

# Norfolk vs. Suffolk: Proposed Agreement Leaves Important Issues Unsettled

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*Norfolk and Suffolk appear headed toward the end of another round in the Great Water Fight, but the proposed agreement seems to weaken the state's authority under the Groundwater Act and may make the groundwater rights of a local government less secure than those of a private property owner*

## INTRODUCTION

The effects of 1980's drought appear throughout Virginia. Between June and December, central Virginia received only 42 percent of its normal amount of precipitation, while rainfall was 40 percent below normal in Tidewater and 20 percent below normal in the region west of the Shenandoah Valley. By February 1981 groundwater in some areas of the Commonwealth was four feet below the January 1980 level, and streamflow and reservoir levels were far below average.<sup>1</sup>

On October 22, 1980, Governor Dalton proclaimed an emergency water shortage in the Tidewater area. Several Tidewater localities, including Norfolk and Virginia Beach, then issued mandatory water use restrictions. Mandatory restrictions also were imposed in Washington (Rappahannock County), Appalachia (Wise County), and Fairfax County, where the Occoquan Reservoir retained only a 40-day supply at one point. Many other localities advocated voluntary conservation programs. Norfolk and Virginia Beach's mandatory allocation programs continued until July 7, 1981, and Governor Dalton rescinded his emergency

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order July 8. However, Virginia Beach did not lift its restrictions on lawn watering, car washing, and the filling of swimming pools and ornamental fountains until August 17.

The prolonged shortage caused an estimated \$200 million in crop and livestock losses, reducing farm profits, adding to farm debt, and increasing pressures to convert farmland to other uses. Continued drought conditions could have ruined Tidewater's \$119-million summer tourist industry.<sup>2</sup> Perhaps most importantly, however, the drought focused attention on some of the inherent difficulties and uncertainties associated with water rights and with other aspects of Virginia's institutional framework for water management. As the water shortage became more acute, several localities resurrected longstanding quarrels over use of this precious resource and generated increasing scrutiny of Virginia's water management institutions.

This report investigates the contentions of Norfolk and Suffolk in their continuing argument over groundwater development and outlines the implications of this argument for water management in Virginia. Of special interest are groundwater rights as established by common law and the state's Groundwater Control Act of 1973. Also explored are the relationships between control of water resources and the powers of municipal corporations in the areas of zoning and land use policy. These issues are relatively independent of the specific water rights questions in this case, for:

[t]he common law doctrines applicable to groundwater are unsettled. There are no decisions interpreting and defining the relationship between the Virginia Groundwater

Control Act and the other statutes and common law rules involved in the case.<sup>3</sup>

In addition to their importance to the parties involved, these three issues have an important impact on the resolution of future interjurisdictional groundwater conflicts.

#### **GROUNDWATER RIGHTS UNDER VIRGINIA'S COMMON LAW**

Groundwater supplies the needs of a quarter of Virginia's population and is especially important because of the state's reliance on the riparian system of water rights for the allocation of surface flows. Under the riparian doctrine, the right to appropriate and use water accompanies ownership of land adjacent to a stream. Other landowners are forced to rely on public supplies or groundwater. Yet groundwater remains misunderstood and abused.

Groundwater-precipitation that infiltrates into the earth and becomes trapped-slowly accumulates in fractures and pore spaces in soil and rock. Scientists first thought that it was not connected to the rest of the hydrologic cycle. It is, in fact, a delicate resource complexly interrelated to both surface water and land use practices. It is estimated that 160 years are necessary to replenish "current storage above a depth of half a mile, about one-half of total groundwater storage."<sup>4</sup> Thus, once depleted, groundwater supplies are not soon replenished. Prolonged withdrawal from these underground supplies in excess of recharge (or mining) can result in land subsidence (sinking) and contamination of the aquifer by mineralized water, which may be saline or brackish. Since groundwater is a major source of streamflow, pumping may decrease surface water levels and may also cause well interference. Finally, some land development activities may adversely affect groundwater supplies. For instance, excavation may interrupt the continuity of an aquifer and destroy an existing well's water supply. Activities that change the infiltration capacity of soil also may hamper an aquifer's ability to renew itself. Because its water movement is so slow, an aquifer requires a lengthy cleansing time once it is contaminated by pesticides or by seepage from septic tanks, landfills, or other sources.<sup>5</sup>

Historically, efforts to preserve groundwater through public regulation and control have met with public opposition because groundwater has been viewed as a private resource accompanying ownership of land under which it is found. Water management in Virginia has been governed primarily by common law rather than by statutory enactment. Under common law, the legal doctrine that should be

applied in any particular dispute evolves out of judicial decisions in a number of cases. Thus, questions concerning ownership of percolating groundwater rights generally have been settled in the state's courts rather than in the General Assembly.<sup>6</sup>

