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COMMENTS

THE FUTURE OF STATE REGULATION OF INTERSTATE WATER EXPORT AFTER *Sporhase v. Nebraska*

Bill Bronson

I. INTRODUCTION

The land's curse is its endless, relentless aridity. Lack of water has molded the western past like no single factor. Like a malevolent vise, aridity has constricted, controlled, and channeled, shaping settlement patterns, dictating economic systems, influencing the style and substance of life itself. Whatever the West became, whatever it is now, it is no more than aridity has allowed. . . . Aridity is the central force in western life. It has been from the beginning, it is today, and it will be tomorrow.¹

Westerners weary of the century old struggle with the forces of nature have been subjected in recent years to an equally frustrating battle with the federal government and the courts over the allocation and development of scarce water resources in the region.² This confrontation has been intensified by the United States Supreme Court's decision last year in *Sporhase v. Nebraska*.³ *Sporhase* is the first ruling in many decades to address an important question for western states: to what extent may a state regulate—even ban—the transfer of water beyond its political boundaries? Although this case has already figured in some recent political and judicial discourse over the future of water use and development, its ultimate impact may not be certain without future litigation.

This Comment will explore the impact of *Sporhase* on various state laws affecting the interstate transfer of water. Ideally, the observations and arguments advanced herein should prove useful to state legislatures interested in drafting constitutionally permissible regulations, as well as

1. R. LAMM & M. MCCARTHY, *THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE* 162 (1982).

2. See, e.g., *United States v. New Mexico*, 438 U.S. 696 (1978); *California v. United States*, 438 U.S. 645 (1978); *Arizona v. California*, 373 U.S. 546 (1963). The Office of the Solicitor in the United States Department of Interior provoked a not-so-minor controversy in 1979 by issuing a legal opinion concluding that the federal government had the right to make use of unappropriated water on federal lands without regard to state water adjudication laws. See 86 Interior Dec. 553 (1979). This much-criticized opinion has been repudiated by the new administration. Solicitor's Opinion No. M-36914 (Supp. I), U.S. Dept. of Interior (Sept. 11, 1981). See also Federal "Non-Reserved" Water Rights, Off. of Legal Counsel, U.S. Dept. of Justice (June 17, 1982) (repudiation of so-called federal "non-reserved" water rights discussed in 1979 Solicitor's Opinion).

3. 102 S.Ct. 3456 (1982).

parties inclined toward further litigation of the export issue.

II. THE DECISION

Joy Sporhase and several other parties jointly owned adjacent tracts of land in Chase County, Nebraska, and Phillips County, Colorado.⁴ A well located on the Nebraska side pumped groundwater for irrigation of both tracts.⁵ Although the well had been registered by the landowners' predecessors in title, as required by law,⁶ neither they nor the parties to the immediate case had applied for an additional permit required by another Nebraska law.⁷ Under the terms of this statute, an individual could not transport groundwater outside the state of Nebraska without an initial determination by the State Director of Water Resources that the withdrawal was reasonable, not contrary to conservation, and not detrimental to the public welfare.⁸ In addition, the issuance of a permit hinged upon a finding that the state in which the water was to be used granted reciprocal rights to withdraw groundwater from that state for use in Nebraska.⁹

The state brought suit to enjoin Sporhase and the other proprietors from irrigating the Colorado tracts without the permit. An injunction was granted by the trial court despite the landowners' contentions that groundwater was an article of commerce and that the statute amounted to an unreasonable and therefore unconstitutional burden on interstate commerce.¹⁰

On appeal, the Nebraska Supreme Court affirmed.¹¹ The court rejected the landowners' argument that water was freely transferable and therefore an article of commerce, citing in support the decision of the United States Supreme Court in *Hudson County Water Co. v. McCarter*.¹² In *Hudson County*, the Supreme Court held that the State of New Jersey could, in the exercise of its police powers, forbid or condition the export of water beyond its political boundaries.¹³ The Nebraska court was unconvinced by the landowners' argument that other United States Supreme Court precedents limiting the rights of states to condition transfers of other

4. *Id.* at 3458.

5. *Id.*

6. NEB. REV. STAT. § 46-602 (1978). *See* Sporhase, 102 S.Ct. at 3458.

7. *Id.* at 3458.

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

9. *Id.*

10. Sporhase, 102 S.Ct. at 3458. *See also* State ex rel. Douglas v. Sporhase, 208 Neb. 703, 705, 305 N.W.2d 614, 616 (1981).

11. State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981).

12. 209 U.S. 349 (1908). *See* State ex rel. Douglas v. Sporhase, 208 Neb. at 709, 305 N.W.2d at 618.

13. *Hudson County*, 209 U.S. at 355-57.

natural resources like natural gas¹⁴ and minnows¹⁵ were controlling in this case. The court noted that:

The natural resources dealt with in those cases have historically been market items, reducible to private possession and freely exchangeable for value. This has never been the case with groundwater in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution.¹⁶

Caution in this instance convinced the majority of the court to distinguish between water and other natural resources and uphold the constitutionality of the Nebraska statute.¹⁷

Undeterred by these conclusions, the landowners appealed to the United States Supreme Court, which reversed the judgment of the Nebraska high court.¹⁸ The case presented the Court with an opportunity to resolve several questions in the field of water law left unsettled since the 1960's. The Court's reasoning, however, raises new questions for states regulating the export of water.

At the outset, the Court determined that the answers to three questions would control the outcome of the appeal: (1) was groundwater an article of commerce, subject to congressional legislation; (2) did the Nebraska statute so restrict the flow of water as to impose an impermissible burden on commerce; and (3) did Congress grant Nebraska and other states permission to enact groundwater regulations that would have been otherwise forbidden under the negative implications of the commerce clause?¹⁹

14. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (state law designed to retain all natural gas discovered in that state for local needs held to be unconstitutional burden on commerce); *Oklahoma v. Kansas Nat. Gas. Co.*, 221 U.S. 229 (1911) (state law prohibiting interstate transportation of natural gas held unconstitutional).

15. *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (state law prohibiting transfer outside of state for sale minnows obtained from waters of same state held repugnant to the commerce clause).

16. *State ex rel. Douglas v. Sporhase*, 208 Neb. at 709-10, 305 N.W.2d at 619.

17. *Id.* at 710, 305 N.W.2d at 619. Chief Justice Norman Krivosha dissented from that portion of the court's opinion upholding the reciprocity clause. He argued that the provision created an unreasonable classification between in-state and out-of-state uses of water. Under the terms of the statute, the State Director of Water Resources could find that a proposed out-of-state use would be perfectly reasonable and beneficial, and yet be prohibited from approving the transfer because the transferee state did not grant reciprocal rights. Such an outcome was irrational and therefore unconstitutional under the due process provisions of the United States Constitution and the Nebraska Constitution. *Id.* at 712-14, 305 N.W.2d at 620-21.

