litigation is recommenced. See generally *Colorado v. Kansas*, 320 U.S. 383 (1943).

them against activities in sister states that affect their attainment. In a leading case, Oklahoma, the downstream state, was able to have upstream activities in Arkansas scrutinized to ensure that Arkansas activities did not violate Oklahoma water quality requirements.\(^{71}\) Importantly, the Oklahoma standards, once reviewed and approved by the EPA, took on federal water quality standard status and were, therefore, enforceable as federal law rather than as attempted extra-territorial enforcement of domestic Oklahoma law. A similar CWA device involves the section 401\(^{72}\) certification process. Projects requiring federal licensure, such as hydroelectric dams regulated by the Federal Energy Regulatory Commission (FERC), must obtain state certification that they do not violate the state’s water laws. In the leading case, a FERC approved project had to allow instream releases and flows that the state required to meet its laws for fish protection, even though FERC had determined that a lesser amount was adequate for fish protection.\(^{73}\)

More speculatively, setting instream flow requirements may serve to limit activities of out-of-state water users that reduce streamflow. This approach is more speculative because, unlike the CWA water quality standards approach, state instream flow requirements that are not part of the water quality standards program do not become federalized. Even without that status as federal law, instream flow requirements are evenhanded limitations that avoid dormant Commerce Clause invalidation. Thus, instream flow requirements can block diversions that seek to export the water to another state. Instream flow requirements also may be respected by the Supreme Court as a present use entitled to deference in an equitable apportionment. A final slim possibility created by minimum stream flow requirements is that, pursuant to the principles of comity announced in Bean v. Morris,\(^{74}\) private litigation of interstate water rights would lead a court to enjoin upstream diversion in respect of the downstream state’s instream flow laws.

This article has painted a gloomy picture, portraying aggressive water using states as the likely winners of a zero sum game played against slower developing or conservation-minded states, with the biggest losers being riverine ecosystems. The law, unwittingly, not only fails to moderate the Tragedy of the Commons,\(^ {75}\) but also accelerates the race to ruin by adding yet another incentive to over-rapid and wasteful development. As a coun-

\(^{71}\) See Arkansas v. Oklahoma, 503 U.S. 91 (1992). In the end, the EPA found that the Arkansas activities complained of did not result in a substantial violation of the Oklahoma requirements so no relief was awarded to Oklahoma.


\(^{74}\) 221 U.S. 485 (1911).

\(^{75}\) See Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968).
terweight, water law throughout history has displayed a pragmatic ability to self correct. The law of interstate allocation will be reworked to promote efficiency, and quite likely, the equal footing concept of state entitlements to shared water resources will reemerge. The real question will be whether it takes the loss of a myriad of small rivers to over-rapid overuse or a high profile tragedy before the Court critically revisits the perverse incentives that now characterize the contemporary law of interstate allocation.