Moreover, such questions have been settled according to a different set of legal doctrines than those governing surface waters and underground streams. The riparian doctrine's concept of reasonable use governs disputes over surface water and underground streams. According to this doctrine, a landowner may use water from a stream flowing through or past his property for any reasonable use on that property. However, he cannot unreasonably interfere with the flow of the watercourse because of his downstream neighbor's equal right to the flow. Subsurface streams theoretically are subject to the riparian doctrine, but apparently no Virginia cases hold underground water to be a subsurface stream.<sup>7</sup> Percolating groundwater (all groundwater not contained in underground streams), on the other hand, has received a different treatment. Percolating waters are distinguishable from underground streams in that they:

ooze, seep, or filter through the soil beneath the surface, without a defined channel, or in a course that is unknown and not discoverable from surface indications without excavation for that purpose. The fact that they may, in their underground course, at places come together so as to form veins or rivulets, does not destroy their character as percolating waters.<sup>8</sup>

Historically, three doctrines have governed legal rights to percolating groundwater: absolute ownership, reasonable use, and correlative rights. Except to reject the concept of correlative rights, which primarily has been applied in the western United States, Virginia has made no clear choice among these doctrines. Absolute ownership grants a landowner the unqualified right to use any resources laying on, above, or below his land in whatever manner he sees fit. The reasonable use doctrine qualifies a landowner's right to use the water under his land. Under this legal construct, the usage must be reasonable and must occur on the land on which the water is found. The requirement that water be used on the land where it is located has led some commentators to construe it as prohibiting water transport from one river basin to another (interbasin transfer).

In a few states the doctrine of correlative rights supplements the reasonable use concept by attempting to mitigate the impact of water shortages. It differs from the reasonable use rule in one main respect: in time of shortages the water must be apportioned to all overlying owners, although the California courts, at least, have not settled on a specific formula for dividing the water. Under the reasonable use rule, on the other hand, an owner may take all the water he can use, provided that the use is reasonable.<sup>9</sup> However, it is often difficult to equitably apportion groundwater supplies. As it has been developed in the East, this doctrine is closely aligned with the riparian system of water law. Each landowner has a coequal right to make a reasonable use of the resource. Reasonableness in this formulation is based on a comparison of the nature of the conflicting uses. Thus, there must be some mechanism devised for weighing competing uses and thereby apportioning supplies. In the West, on the other hand, the correlative rights concept "bases water allocations on a proportional division of the water available from a common source."<sup>10</sup> In general, then, a 20 percent shortfall in supply would require all users to institute a 20 percent cutback in pumping.

Two early cases, *Miller v. Black Springs Improvement Company (1901)* and *Heninger v. McGinnis (1921)*, upheld the English common law concept of absolute ownership<sup>11</sup> Underlying this concept is the belief that "water, whether moving or motionless in the earth, is not in the eye of the law, distinct from the earth."<sup>12</sup> Thus, a landowner owns everything beneath the surface of his property and may "make unlimited use of the water or any use of the land which affects the movement of groundwater without accountability to others who may be adversely affected."<sup>13</sup>

However, the 1927 case of *Clinchfield Coal Corporation v. Compton* indicated that choice of doctrine was still an open question and appeared to favor acceptance of the reasonable use doctrine in upholding the mining company's pumping of wells on its property. This doctrine concludes that a landowner may use percolating groundwater "for any reasonable purpose in connection with use of the land from which it was taken or the right to undertake usual land development activities without accountability to other landowners whose groundwater supplies may be adversely affected."<sup>14</sup> Thus, the concept of reasonable use, as it appears in *Clinchfield Coal*, differs in important respects from the surface water doctrine of reasonable use.

In the case of surface streams, reasonableness is a relative concept and the

rights of each party are determined by the needs of other users. Although the two doctrines have been described as equivalent, fundamental differences exist, with rights under the groundwater doctrine of reasonable use being considerably more absolute.<sup>15</sup>

Under the *Clinchfield Coal* ruling, the only limitations on the nature or amount of pumping appear to be waste and malicious intent. According to the court, this rule allows the use of percolating groundwater for all purposes "properly connected with the use, enjoyment, and development of the land."<sup>16</sup> However, in the commentary (dicta) accompanying its decision, the court indicated that the reasonable use doctrine forbids "maliciously cutting it off, its unnecessary waste, or withdrawal for sale or distribution for uses not connected with the beneficial enjoyment of the land from which it was taken."<sup>17</sup> The court, however, refused to make any final choice between the reasonable use and absolute ownership doctrines. Despite the court's warnings about sale, malicious intent, and waste, "legal accountability has not been imposed in most situations where the activities of one party have had an adverse effect on the water supply of others."<sup>18</sup> Ultimately, it appears that little legal recourse is available to landowners whose wells have been interfered with by an individual in a hydrologically superior position.