18. *Sporhase v. Nebraska*, 102 S.Ct. 3456, 3465-67 (1982).

19. *Id.* at 3457-58. The appellants renewed due process and equal protection arguments first raised during the state appeal, but the Court did not reach these in light of its handling of the commerce

To answer the first question, the Court had to dust off the pages of its seventy-four year old decision in *Hudson County*—the touchstone of the Nebraska Supreme Court's opinion—and reassess its meaning. *Hudson County* dealt with efforts by a New York-based water company to obtain access to New Jersey water. The company argued that the state's prohibition on interstate export of water impaired the obligations of contract, took property without just compensation, interfered with interstate commerce, denied privileges afforded New Jersey residents, and denied New York citizens equal protection of the laws.²⁰ Much of the Supreme Court's decision revolved around the just compensation claim, which was dismissed as nebulous in light of the state's interest in preserving waters within its political boundaries—a valid exercise of the police power.²¹ The commerce clause challenge was dismissed by Justice Holmes, the author of *Hudson County*, with the conclusion that “[a] man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end.”²²

That conclusion was premised on a late nineteenth century Supreme Court decision, *Geer v. Connecticut*.²³ In *Geer*, the Court upheld a state ban on the interstate transportation of game birds captured in the state, on the ancient theory that the state “owned” wild animals within its borders and could legally qualify the rights to those animals by private individuals who had “captured” them.²⁴ One such qualification was the prohibition against interstate transfer of the captured animals.²⁵ The Court in *Hudson County* simply extended the legal fiction of state ownership of wild game to water, a resource not easily amenable to the precepts of real property law. Thus, New Jersey could so much as forbid the removal of “its” resource from within its boundaries; it could, in effect, remove water from the list of commercial articles, just as an individual could withhold his property from the marketplace.

In *Sporhase*, the Court recognized Nebraska's reliance on *Hudson County* as the way to keep groundwater regulation from the purview of commerce clause analysis.²⁶ Nevertheless, the Court was obliged to contrast the holding in *Hudson County* with the later and more contrary

clause issue. *Id.* at 2458 n. 3.

20. *Hudson County*, 209 U.S. at 353-54.

21. *Id.* at 356-57.

22. *Id.* at 357.

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

24. *Id.* at 522-35.

25. *Id.* at 535.

26. *Sporhase*, 102 S.Ct. at 3459.

opinion in *City of Altus v. Carr*,²⁷ the case relied upon heavily by Sporhase and other appellants.²⁸ *City of Altus* was concerned with an attempt by the Texas legislature in the 1960's to forbid the interstate transfer of groundwater without legislative approval.²⁹ Prior to enactment of the statute, the City of Altus, Oklahoma, had contracted with a Texas landowner to have groundwater pumped from below his land and piped to the city.³⁰ The city sought an injunction from a three-judge federal district court prohibiting enforcement of the statute.³¹ The State of Texas defended its conditional ban on interstate water transfers by asserting that it was designed to conserve and protect the supply of groundwater, and that even if the result was burdensome, groundwater was not an article of commerce subject to constitutional protection.³²

Relying upon the reasoning in the same "natural gas" cases distinguished by the Nebraska Supreme Court, the federal court in Texas rejected that state's argument, noting that even the principle of conservation could not justify a discriminatory ban on interstate export of certain resources.³³ Furthermore, groundwater in Texas was subject to a "rule of capture," i.e., any person who drilled for and made use of that resource was considered the "owner." As such, groundwater was treated as a form of private property, freely transferable or saleable by its owner, and was not considered the property of the sovereign.³⁴ In this context, water could be considered an "article of commerce" and be subject to judicial protection.³⁵

City of Altus was affirmed without opinion by the United States Supreme Court in 1966.³⁶ This summary judgment puzzled commentators, who speculated that *City of Altus* may have overruled *Hudson*

27. 255 F.Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

28. Sporhase, 102 S.Ct. at 3459.

29. 255 F.Supp. at 830, 832. The law provided that:

No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.

Act of Aug. 30, 1965, ch. 568, 1965 Tex. Gen. Laws 1245, *repealed by* Act of Apr. 12, 1971, ch. 58, 1971 Tex. Gen. Laws 658.

30. 255 F. Supp. at 831-32.

31. *Id.* at 830.

32. *Id.* at 838-39.

33. *Id.* at 838-39. The conservation rationale was deemed weak in this particular instance, since "intrastate production and transportation of water between points within the State" could be maintained without legislative interference. *Id.* at 840 (emphasis added).

34. *City of Altus*, 255 F. Supp. at 840, citing *City of Corpus Christi v. City of Pleasonton*, 154 Tex. 289, 276 S.W.2d 798 (1955); *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

35. *City of Altus*, 355 F. Supp. at 840.

36. 385 U.S. 35 (1966), *aff'g* 255 F. Supp. 828 (W.D. Tex. 1966).

County, albeit *sub silentio*.³⁷ When called upon to interpret the meaning of the former opinion, the Supreme Court in *Sporhase* emphasized that its summary affirmance "did not necessarily adopt the [federal district] court's reasoning."³⁸ Indeed, the Court opined that the Nebraska court decision before it was "not necessarily inconsistent"³⁹ with the reasoning in the federal case. The Nebraska court had itself distinguished *City of Altus* on the belief that groundwater is not freely appropriable in Nebraska as in Texas, but is instead, under the Nebraska constitution, a "public necessity,"⁴⁰ subject to state regulations on the nature and quantity of use.⁴¹ As such, the Supreme Court agreed that a Nebraska surface owner lacked a "comparable interest"⁴² in the water beneath his land.

Nevertheless, this distinction did not convince the Court to end its analysis in favor of the state's position, for as the Court noted, *City of Altus* was inconsistent with *Hudson County*.⁴³ The fatal wound of irreconcilability lay in *Hudson County's* reliance on the public ownership theory expressed in *Geer v. Connecticut*. The district court in *City of Altus* had rejected this theory on the grounds that a legal fiction should not be allowed to defeat the substance of the commerce clause.⁴⁴ More importantly, *Geer* had been overruled by the Supreme Court in *Hughes v. Oklahoma*⁴⁵ in 1979. In laying *Geer* to rest, the Court had concluded that a mere legal fiction did nothing more than symbolize the power of a state to preserve and protect vital natural resources, and that this simple fact should not be a barrier to judicial scrutiny of regulations banning or otherwise conditioning the interstate transfer of those resources.⁴⁶ By concluding that water should now be considered an article of commerce, the Court was fulfilling the prophecies of the commentators.⁴⁷

37. See, e.g., Clark, *The Colorado Doctrine: Surface-Water Rights by Appropriation Only*, in 5 WATERS AND WATER RIGHTS 114 (R.E. Clark ed. 1967); Corker, *Water Rights in Interstate Streams*, in 2 WATERS AND WATER RIGHTS 319, 321 (R.E. Clark ed. 1967); Note, *Water Rights and the Commerce Clause: City of Altus v. Carr*, 47 OR.L.REV. 228 (1968).