#### GROUNDWATER ACT OF 1973

Principles such as absolute ownership and reasonable use are limited as effective groundwater allocation mechanisms. These doctrines do not have a firm basis in contemporary scientific data on groundwater. Many effects of groundwater pumping practices (such as interference with the water supplies of others, subsidence, saltwater intrusion, or aquifer contamination) have not been subjected to legal controls because, supposedly, they could not be anticipated.<sup>19</sup> Uncertainty over future availability under these doctrines also may prompt landowners to forego conservation efforts. The individual who husbands his water supply may find his well dry from uncontrolled pumping by others. The emphasis on private litigation to determine legal rights meant that, generally, any public interest was excluded from consideration and the law evolved in a piecemeal rather than a coherent fashion.

In 1973, however, the General Assembly passed a Groundwater Act which declared that the right to "reasonable control of all groundwater resources within this state belongs to the public."<sup>20</sup> The Act provides for the designation of sections of the state as groundwater

management areas and their subjection to a state system of groundwater allocations, including controls over withdrawals. The State Water Control Board may initiate proceedings, or a local government may petition for such a designation, when:

1. Groundwater levels (elevations relative to mean sea level of water table or of artesian water head) in the area in question are declining or have declined excessively, or
2. The wells of two or more groundwater users within the area in question interfere substantially with one another, or
3. The available groundwater supply in the area in question is being or is about to be overdrawn, or
4. The groundwater in the area in question has been or reasonably may be expected to become polluted.<sup>21</sup>

In such instances, the State Water Control Board must hold public hearings on the existence of one or more of these conditions. It may designate the area a critical groundwater area only if it finds that one of these conditions exists and if it determines that protection of public health, safety, or welfare requires such a designation. The first areas to be included in the program are (1) the southeastern corner of the state, including the counties of Isle of Wight, Prince George, Southampton, Surrey, Sussex; and the cities of Chesapeake, Franklin, Hopewell, Norfolk, Suffolk, Portsmouth, and Virginia Beach; and (2) the Eastern Shore, including Accomack and Northampton counties.

Under the Groundwater Act, permits are required for certain types of groundwater withdrawals in a management area. Any individual seeking to establish a new groundwater use, to expand an existing well, or to use an established well after July 1976 must apply to the State Water Control Board for such a permit. That agency may approve the use, impose conditions such as limitations on the amount of water withdrawn, or reject the application completely. Criteria enacted by the General Assembly to be used for guiding decisions stipulate that the withdrawal must be for a beneficial use and must cause no undue interference with existing wells. The dominant goal of the permit program is the regulation of future groundwater uses to protect existing uses and the groundwater system. The Act, therefore, institutionalizes an essential aspect of the doctrine of prior appropriation—the determination of right according to priority in

time.<sup>22</sup> It marks a distinct departure from either the absolute ownership or the reasonable use doctrines because water rights under both of these concepts were property rights that adhered to ownership of the land.

Closer inspection of the Groundwater Act of 1973, however, reveals several potential weaknesses. The Act exempts from the permit requirements groundwater used for domestic consumption, for the watering of crops or livestock, or for any "single industrial or commercial purpose" using less than 50,000 gallons a day.<sup>23</sup> Individuals or localities in these exempt categories also do not need a permit to acquire new wells or to enlarge existing wells within a management area.<sup>24</sup> In addition, individuals using groundwater on the date an area is designated a groundwater management area (or on any date within two years prior to the designation) may "continue to apply groundwater to beneficial uses" to the same extent as they could prior to the designation.<sup>25</sup> Thus, a substantial number of unregulated withdrawals is possible. The Act repeatedly links the right to use groundwater with its beneficial use, but fails to define beneficial use. An issue related to this definition is the validity of restrictions placed on future uses especially where they may conflict with existing ones.<sup>26</sup> Are established uses automatically (1) beneficial ones, and (2) more beneficial than possible future re uses? Do restrictions on future uses constitute a deprivation of property without due process of law? Further, is a management area's approach subject to constitutional challenge on the grounds that it mandates less-than-equal treatment to users in different parts of the state?<sup>27</sup> Finally, the requirement prohibiting undue interference with existing wells may be interpreted in a variety of ways. How much damage must a well owner incur before he can claim undue interference?

#### MUNICIPAL POWERS

While the Groundwater Act of 1973 provides for local input, final responsibility and authority for the permit program's operation belongs to the state. What does this imply for traditional local functions such as zoning and the protection of public health and safety (the police power)? Will municipalities allow perceived invasions of their powers? Do localities possess any specific water rights, such as power over groundwater usage within their territories?

May a locality supplement the requirements of the Groundwater Act with its own criteria for the pumping of groundwater in that portion of the aquifer or management area within its

jurisdiction? How does the failure of Virginia's courts to adopt a single groundwater doctrine affect the powers of local municipalities? Finally, what, if any, changes occur in groundwater rights when the landowner wishing to drill, enlarge, or pump a well is another local government? A brief investigation of the powers granted to municipal corporations by the Virginia General Assembly is necessary in order to understand these questions and their relationship to (1) the dispute between Norfolk and Suffolk and (2) the management of water resources (especially groundwater).

Three sections of the Virginia Code (15.1-838, 15.1-840, and 15.1-875) are important for this discussion. Section 15.1-838 confers, under certain circumstances, the powers outlined in the remainder of the chapter and the conditions under which these powers may be exercised outside a municipality's boundaries. The vested powers may be exercised by a municipal corporation's council "when such powers are specifically conferred" upon it. The 1965 case of *Board of Supervisors v. Corbett* interpreted this section to mean that none of the powers listed are conferred unless a municipality requests them and its request has been granted by the General Assembly.<sup>28</sup> Once this request has been granted and the chapter is applied to the municipality, the locality's use of these powers outside its geographical boundaries shall, "except as to existing nonconforming use, be subject to the zoning regulations of the political subdivision in which the power is sought to be exercised."<sup>29</sup> In other words, a municipality must ask to be included under the Act. Thereafter, it generally must adhere to the zoning laws of any other municipality in which it owns property. However, the statute exempts from this requirement land uses in existence prior to the law's enactment.

An additional modification of the law's applicability to incorporated cities and town occurs in section 15.1-840. This provision declares that whenever a conflict occurs between the powers granted by the Act and those granted by a municipality's charter, the charter will take precedence. This section is a deviation from the traditional common law relationship between a state and its units of local government. Under the common law concept called Dillon's Rule, localities are creatures of the state, and the state may alter or abolish them as it deems fit. State laws are superior to local ordinances, and courts usually will enforce state rather than local law (on the grounds that the state has pre-empted the field whenever the two conflict).

Among the powers granted to municipalities included under the Act is the right to:

provide and operate within or without the municipal corporation water supplies and water production, preparation, distribution, and transmission systems . . . for the purpose of furnishing water for the use of the inhabitants of the municipality; may contract with others for such purposes and services; . . . may charge and collect compensation for water thus furnished....<sup>30</sup>

Again, the municipality must request permission if the water supply it uses is found in another locality. Consent is not required, however, for the operation or "orderly expansion" of "any such water supply system in existence on July 1, 1976."<sup>31</sup>

According to these three sections, a municipal corporation which requests inclusion under the Act and whose request is granted may operate a water system outside its geographic boundaries if it gains permission of the municipality in which its supply is located or it operated the system prior to July 1, 1976. If there is a conflict between these sections and the relevant municipal charter, the charter provision theoretically will take precedence.

These provisions modifying the common law concept expressed in Dillon's Rule pose complex questions for the current quarrel between Norfolk and Suffolk, for the management of Virginia's water resources, and for a variety of state and local relationships in the Commonwealth. For instance, suppose two municipalities fall under the provisions of these sections. Both of them have charter provisions on land use or water supply or the regulation of milk and food products that conflict with these particular sections of the state code. Theoretically, their charters take precedence. Yet what happens if there is a dispute between the two localities in one of these areas? Which charter should take precedence? Whose powers take precedence in a dispute between a municipality included in the Act and one that is not? Finally, how should the Act's exemptions be handled? If a local government included in the Act by the legislature has a charter provision that conflicts with one of the Act's exemptions, what takes precedence—the charter or the exemption?

#### THE DISPUTE BETWEEN NORFOLK AND SUFFOLK

The lawsuits of Norfolk and Suffolk involve issues of common law, the Groundwater Act, and

the three sections of the Virginia Code outlined above. When the most recent dispute began, Norfolk was drawing 53 million gallons of water a day from wells, lakes, rivers, and other surface sources. It treated this water and piped it to customers within Norfolk (including the U.S. Navy), Virginia Beach, Portsmouth, and Chesapeake.

Norfolk supplies 95 percent of Virginia Beach's water. The prolonged drought during the summer of 1980 forced Norfolk to reduce the amount of water it provided to residential, commercial, and military users to 3/4 of their average 12-month allocation, and Norfolk feared that another 25 percent reduction would be necessary unless new supplies were found. Since 1961, Norfolk has drawn groundwater from four wells located on property owned by Norfolk but located within the city limits of Suffolk. Originally, the wells were located in Nansemond County, which became part of the City of Suffolk in 1974. Norfolk's property in Suffolk can produce 160 million gallons a day in emergency situations.<sup>32</sup> Norfolk believed that the 1980 shortage could be alleviated by drilling new wells on its land in Suffolk. Such wells were expected to provide up to 12 million gallons a day.<sup>33</sup> Thus, after Governor Dalton issued his October 22, 1980, executive order proclaiming an emergency water shortage in the region, Norfolk filed a petition with the City of Suffolk for a conditional use permit to construct deep wells that would augment existing supplies during drought emergencies.