38. *Sporhase*, 102 S.Ct. at 3461. Affirmance indicates only the Court's agreement with the judgment of the lower federal court. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981).

39. *Sporhase*, 102 S.Ct. at 3461.

40. NEB. CONST. art. XV, § 4.

41. See, e.g., *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 799-801, 140 N.W.2d 626, 636-37 (1966).

42. *Sporhase*, 102 S.Ct. at 3461.

43. *Id.*

44. 255 F. Supp. at 840.

45. 441 U.S. 322 (1979). See *supra* note 15.

46. *Id.* at 329-35.

47. See, e.g., Ladd, *Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan*, 42 MONT.L.REV. 267, 310 (1981). Cf. Tarlock, *Western Water Law and Coal Development*, 51 U.COLO.L.REV. 511, 559 (1980) (*Hughes* probably "implicitly overrules" *Hudson County*); Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of*

The state of Nebraska attempted to draw a distinction between water and other natural resources by arguing that the surface owner who used groundwater did not have as great an ownership interest as did the captors of gamebirds and minnows.⁴⁸ In response, the Court granted that the state's "greater ownership interest [in water] may not be irrelevant to Commerce Clause analysis. . . ." ⁴⁹ But that consideration did not remove groundwater regulations from the scope of judicial review. The state's argument was still based on a discredited legal fiction. Water was deemed a marketable commodity, regardless of the pricing system governing its allocation.⁵⁰ Similarly, the importance of water to human survival did not override constitutional considerations, even if the management of groundwater was best left in state hands.⁵¹

Indeed, this aspect served to magnify the "interstate dimension"⁵² in water use. The Court emphasized that over 80 percent of the nation's water supply is used for agricultural purposes.⁵³ The markets supported by irrigated farms spanned not only this country, but the world. The Court could not see how allocation of such an important resource could be left entirely in state hands.⁵⁴ Moreover, the Court reasoned that removing Nebraska groundwater from the status of an "article of commerce" would curtail Congress' power to implement its own groundwater policies. This was an unacceptable situation, given the national ramifications of groundwater scarcity.⁵⁵

The conclusion that groundwater is an article of commerce did not answer the second matter before the Court—the alleged unconstitutionality of the Nebraska statute. To address this problem, the Court turned to its standard test of validity for state laws affecting interstate commerce. The test, best enunciated in *Pike v. Bruce Church, Inc.*,⁵⁶ provides that:

[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden

Natural Resources, 1979 SUP.CT.REV. 51, 90-91 (*Hudson County* of "doubtful validity" in light of *Geer's* demise).

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

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 3462-63.

55. *Id.* at 3463, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 621-23 (1978).

56. 397 U.S. 137 (1970).

that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce.⁵⁷

Nebraska offered one purpose for the statute—the conservation of diminishing quantities of groundwater.⁵⁸ Generally stated, the Court could find no fault with this purpose. The Court also recognized that Nebraska's concern was genuine, considering the inadequate water supply in the region encompassing appellant's land-holdings.⁵⁹ This concern was, in the Court's view, fairly advanced by the first three conditions governing interstate export of groundwater: that the withdrawal be reasonable, conservative, and in the public interest.⁶⁰ Any incidental burden from a prohibition on interstate transfers could be outweighed by a legitimate conservation problem.⁶¹ And, the conditions were applied evenhandedly, because the state imposed equally severe withdrawal and use restrictions on its own citizens.⁶² "[I]n the absence of a contrary view expressed by Congress," the Court maintained, "we are reluctant to condemn as unreasonable measures taken by a state to conserve and preserve for its own citizens this vital resource in times of severe shortage."⁶³

The Court emphasized that the state's authority to regulate scarce water supplies for the purpose of protecting public health and safety, *but not the health of an economy*, was "at the core of its police power."⁶⁴ Within this range, a state could even restrict the interstate transfer of water, or create a limited preference for its own citizens in the use of the water, subject to any related federal statutes.⁶⁵ That groundwater was even available was testimony in part to Nebraska's program for protection of that scarce resource.⁶⁶ The Court concluded its facial analysis of the first

57. *Id.* at 142. This test has been criticized for vagueness; e.g., it does not define what interests are "legitimate," or what kinds of effects are "incidental." More importantly, the test does not indicate whether the failure to meet one of the test's three prongs by necessity renders the statute unconstitutional, or whether state and national interests must be balanced. *See Hellerstein, supra* note 47, at 67 n. 85. Nevertheless, the Court has shown no inclination to depart from this subjective standard. And, state legislation fails to meet the standard in almost every case where *Pike* is invoked. Hellerstein, *supra* note 47, at 71.

58. *Sporhase*, 102 U.S. at 3463.

59. *Id.* at 3463-64. Applicant's land in Nebraska was located within a state-established groundwater control area. The state and its subdivision had adopted several rules and regulations controlling and directing the flow of scarce water supplies, including a limit on the *intrastate* transfer of groundwater between separate surface tracts. *Id.*

60. *Id.* at 3464. *See also* NEB. REV. STAT. § 613.01 (1978).

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

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

three statutory conditions with the recognition that they did not impermissibly burden commerce.⁶⁷ Even the appellants had conceded as much.⁶⁸

The reciprocity provision, however, did not pass constitutional muster. Initially, the Court found that the provisions operated as an explicit barrier against commerce, especially between Colorado and Nebraska, because Colorado law explicitly forbids the export of groundwater from the state under any conditions.⁶⁹ Nebraska could not demonstrate that the reciprocity provision bore a sufficiently close relationship to the legitimate conservation rationale. The Court heard no evidence that the provision was necessary to preserve scarce water resources. On the contrary, the Court echoed Nebraska Chief Justice Krivosha's dissent⁷⁰ by observing that:

[e]ven though the supply of water in a particular well may be abundant, or perhaps, even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska.⁷¹

But the Court left the door open:

If it could be shown that the State as a whole suffers from a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision.⁷²

The Court even speculated that a "demonstrably arid state" might be able to justify a total ban on interstate transfers on conservation grounds, assuming sufficient evidence existed to satisfy the claim.⁷³ In the immediate case, however, the state could not marshal evidence to justify such a ban, much less the need for reciprocity.⁷⁴ In sum, the provision did not survive the Court's strict scrutiny.

The Court could not rationalize the state's argument that an otherwise impermissible burden on interstate commerce was somehow sanctioned by a series of federal statutes and interstate compacts ratified by

67. *Id.* at 3464-65.