Suffolk, however, feared that Norfolk wanted to pump these wells for prolonged periods to accommodate continued expansion and development in Norfolk and Virginia Beach. Suffolk's public utilities department also applied for a conditional use permit to construct and pump wells in the same aquifer, with the aim of selling the water to Norfolk and other localities as the need arose. On October 24, 1980, Suffolk City Council approved Suffolk's application but denied Norfolk's. Suffolk's city manager invited Norfolk to begin financial discussions with Suffolk for additional water supplies. Instead, Norfolk sought to drill two wells on property owned by the U.S. Navy in Suffolk, and the Navy acquiesced. Water from this site would have been used to satisfy the Navy's needs during the drought emergency.

On November 5, 1980, Suffolk filed suit against the Navy in federal district court to block development of the wells. Suffolk argued that the Navy should have undertaken a full environmental impact statement, not just a preliminary environmental assessment, before granting Norfolk permission to drill the wells.

The Navy claimed that its studies had demonstrated that a full environmental impact statement was not necessary and that a delay in developing new water supplies would threaten the Navy's ability to "maintain the operational readiness of the Atlantic Fleet."<sup>34</sup> The federal judge in this case postponed his decision until the wells could be tested and their impact on the environment estimated. No tests had been conducted as of September 30, 1981.

Suffolk also took legal action against the City of Norfolk, which replied with a countersuit. The basic contentions outlined by the various parties underscore the uncertainties within Virginia's institutional framework for water management. If these suits were settled amicably tomorrow, the basic issues would remain unresolved. Although the outcome of these suits is important to the parties involved, their essential significance rests in their opportunity to offer understanding of problems in the state's system of water resources management.

The issues in these cases can be presented as three questions: (1) How should the courts interpret those sections of the Code that set the powers of municipal corporations? (2) What is the impact of those sections on the Groundwater Act of 1973? (3) What is the appropriate common law doctrine in the area of groundwater rights? As Suffolk indicated in its reply brief in *City of Norfolk v. City of Suffolk*, at stake are "the existence and extent of water rights under state law, as well as the permissible scope of state and municipal regulations governing the use of land and the groundwater which lies beneath it."<sup>35</sup>

#### Municipal Rights

Much of Suffolk's argument is based on the three sections of the Virginia Code outlined above. According to Suffolk's understanding of these sections, Norfolk's ownership of any wells within Suffolk and its sale of water to Virginia Beach and to the U.S. Navy are illegal for four reasons. Three of these contentions rest directly on Suffolk's interpretation of its and Norfolk's powers as municipalities, while the fourth is based on its interpretation of the common law. Suffolk alleges in Count 1 of the Bill of Complaint:

The drilling, ownership and operation by Norfolk of the deep wells at the Navy's Driver Antenna Site, which is within the boundaries of Suffolk, is not an orderly expansion of the water supply system of Norfolk under the terms of Sec. 15.1-875 of the Virginia Code Annotated.<sup>36</sup>

Count 2 argues that Norfolk possesses no legal authority to provide water to customers outside its own boundaries. Count 4 of Suffolk's complaint maintains that under the terms of its zoning ordinance, Norfolk must obtain permission before it drills any additional wells within Suffolk's jurisdiction. It claims that (1) Norfolk is not legally entitled to an exemption and (2) Suffolk's zoning ordinance should take precedence over those parts of the Virginia Code granting exemptions.

In its legal brief and May 4, 1981, courtroom presentation of Count 2, Suffolk stressed section 2(9) of Norfolk's charter. This provision allows Norfolk to:

acquire in any lawful manner in any county of the state, or without the state, such water, lands, and lands under water as the council of said city may deem necessary for the purpose of providing an adequate water supply for said city. . . . The said city may sell or supply to persons, firms, or industries residing or located outside of the city limits any surplus of water it may have over and above the amount required to supply its own inhabitants.<sup>37</sup>

Norfolk and Suffolk's conflict over the interpretation of this provision revolves around (1) the definition of a surplus, (2) the extra-territorial sources of Norfolk's supplies, and (3) the legality of Norfolk's selling water to Virginia Beach.

Suffolk maintains that the phrase "acquire in any lawful manner in any county of the state" means that Norfolk may acquire water only in counties, not in cities. It makes no difference that the four original wells were drilled in Nansemond County. Once Nansemond County became part of Suffolk, the wells were no longer legal. If the original wells are not legal, then certainly no additional wells may be drilled within Suffolk's municipal boundaries. Not only are both Norfolk's old and new wells illegal, but also, Suffolk argues, they threaten Suffolk with irreparable harm. To satisfy its customers and to service Virginia Beach's continued development, Norfolk will withdraw too much groundwater. This mining will harm private well owners in Suffolk, cause saline intrusion into the aquifer, and may also cause land subsidence. Thus, Suffolk asked the court to prohibit the further pumping of any of Norfolk's wells located in Suffolk.<sup>38</sup>