68. *Id.* at 3465.

69. COLO. REV. STAT. § 37-90-136 (1974). *See* Sporhase, 102 S.Ct. at 3465.

70. *See supra* note 17.

71. Sporhase, 102 S.Ct. at 3465.

72. *Id.*

73. *Id.*

74. *Id.*

Congress.⁷⁵ That Congress could do so was not disputed,⁷⁶ but none of the several statutes and compacts put forth in defense of the Nebraska statute contained the express intent or policy to countenance an otherwise unacceptable infringement upon commerce.⁷⁷ Mere deference by Congress to state water law was not enough to avoid the negative implications of the commerce clause.⁷⁸

In a brief dissent, Justice Rehnquist⁷⁹ took exception to that portion of the Court's analysis concerning the relevancy of congressional regulation of groundwater. In his view, Congress' power was already so far-reaching that the federal government could regulate subject matter not considered "articles of commerce."⁸⁰ But this was deemed irrelevant to the most important question raised by the case—whether or not water was in fact such an article of commerce. Essentially, Justice Rehnquist steered a course opposite from the majority opinion, and argued that a state, by exercising its quasi-sovereign authority to protect and preserve a natural resource, could "preclude that resource from attaining the status of an article of commerce."⁸¹ Rehnquist proffered a narrower conception: that "commerce" could not be said to exist in a resource which could not be owned as real property, and in which the state recognized only a limited use-right.⁸² "Commerce," he concluded, "cannot exist in a natural resource that cannot be sold, rented, traded or transferred, but only *used*."⁸³ Arguably, the gist of Justice Rehnquist's argument is analogous to the restrictive views on the reach of the commerce clause espoused by some members of the Court during the late nineteenth and early twentieth

75. *Id.* at 3465-66.

76. *Id.* at 3466 n. 21, citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (*McCarran Act*, 59 Stat. 33 (1945)); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (I.R.C. § 1606(a) (1939)); *Whitefield v. Ohio*, 297 U.S. 431 (1936) (*Hawes-Cooper Act*, 45 Stat. 1084 (1929)); *In re Rahrer*, 140 U.S. 545 (1891) (*Wilson Act*, 26 Stat. 313 (1890)).

77. *Sporhase*, 102 S.Ct. at 3466, citing *New England Power Co. v. New Hampshire*, 102 S.Ct. 1096, 1102 (1982).

78. *Sporhase*, 102 S.Ct. at 3466. Having declared the reciprocity provision of the statute unconstitutional, the Court remanded the case to the Nebraska Supreme Court for a determination whether the invalid language was severable from the rest of the statute. *Id.* at 3467. On December 10, 1982, the Nebraska court heard arguments on the question. All parties maintained that the language is severable. Letter from G. Roderic Anderson, Assistant Attorney General, State of Nebraska to the author (Dec. 15, 1982). The court agreed. *See State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983).

79. Justice Sandra Day O'Connor joined in the dissent.

80. *Sporhase*, 102 S.Ct. at 3467 (Rehnquist, J., dissenting), citing *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 281-83 (1981) (Rehnquist, J., concurring in judgment).

81. *Sporhase*, 102 S.Ct. at 3468.

82. *Id.*

83. *Id.* (emphasis his). Arguably, this distinction is somewhat nonsensical, because the use-right can be sold, exchanged, etc., and it is the use-right which is in question.

centuries.⁸⁴ If Justice Rehnquist was trying to resurrect such a nostalgic argument, however, he did not succeed in convincing the majority of the worth of that argument.

III. THE AFTERMATH

Although *Sporhase* represents the first definitive ruling in over seventy years on the constitutionality of water embargoes, it still raises as many questions as may have been answered. Already, some commentators have bemoaned the possible impact of this decision on the allocation of water in the western states.⁸⁵ These fears are not unjustifiable, but it would be imprudent not to assess carefully all the ramifications of *Sporhase*, and unwise not to design new legislation which serves the legitimate conservation rationale acceptable to the Court.

A. Current State Water Export Laws

Several western states regulate the interstate transfer of ground and surface waters.⁸⁶ *Sporhase* was concerned solely with groundwater, but an extension of the reasoning to surface water follows *a fortiori*. Indeed, the majority opinion at one point states "that water is an article of commerce."⁸⁷ Thus, the scope of the decision is all-encompassing.

State regulations fall into three categories.⁸⁸ Like Nebraska, several

84. Justice Rehnquist appears to have resurrected the late Justice Holmes' notion that until natural resources are "captured" and reduced to possession, they cannot be considered "articles of commerce." See *Pennsylvania v. West Virginia*, 262 U.S. 553, 600-03 (1923) (Holmes, J., dissenting) (natural gas is not an article of commerce until reduced to possession).

85. See, e.g., *The Impact of the Supreme Court Decision in Sporhase versus Nebraska: Hearings Before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works*, 97th Cong., 2d Sess. [hereinafter cited as *Sporhase Hearings*] 151-52 (statement of Interstate Conference on Water Problems); D. Bradley, *Western Water in Court* (Nov. 1982) (unpublished paper); Unsigned legal memorandum, law firm of Brown, Roedy, Bonzillian, and Gold, *Deficiencies in the Effort in Senator Wallop's Amendments to S. 1844 to Protect State Water Law* (Aug. 3, 1982). Ms. Bradley, a former Montana legislator, is currently Democratic National Committeewoman for Montana. The firm of Brown, Roedy, Bonzillian, and Gold represented the Kansas City Southern Railroad, the Sierra Club, and the National Farmers' Union in lobbying against federal coal slurry pipeline legislation in 1982. See *Great Falls Tribune*, Sept. 12, 1982, at 7-A, col. 4.

86. See *infra* text accompanying notes 88-92. Some eastern states and the District of Columbia do regulate the export of water. See White, *Reasonable State Regulation of the Interstate Transfer of Percolating Water*, 2 NAT. RES. LAW 383, 385 n. 11 (1969). This Comment will concentrate on the more controversial statutes in the western states. For additional discussion of the western states' export control laws, see Clyde, *State Prohibitions on the Interstate Exportation of Scarce Water Resources*, 53 U.COLO.L.REV. 529 (1982); Comment, *Coal Slurry: All Quiet on the Western Front?* 3 PUB.LAND.L.REV. 156 (1982) [hereinafter cited as Comment, *Coal Slurry*]; Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 U.TEX.L.REV. 1249 (1982); Comment, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause? or Will New Mexico's Embargo Law Hold Water?* 21 NAT. RES. J. 617 (1981).

87. *Sporhase*, 102 S.Ct. at 3463 (emphasis added).

88. See Clyde, *supra* note 86, at 530.

states condition export of water beyond their boundaries on a reciprocal basis.⁸⁹ Three states have banned the interstate export of some waters.⁹⁰ In addition, two states—Montana and Oklahoma—have specific statutory prohibitions against the use of in-state water in coal slurry pipelines.⁹¹ Finally, six states condition interstate transfers upon approval of their respective legislatures.⁹² Nearly all these states are in the region commonly referred to as the “Great Plains”—or, as it was more aptly described by nineteenth century government explorer Stephen M. Long, the “Great American Desert.”⁹³

Two of these statutes have already been challenged in courts. Montana’s conditional embargo⁹⁴ was the focus of a suit filed in federal district court in 1973, alleging that the law was in violation of commerce clause.⁹⁵ The parties contesting the statute later amended their complaint,

89. CAL. WATER CODE § 1230 (West 1971) (streams); IDAHO CODE § 42-408 (1977) (all waters); KAN. STAT. ANN. § 82a-726 (1977) (groundwater); NEB. REV. STAT. §§ 46-233.01 (surface waters), 46-613.01 (groundwater) (1978); NEV. REV. STAT. § 533-515 (1979) (permits for appropriation when point of diversion is outside state or lands to be irrigated are outside state); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1982) (waters for domestic use or irrigation within any state having common boundary with South Dakota); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962) (all waters). A Utah statute gives the state engineer authority to allow interstate diversions only after the engineer evaluates and publicizes “the advantages to the State of Utah and its citizens of exporting water.” UTAH CODE ANN. § 73-2-8 (1980).

90. COLO. REV. STAT. § 37-81-101 (Supp. 1982) (surface waters-agricultural uses in adjacent states allowed if land therein is owned by Colorado landowner, but only upon authorization of state legislature); COLO. REV. STAT. § 37-90-136 (1974) (groundwater); NEV. REV. STAT. § 533.520 (1979) (no permits for change of use or transfer of water and water rights “as to such waters as shall have been prior to March 23, 1951, and which are now diverted in Nevada and which were prior to March 23, 1951, and now are used for domestic or industrial purposes [outside Nevada]”); N.M. STAT. ANN. § 72-12-19 (1978) (groundwater). An Arizona statute gives state authorities power to grant permits for interstate diversions, but gives them “discretion” to “decline to issue a permit if the point of diversion is within the state but the place of beneficial use is in some other state.” ARIZ. REV. STAT. ANN. § 45-153B (Supp. 1982-1983).

91. MONT. CODE ANN. § 85-2-104 (1981); OKLA. STAT. ANN. tit. 27, § 7.6 (West Supp. 1981-82). Nevertheless, both states do allow construction of coal pipelines under other statutes. MONT. CODE ANN. §§ 69-13-101, -102, -201, -302, -303 (1981); OKLA. STAT. ANN. tit. 27, §§ 7.1-7.5 (West Supp. 1981-82). See Comment, *Coal Slurry*, *supra* note 86, at 158-59.

92. MONT. CODE ANN. § 85-1-121 (1981) (all waters); NEB. REV. STAT. § 46-233.01 (1978) (surface waters; reciprocity also required); S.D. COMP. LAWS § 46-5-20.1 (Supp. 1982) (applications for any waters in excess of 10,000 acre feet annually); OKLA. STAT. ANN. tit. 82, § 1085.2(2) (West Supp. 1981-82); OR. REV. STAT. § 537.810 (1981) (all waters); WYO. STAT. § 41-3-105 (1977) (all waters). A similar Texas statute, declared unconstitutional by the federal district court in *City of Altus v. Carr*, 255 F.Supp. 828 (W.D. Tex.), *aff’d per curiam*, 385 U.S. 35 (1966), was repealed by the Texas legislature in 1971. 1971 Tex. Gen. Laws 658.

93. K. TOOLE, *THE RAPE OF THE GREAT PLAINS: NORTHWEST AMERICA, CATTLE, AND COAL* 23 (1976).

94. MONT. CODE ANN. § 85-1-121 (1981).

95. *Intake Water Co. v. Yellowstone River Compact Comm’n*, No. 1184 (D. Mont. filed June, 1973). See Martz & Grazis, *Interstate Transfers of Water and Water Rights—The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33, 63 (1977).

alleging instead that the law had been impliedly repealed by adoption of an interstate water compact in 1951.⁹⁶ Presumably, this amendment to the pleadings removed the constitutional issue from the court's consideration.⁹⁷

A New Mexico statute forbidding the export of groundwater was successfully attacked on commerce clause grounds in *City of El Paso v. Reynolds*,⁹⁸ decided in January of 1983. The federal district court hearing the case drew heavily from the *Sporhase* decision to justify striking down the statute.⁹⁹ The importance of this recent case will be addressed later.¹⁰⁰ At this juncture, it is instructive to make some observations about the constitutionality of all the embargo statutes.

Clearly, all the laws must now survive scrutiny under the *Pike* test. Water resources will be treated as articles of commerce, despite the "greater ownership interest" a state has in those resources.¹⁰¹ That several western states claim ownership of in-state waters in their constitutions or in statutes¹⁰² is generally irrelevant to commerce clause analysis.¹⁰³ Thus, states with a reciprocity statute like Nebraska's face almost instant court challenges if the transferee state enacts some barrier to sharing water with the transferor state. Only if that state can supply evidence of a critical water shortage, along the lines suggested by the Court,¹⁰⁴ can its reciprocity provision survive the gauntlet of judicial review.

A similar analysis should hold true for states conditioning water exports by legislative approval, especially if *intrastate* transfers do not require such approval. The decision in *City of Altus* already mandates this outcome, and *Sporhase* resolves any doubts about the legal significance of the former decision. But a provision allowing legislative disapproval of

96. *Intake Water Co. v. Yellowstone River Compact Comm'n*, No. 1184 (D. Mont. filed June, 1973, amended complaint, Oct. 1980).

97. Ladd, *supra* note 47, at 309 n. 228.

98. Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983) (memorandum opinion).

99. *Id.* at 1, 25-36.

100. *See infra* text accompanying notes 113-122.

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

102. COLO. CONST. art. XVI, § 5; MONT. CONST. art. IX, § 3; N.M. CONST. art. XVI, § 2; WYO. CONST. art. VIII, § 1; ARIZ. REV. STAT. ANN. § 45-131 (Supp. 1980); CAL. WATER CODE § 102 (West 1971); IDAHO CODE § 42-101 (1977); NEB. REV. STAT. § 46-202 (Supp. 1980); NEV. REV. STAT. § 533.025 (1979); N.M. STAT. ANN. § 72-12-18 (1978); N.D. CENT. CODE § 61-01-01 (1960); OKLA. STAT. ANN. tit. 60, § 60 (West 1971); OR. REV. STAT. § 537.110 (1979); S.D. COMP. LAWS ANN. § 46-1-3 (1967); TEX. WATER CODE ANN. § 5.021 (Vernon 1972); UTAH WATER CODE ANN. § 73-1-1 (1980); WASH. REV. CODE ANN. § 90.03.010 (1962).