Suffolk also contends that even if Norfolk possessed the authority to sell water, it could only sell its surplus. Suffolk defines surplus as any unused portion of Norfolk's surface water supplies. According to Suffolk's attorney, the "last increment of water that you acquire is your

surplus."<sup>39</sup> Norfolk acquires no water in Suffolk without pumping it. Without recourse to the wells located within Suffolk's boundaries, Norfolk has no surplus to sell, especially since the four wells in Suffolk are supposed to be for emergency purposes only. Thus, according to Suffolk's logic, Norfolk has no surplus and cannot use Suffolk's water resources as the basis of a water business. Citing *Mount Jackson v. Nelson* for support, Suffolk maintains:

[T]he purpose for which a municipality is authorized to construct waterworks or to contract for a supply of water is usually to supply its own needs and the needs of its inhabitants, and it may be laid down as a general rule that a grant of power to a municipality for these purposes gives it by implication no authority to enter into the business of furnishing water to persons beyond a municipal limits.<sup>40</sup>

Ultimately, Suffolk contends that Norfolk may only acquire water outside Norfolk's city limits for its own use, and in so doing, it may only go into a county. There is no justification, Suffolk alleges, for Norfolk's operating an extra-territorial "water business."

The argument presented by Suffolk in support of Count 1 relies on the city's logical formulation of Count 2. Suffolk maintains that there can be an "orderly expansion" of a water system only if there existed the power to originate the system. Since Norfolk, according to Suffolk's brief, did not possess the authority to operate a water business outside its boundaries in the first place, it cannot argue that the new wells are an "orderly expansion."<sup>41</sup> Further, Suffolk argues that even if a judge found that Norfolk had the right to operate the four original wells in Suffolk, the two new wells still do not represent an orderly expansion because Norfolk "picked the worst possible location.... [Water is being pulled] from the aquifer that serves countless people in the community."<sup>42</sup>

Both Counts are used by Suffolk as the foundation of its contention in Count 4 that Norfolk had to obtain permission before drilling any new wells. Suffolk also argues in Count 4 that the Navy-owned Driver Antenna Site is subject to Suffolk's zoning authority as long as the rules are "not inconsistent with the federal purpose in acquiring the lands and are not subject to federal statutes."<sup>43</sup> Suffolk contends that the water from the new wells will be used to supply Virginia Beach, not the U.S. Navy, and therefore it is immaterial that the wells are located on federal property. Finally, Suffolk argues that the state's Groundwater Control



Act of 1973 does not pre-empt the city's zoning ordinance because the Groundwater Act exempts "wells supplying municipalities such as Norfolk or Virginia Beach" from its provisions.<sup>44</sup>

Norfolk disputes all of Suffolk's allegations concerning their respective powers as municipal corporations. With respect to Count 2, Norfolk urges acceptance of (1) its own definition of a surplus, (2) a second interpretation of municipal powers, and (3) a blurring of the city/county distinction. To Norfolk, there is no Virginia statute that defines a water surplus, and the city relies on the *Mount Jackson* case, as did Suffolk, for support of its position.

It is common custom for municipal corporations in Virginia to furnish water to those who live beyond their limits. This is a source of profit to them, contributes to the sanitation of the outlying districts and indirectly to that of the towns themselves. To discontinue this would, in many instances, be disastrous, and would redound to the injury of all concerned without corresponding benefit to anybody. When to sell and when not to sell must be left, as other matters of business are, to their sound judgment.<sup>45</sup>

Thus, Norfolk must determine whether a surplus exists. While one of that city's citizens may challenge the determination, the City of Suffolk cannot.

Norfolk also uses this quote from *Mount Jackson* to substantiate its position that it has the authority to operate an extra-territorial water supply system to furnish the needs of Virginia Beach. Since the land for the original wells was county land at the time of drilling, Norfolk believes it still possesses legal authority to operate the wells. The new wells, to be located on land purchased by the U.S. Navy from Norfolk, represent to Norfolk a legitimate expansion of a continuing system, even though the land has become part of the City of Suffolk. If the court upholds Suffolk's differentiation between a city and a county, the new wells remain legal, Norfolk believes, because they are located on federal land and because the water pumped from them is for the Navy's use. No municipality, Norfolk argues, can interfere with activities conducted on federal land.

Finally, Norfolk disposes of Suffolk's consent argument through reliance on its own charter and section 15.1 of the Virginia Code. Norfolk bases its case on the fact that it has never requested inclusion, and is not included, under section 15.1-838 of the model municipal charter. Moreover, Norfolk's charter (section 2[9] ) grants it the right to build and maintain a water supply system, to acquire re

land for the system in any county of the state, and to contract with other localities for the sale of "any surplus of water it may have."<sup>46</sup> Even if the Code does apply, Norfolk maintains that its actions fall within one of the listed exemptions. To Norfolk, these exemptions cannot be overridden by Suffolk's zoning ordinance. Thus, while Suffolk stresses the consent requirements of section 15.1-875, Norfolk emphasizes that:

[n]o consent shall be required for the operation of any such water supply system in existence on [July 1, 1976] or in the process of construction or for which the site has been purchased or for the orderly expansion of such water supply system.<sup>47</sup>