103. *Sporhase*, 102 S.Ct. at 3462. *See also* Martz & Grazis, *supra* note 95, at 49; Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 13, 22 (1964).

104. *See supra* text accompanying notes 69-72. Even the most vehement critics of the Court's decision would have to agree that reciprocity provisions like those in the Nebraska statute, broadly drafted, make little sense from the standpoint of beneficial use.

some or all interstate transfers or sales of water may be permissible even under *Sporhase* if it is narrowly tailored to the goal of conserving water for public health and safety.¹⁰⁵

The unconditional embargo invites almost immediate suspicion because of its facially discriminatory nature. Yet the majority in *Sporhase* recognized that a state could justify such a ban, assuming that the state could again produce evidence of a severe shortage.¹⁰⁶ It is this possibility that may have convinced the Court not to overrule expressly *Hudson County*. Nevertheless, contrary to Justice Holmes' judgment, the sovereign must now answer "for its will"¹⁰⁷ to the courts if the evidence of shortage is challenged.

B. "Public" versus "Economic" Health: *Sporhase* and the City of El Paso Decision

A crucial point raised in *Sporhase* was whether a state is limited to a showing of shortages detrimental to the health and safety of its citizens, or whether it can justify export restrictions by a conscious choice to allocate existing water resources rationally to preserve present and future economic activity. Western states in particular have long justified legitimate conservation goals through the concept of "beneficial use."¹⁰⁸ According to Dean Trelease, such use means not just one valuable to the appropriator, but "reasonable and economic. . . in view of other present and future demands upon the source of supply."¹⁰⁹ Could a state support either a conditional or absolute ban on the export of water if it could establish that, after *all* existing and future uses are considered, such export would be wasteful and

105. Cf. *Sporhase*, 102 S.Ct. at 3464 (Court is "reluctant to condemn as unreasonable measures taken by a state to conserve shortage.") Nevertheless, a provision for legislative approval could be challenged on due process and equal protection grounds if the provision was utilized arbitrarily to *disapprove* of one export proposal at one time, while used on another occasion to ratify a similar proposal. See McDaniel, *Commerce Clause and Water Availability Issues Concerning Coal Slurry Pipelines*, 12 NAT. RES. LAW 533, 542 (1979) (suggesting that different treatment of Energy Transportation Systems, Inc. and Texas Eastern slurry pipeline proposals by Wyoming legislature could be attacked as unreasonably arbitrary). Any legislative approval scheme must be designed in such a way as to keep politically-motivated discretion to an absolute minimum—arguably a Herculean task.

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

107. See *Hudson County*, 209 U.S. at 357.

108. The concept of beneficial use developed concurrently with the prior appropriation doctrine in the western states during the nineteenth century. Basically, the concept refers to the use of a quantity of water in a reasonable and prudent manner. It is a concept uniquely suited to the arid western states, where all water uses must be measured carefully against the demands of man and nature. For a brief history of the beneficial use requirement, see Hutchins, *Background and Modern Developments in State Water Rights Law*, in 1 WATERS AND WATER RIGHTS 85-87 (R.E. Clark ed. 1967).

109. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1, 16 (1957).

therefore "non-beneficial?"¹¹⁰

Arguably, this question has already been answered in the negative. The *Sporhase* majority did not include a state's *economic* health within the definition of public health and safety.¹¹¹ Legislation designed to protect particular economic interests would probably be considered unwarranted economic protectionism.¹¹² This point was hammered home in a more recent decision by a lower federal court. In *City of El Paso v. Reynolds*,¹¹³ the federal district court of New Mexico declared that state's ban on the interstate transfer of groundwater¹¹⁴ unconstitutional and enjoined enforcement of the statute against the city of El Paso, Texas, which has been seeking groundwater from beneath a tract in New Mexico to supply the city's municipal and business needs.¹¹⁵

In reaching this decision, the district court drew heavily upon the reasoning in *Sporhase*.¹¹⁶ Clearly, the statute was facially discriminatory, but the court was willing to consider evidence that it served a legitimate local purpose, was narrowly tailored to serve that purpose, and that no adequate non-discriminatory alternatives were available.¹¹⁷ Although the court was impressed with the intricacy of New Mexico's water laws and their relationship to conservation, it did not find this to be a sufficient justification for supporting an unconditional ban on groundwater export.¹¹⁸ Pointing to *Sporhase*, the court noted a distinction between public health and safety and economic protectionism, and concluded that "a state

110. Cf. Ladd, *supra* note 47, at 311 (suggesting that the "more appropriate approach" to export regulation would be "to prohibit those wasteful or inefficient uses of water whether they be in-state or out-of-state"). Arguably, this is the approach the Montana Legislature adopted when implementing a ban on the use of water in coal slurry pipelines. See Comment, *Coal Slurry*, *supra* note 86, at 158-61.

111. *Sporhase*, 102 S.Ct. 3464.

112. *Id.*, citing *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949). The Court has been remarkably consistent in striking down state laws consciously or unconsciously designed to further local economic interests. As Professor Tribe has noted, "[t]he central thrust of the Supreme Court's work in the area of federal—state relations has been to 'put the inertia on the other side—on the side of the centralizing forces of nationhood and union.'" L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 319 (1978).

113. No. 80-730 HB (D.N.M. Jan. 17, 1983) (memorandum opinion).

114. N.M. STAT. ANN. § 72-12-19 (1978) provides that "[n]o person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico. . . ."

115. *City of El Paso*, No. 80-730 HB, at 4-5, 36.