Norfolk holds that the drilling of additional wells on its Suffolk property represents nothing more than the orderly expansion of an existing use, and therefore, it is exempted from the consent requirement. Norfolk also points to Suffolk's own zoning ordinance (section 720.6) for support for its arguments:

Any existing use which would be permissible by use permit in the district in which it is located shall without further action be deemed conforming except for the class of uses involving change from one nonconforming use to another. So long as the use remains the same, new structures or structural alterations within the general limits of the regulations of this ordinance shall be permitted on the premises of any such use.<sup>48</sup>

Norfolk contends that it has used its Suffolk property for one purpose since 1966—a reservoir supplemented by wells. It is merely seeking to continue that use by constructing two new structures.

#### **Common Law and the Groundwater Act**

Suffolk's fourth contention (Count 3 of the Complaint) alleges that Norfolk's sale of water away from the land is "an unreasonable use of the water and is contrary to the law of Virginia."<sup>49</sup> In support of this contention, Suffolk relies on the common law doctrine of reasonable use as summarized in the *Clinchfield Coal* case. According to Suffolk's interpretation, this doctrine prohibits the interbasin transfer of water and prevents Norfolk from expanding its water system in Suffolk without Suffolk's consent and without complying with its comprehensive zoning ordinance. While *Clinchfield Coal* does warn against sale of groundwater away from the land, the mention is in a dictum and is not part of the actual ruling. Moreover, the case does not specifically equate sale away from the land with the prohibition of interbasin transfers. Suffolk believes the prohibition of interbasin transfers



applies in this instance because Norfolk impounds some surface waters in a reservoir: "And then they add into it groundwater which becomes mixed and intermixed with this surface water and in itself becomes surface water. . . ."50 Once it is transformed into surface water, water from the disputed wells cannot be transferred from one river basin to another.

Finally, Suffolk argues that its police power gives it primary responsibility for the protection of groundwater resources regardless of the existence of the Groundwater Act of 1973. Suffolk believes that it should have the last word in any difference of opinion on the propriety of pumping. Thus, Norfolk should not be allowed to drill even though it has received permission from the State Water Control Board for the new wells. For Suffolk, the question presented by this case is:

whether, and to what extent, state and local zoning ordinances operate to control the use of groundwater and whether such ordinances, the Virginia common law or Virginia Code Section 15.1-875 are in conflict with the Virginia Groundwater Control Act.<sup>51</sup>

Suffolk believes that its zoning ordinance should be the controlling regulation in this case because it is the city's means of implementing its police power.

These contentions reflect Suffolk's view that Norfolk "has entered into long-term contracts to supply more water than it has" and will remain in an emergency situation justifying pumping at Suffolk's expense as long as it can expand its sales to Virginia Beach and other municipalities. According to Suffolk, it is important for Norfolk to maintain an emergency atmosphere because that city has declared that it will pump the Suffolk wells only during emergency water shortages. Suffolk claims that such assertions lack credence because an emergency water shortage will exist as long as Norfolk and Virginia Beach continue to expand

Norfolk, on the other hand, maintains that its rights under state law and its own charter are reinforced by the common law doctrine of absolute ownership. Norfolk argues that it owns the property and therefore owns the resources located on that property. These resources, including groundwater, may be disposed of as Norfolk wishes. Any interference by Suffolk in Norfolk's drilling of new wells, therefore, constitutes in Norfolk's view a deprivation of property without either compensation or due process of law. Norfolk's attorneys suggest that

"the idea of not being able to export water is almost an absurdity."<sup>52</sup> The city cites the Groundwater Act as specifically providing that participants within a management area may enter into agreements with each other concerning the transfer of water, and "there certainly is more than one basin within this particular area."<sup>53</sup>

On July 28, 1981, Judge Edward P. Simpkins overruled Norfolk's demurrer to Suffolk's Bill of Complaint. This procedural ruling means that Suffolk has raised a sufficient number of questions about the relevant statutory and common law so that its complaint is not frivolous. Simpkins' judgment did not decide any of the factual or legal questions involved.

#### The Governor's Plan

On February 4, 1981, Governor Dalton issued a statement outlining a 15-point agreement that he wanted Norfolk and Suffolk to sign. Under the terms of this agreement, Norfolk and Suffolk would dismiss their suits and negotiate an agreement for water supplies that (among other elements) would include:

1. A recognition that groundwater is an asset of the municipality in which it is located;
2. Compensation to the locality for the removal of groundwater;
3. Limitations on the drilling of new wells and their location only in areas approved by the State Water Control Board;
4. Compensation to well owners who are adversely affected by the development of additional water resources; and
5. Cooperation among the localities involved to refine data on the physical action of the aquifer, provide a continuous check of draw down and/or saltwater intrusion, and design and implement a public education program on the agreement.<sup>54</sup>