116. *Id.* at 1, 25-36. The court rejected a defense by the State of New Mexico that the Rio Grande Compact of 1938, 53 Stat. 785 (1939), established congressional approval for an embargo on the transfer of New Mexico groundwater. *City of El Paso*, No. 80-730 HB, at 10-24. The court found no evidence that the compact apportioned the surface waters of the Rio Grande River between New Mexico and Texas, or that the same compact controlled the use of groundwater hydrologically related to the river. *Id.*

117. *Id.* at 26, citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

118. *City of El Paso*, No. 80-730 HB, at 27-28.

may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside fulfilling human survival needs, *water is an economic resource*.¹¹⁹ As for the state's argument that a ban could be sustained on the grounds that future requirements would be shortchanged by a present transfer, the court responded that:

[t]his predicted shortage is based on what defendants [New Mexico and others] define as reasonable "public welfare" needs, including water requirements for municipalities, industry, irrigated agriculture, energy production, fish and wildlife, and recreation. *Aside from the amounts necessary for public health and safety, these are requirements for water related to economic activities*. In essence, defendants recognize no limits on the future uses for which New Mexico should be able to preserve groundwater. However, to extend the state's power to discriminate to all potential uses of water would remove groundwater from Commerce Clause restraints. *The policy of maximizing all "public welfare" uses of water in New Mexico, and the furthering of that policy by prohibiting interstate commerce in groundwater, is tantamount to economic protectionism*.¹²⁰

In short, New Mexico could impose the same transfer and use regulations on out-of-state users as it did on its own citizens.¹²¹ It could not, however, condition the export of groundwater merely because its irrigated agriculture economy might have to take second place to the growing municipal and industrial uses in Texas.¹²²

C. *The Montana Coal Slurry Statute: A Case Study in Dubious Constitutionality*

The rationale adopted by the court in *City of El Paso* is equally applicable to statutes banning the export of surface waters. A Montana statute, for example forbids the use of water in a coal slurry pipeline by removing it from the category of beneficial uses.¹²³ The statute avoids facial discrimination by denying use of water to an intrastate, as well as an interstate, pipeline.¹²⁴ But it is likely that, in light of *Sporhase* and *City of*

119. *Id.* at 28 (emphasis added).

120. *Id.* at 30 (emphasis added).

121. *Id.* at 31.

122. *Id.* at 32. The court concluded that "there is no present or imminent shortage of water in New Mexico for health and safety needs." *Id.*

123. MONT. CODE ANN. § 85-2-104 (1981) provides: "Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state. (2) The use of water for the slurry transport of coal is not a beneficial use of water."

124. *Id.* An earlier version of the statute provided that the "use of water for slurry to export coal

El Paso, the beneficial use route would still be seen as a circumvention, however innocent, of the dictates of the commerce clause.¹²⁵

A major reason for adopting the statute was a fear of adverse economic and environmental impacts on existing and reasonably foreseeable uses of water.¹²⁶ Considered in light of *Hudson County*, this justification is judicially acceptable. But, as noted previously, *Sporhase* and its first offspring carry the Supreme Court's fears of economic protectionism over to the realm of water, insofar as the available water constitutes an "economic resource." The absence of a complete inventory of water resources in the state¹²⁷ does suggest that the Montana legislature was not acting unreasonably in forbidding some uses, at least during a brief time for conducting such an inventory. There is some evidence now, however, that sufficient water may be available for slurry transport and other development uses.¹²⁸ At the very least, a permanent ban on the use of

from Montana is not a beneficial use" of water. 1974 Mont. Laws ch 192 (repealed 1979) (emphasis added). This version was clearly discriminatory and was criticized as such by some commentators. See Tarlock, *supra* note 47, at 539; McDaniel, *supra* note 105, at 454. Nevertheless, the avoidance of facial discrimination has been deemed artificial by at least one commentator. According to this argument, there is at least a discriminatory effect on interstate commerce from a ban on water use in slurry pipelines, because most pipelines are feasible only on an interstate scale. See McDaniel, *supra* note 105, at 544. Another writer has suggested that short intrastate lines might be possible, "and do generate benefits which [would be] foregone by the prohibiting state." Comment, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?*, 53 U. COLO. L. REV. 655, 672 (1982). Cf. C. BORIS & J. KRUTILLA, WATER RIGHTS AND ENERGY DEVELOPMENT IN THE YELLOWSTONE RIVER BASIN: AN INTEGRATED ANALYSIS 122 (1980) (discussing success of short-distance "Black Mesa" Slurry pipeline currently in operation between Arizona and Nevada).

How a court will resolve this problem is an open question. As noted earlier, one cannot predict with certainty where the United States Supreme Court will go everytime the *Pike* rationale is invoked to analyse questionable state legislation. See Hellerstein, *supra* note 57, at 71. But see discussion *infra* note 125.

125. Prior to the Supreme Court decision in *Sporhase*, this author was convinced that the Montana statute could survive a commerce clause challenge. Comment, *Coal Slurry*, *supra* note 86, at 162-71. This conclusion was based on a fusion of principles from *Hudson County* and modern commerce clause case law. This author speculated that water would be deemed an article of commerce, and that laws controlling the export of water would be scrutinized under the *Pike* test, but that a court would still give great weight to a state's interest in water resources for the physical health of its citizens and the viability of its existing and future economic base. In view of *Sporhase* and *City of El Paso*, however, this author is obviously no longer comfortable with his earlier assessment, and is therefore inclined to reject it. See also Clyde, *supra* note 86, at 552 (defining certain uses of water as non-beneficial still invites a commerce clause challenge). But there are still a few adherents to the "old-time religion." See Minutes of the Montana State House of Representatives Committee on Natural Resources, Hearings on House Bills 893, 894, and 908, Mar. 16, 1983 [hereinafter referred to as Hearings on Montana Water Marketing Legislation] (statements by attorneys Mike Meloy and Sharon Morrison that coal slurry law is still constitutional even under *Sporhase*).

126. See Comment, *Coal Slurry*, *supra* note 86, at 160-61.

127. See Ladd, *supra* note 47, at 267. Several preliminary studies on water resources in the Yellowstone River Basin conflict as to whether there is a sufficient supply for all conceivable uses in the area. C. BORIS & J. KRUTILLA, *supra* note 124, at 9.

128. See MONT. DEPT. OF NATURAL RESOURCES AND CONSERVATION, A WATER PROTECTION

water in slurry pipelines, without a sincere effort to document available water resources, is probably suspect.

Montana's policy on slurry pipelines may be contradictory in that it indirectly encourages consumption of coal for energy production *in* the state in thermal generating plants—a far more consumptive use of water than use in a slurry pipeline.¹²⁹ The recurrent talk of forbidding slurry transport in order to assist the state's railroad industry raises a hint of protectionist sentiment.¹³⁰ Finally, Montana's other anti-export statute, which *allows* interstate transfers of water with legislative approval,¹³¹ suggests that the state legislature cannot argue that it has carefully considered the ramifications of its stated conservation policy. A court confronted with a challenge to the slurry statute might have a hard time understanding why the state bans one type of interstate transfer of water, but not others.

Conceivably, in-state interests opposed to coal slurry could rely on the Yellowstone River Compact¹³² to forbid transfer of water from the southeastern Montana coal fields. Under the terms of Article X of the Compact, interstate transfers outside the river basin must have the

STRATEGY FOR MONTANA-MISSOURI RIVER BASIN 27 (Sept. 1982) [hereinafter cited as DNRC WATER PROTECTION STRATEGY STUDY]. Gary Fritz, administrator of the water resource division of the Department of Natural Resources and Conservation [DNRC] estimated in early 1983 that 300,000 acre-feet of water per year could be made available to the state from the Fort Peck Reservoir, a federal water storage project, for various industrial uses such as coal slurry. Minutes, Water Marketing Conference, Montana Environmental Quality Council (Jan. 11, 1983) (author's copy). DNRC is authorized by statute to purchase water from this reservoir. MONT. CODE ANN. § 85-1-205 (1981). See also C. BORIS & J. KRUTILLA, *supra* note 124, at 40 (discussion of federal government offer of Fort Peck water to Montana in 1976).