The member localities of the Southeastern Public Service Authority (Norfolk, Virginia Beach, Suffolk, Southampton County, Portsmouth, Chesapeake, Isle of Wight County, and Franklin) have agreed in principle to the Governor's proposal. In February 1981 Virginia Beach signed 10-year contracts with Isle of Wight County and Suffolk which follow the Governor's guidelines. Under the terms of the contracts, Virginia Beach will pay for the drilling of any wells and for

pumping equipment. It will also pay the localities 15 cents per thousand gallons of water and compensate any private well owners injured by the new deep wells. Suffolk and Isle of Wight will retain ownership and control of the wells that will guarantee Virginia Beach 8 million gallons of water a day during droughts or emergencies. During emergencies, however, Suffolk retains the right to 80,000 gallons of water a day. Even with this additional supply, continued conservation efforts will be required in Virginia Beach because the total available supply (23 million gallons a day) is less than the city's average daily summer demand of 30 million gallons.

Under terms of an agreement expected to be signed in mid-October, Norfolk will treat and transport water from Virginia Beach's new emergency wells. In return, Virginia Beach will pay half of Norfolk's legal costs in its dispute with Suffolk. The pact also prohibits Norfolk from drilling new wells on its Suffolk property for 10 years and postpones litigation of the pending lawsuits for the same period.

#### CONCLUSION

Acquiescence to this agreement would appear as a recognition of the legal rights of, and would guarantee adequate water supplies to, all parties involved. But important issues remain unsettled. Such an agreement will not conclusively decide the legal rights of either these parties or other municipalities in similar situations. It will remain binding only as long as the various parties adhere to it and the only enforcement mechanism available is litigation.

The proposed agreement does not answer the principal issues contained in these cases. Under the agreement, it appears that a locality may impose its own criteria for pumping groundwater in addition to the requirements of the Groundwater Act. It also seems to confer legitimacy on and even expand the groundwater doctrine of reasonable use by requiring compensation both to the locality in which the water is located and to any other well owner whose supply is damaged whenever water is exported from the overlying land. Moreover, adherence to

this agreement would seem to indicate that the groundwater rights of units of local government are less secure than those of individual property owners. A private business, for instance, would appear less subject to regulation by the relevant political subdivision than would a party to the suggested agreement. Most importantly, however, this agreement seems to weaken

significantly the operation of the Groundwater Act by placing ultimate authority to issue regulations governing drilling and pumping with the locality rather than with the State Water Control Board.

Thus, the proposed agreement appears to provide a solution to an immediate problem without answering the important and complex questions that underlie it. It lacks an important element of the function of law—stability and predictability in the ascertainment of rights and obligations. The possibility would remain, for instance, for a water-owning locality to shut down wells supplying another municipality. One area of disagreement in the present case is whether a genuine water emergency exists. It is hoped that the agreement will provide a triggering mechanism to define when an emergency exists. If such a disagreement existed during future water shortages, the pumping of emergency wells might not be approved by the controlling locality.

Further, the proposed agreement does not apply to private well owners within a groundwater management area. The rights and duties of individuals in cases of well interference or subsidence thus remain undetermined. The agreement makes no real choice between the absolute ownership and reasonable use doctrines of groundwater law and provides no guidance for future disputes among either individuals or municipal corporations. Further, it will not settle the question of whether the prohibition of inter-basin transfers applies to groundwater as well as surface water supplies. While in the present situation the agreement may represent the best available compromise, it also illustrates that neither the state nor the localities involved believe the time has come to resolve these issues in a lasting manner.

## FOOTNOTES

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6. *Ibid.*, p. 23.
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8. *Clinchfield Coal Corporation v. Compton*, 148 Va 437, 139 SE 308 (1927) at 311.
9. Harry Cohen, "Water Law in Alabama," 24 *Alabama Law Review* (1972), p. 473.
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27. *Ibid.*
28. *Board of Supervisors v. Corbett*, 206 Va 167, 142 SE2d 504 (1965).
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30. *Ibid.*, sec. 15.1-875.
31. *Ibid.*
32. Complaint of the City of Norfolk, Virginia, for a Declaratory Judgment and Injunctive Relief in *City of Norfolk v. City of Suffolk*, p. 3.
33. *Ibid.*, p. 4.
34. Federal Defendants' Motion for Summary Judgment in *City of Suffolk, Virginia v. Edward Hidalgo, Secretary of the Navy, et al.*, p. 4.
35. Reply Memorandum in Support of Defendants' Motion to Dismiss . . . in *City of Norfolk v. City of Suffolk*, p. 8.
36. Bill of Complaint in *City of Suffolk v. City of Norfolk*, p. 7.
37. *Norfolk City Code*, p. 14.
38. Transcript of Proceedings in the Circuit Court for the City of Suffolk, May 4, 1981, in *City of Suffolk v. City of Norfolk*, pp. 48-50.
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43. *Ibid.*, p. 66.
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