129. COMPTROLLER GENERAL OF THE UNITED STATES, COAL SLURRY PIPELINES: PROGRESS AND PROBLEMS FOR NEW ONES 7 (1979). Ted Doney, former director of DNRC and a current advocate of water marketing, estimates that the amount of water consumed per million tons of coal in a thermal steam-generating plant is approximately 3,500 acre feet. This compares with 370-750 acre-feet per million tons of coal for a modest coal slurry line. Doney argues that if slurry pipelines were used to move coal out of Montana instead of burning it here, water could be saved and the state would not have to contend with the environmental impacts from power plants. Minutes, "Water Issues Facing Montanans" (Montana State University Water Resources Research Center) (Dec. 3, 1982) (author's copy). For a discussion of the heated battle between agriculturalists (in union with environmentalists) and industrial interests over strip mining and siting of power plants in rural Montana, see K. TOOLE, *supra* note 93.

130. A recent Montana legislative hearing on three water-marketing proposals attracted representatives of railroad management and labor who, in a rare display of unity, argued vehemently against any plan to market coal in slurry pipelines. Both sides fear the competition would result in lost revenues and jobs. Hearings on Montana Water Marketing Legislation, *supra* note 125. That several legislators in attendance were more impressed with the industry's arguments than the legal and environmental issues was readily obvious from the speeches and commentary. *Id.*

131. MONT. CODE ANN. § 85-1-121 (1981) gives the legislature authority to permit interstate transfers.

132. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (1951).

unanimous consent of the signatory states to the Compact.¹³³ Presumably, Montana could exercise its veto power and prevent interbasin transfers of water in slurry lines—a move that would effectively prohibit this method of transporting coal to market, because most of the coal mined in Montana is located within the Yellowstone Basin.¹³⁴ The resulting “burden” on commerce would be defended by pointing to congressional ratification of the Compact. Congress can, by statute or compact, permit what would otherwise have been an unreasonable burden on commerce.¹³⁵

How defensible the Compact defense would prove is a matter of conjecture. In *Sporhase*, the Court emphasized that congressional consent to the unilateral imposition of burdens must be “expressly stated.”¹³⁶ Arguably, the language of and history behind the Yellowstone Compact reveal no such consent. Article X has already been attacked by some as an unreasonable burden,¹³⁷ and future litigation may yet render the Compact ineffective as a means of prohibiting interstate transfers of water. Congress may also moot the issue if it ever grants federal eminent domain power to coal slurry pipeline companies—a move some westerners see as the first step toward securing a federal hand on the water faucet.¹³⁸

The growing apprehension over *Sporhase* has already convinced some

133. *Id.* (Art. X). See also *Utah Int'l, Inc. v. Intake Water Co.*, 484 F. Supp. 36, 45 (D. Mont. 1979) (each signatory state can control every aspect of appropriations under the Compact); 38 OP. MONT. ATT'Y GEN. NO. 18, 1-4 (1979) (diversion of water under Article X requires consent of all states privy to the Compact). See generally Comment, *The Yellowstone River Compact: An Overview*, 3 PUB. LAND L. REV. 179 (1982).

134. The Fort Union Coal Formation, which covers roughly all of southern Saskatchewan, western North Dakota, eastern Montana and northeastern Wyoming, contains approximately 1.3 trillion tons of coal, of which between 40 and 50 billion tons are in the eastern Montana component. K. TOOLE, *supra* note 93, at 13-14. The Yellowstone River Basin covers a large portion of this component. See DNRC WATER PROTECTION STRATEGY STUDY, *supra* note 128, at 2-5.

135. See cases cited *supra* note 76.

136. *Sporhase*, 102 S.Ct. at 3466 (citations omitted).

137. *Intake Water Co. v. Yellowstone River Compact Comm'n*, No. 1184 (D. Mont. filed June 29, 1973). See also Clyde, *supra* note 86 at 543. Recently, the Yellowstone River Pipeline Company filed suit in federal district court in Wyoming challenging Montana laws governing interstate diversions of water, but naming all the signatory states to the Yellowstone Compact as defendants. The federal court transferred the suit to Montana District Court, contending that only Montana's laws are in dispute. *Great Falls Tribune*, Apr. 11, 1983, at 9-A, col. 3. No further action has been taken as of this writing.

138. For a brief history of proposed federal eminent domain legislation and the strong opposition to it, see Comment, *Coal Slurry*, *supra* note 86, at 171-76. In recent years, supporters of eminent domain legislation have been picking up more support for a federal role. As of this writing, a new proposal has just passed the House of Representatives Interior Committee. *Great Falls Tribune*, Apr. 7, 1983, at 12-B, col. 1. And, as in past years, a coalition of western politicians, agriculturalists, environmentalists, and railroad interests will come together to push for defeat of the legislation or, in the alternative, soften its impact with placatory amendments. See, e.g., S. REP. NO. 528, 97TH CONG., 2D SESS. 12-18, 31-32 (1982) (discussion of amendments to S. 1844, 97th Cong., 1st Sess. (1981) dealing with primacy of state water law).

Montanans to repeal both of the state's anti-export laws and enact a comprehensive water marketing scheme.¹³⁹ Interest in this new approach has been buoyed by the agreement between the State of South Dakota and Energy Transportation Systems, Inc. (ETSI), a slurry pipeline company, to market some 10,000 acre feet per year of water from the Oahe Reservoir in South Dakota for a slurry pipeline based in Wyoming.¹⁴⁰ Montana Governor Ted Schwinden, the State Department of Natural Resources and Conservation (DNRC), and some legislators and water development advocates argue that Montana must pursue a similar development policy if it is to avoid losing water to downstream states and their water use programs.¹⁴¹ The possibility of a slurry pipeline based in Montana has already been discussed.¹⁴²

Generally, water marketing proposals now under consideration envision carefully planned and coordinated transfers of water under a contract or similar means of conveyance.¹⁴³ Applicants for Montana water would have to pay the state for an export permit.¹⁴⁴ Revenue from sales of water would be devoted to a number of uses, including development of water projects, soil conservation, and general fund expenditures.¹⁴⁵ Legislative approval would be required for each sale agreement and permit,¹⁴⁶ with contracts or leases terminating after a specified period.¹⁴⁷

Those proposals have stirred up a hornets' nest of opposition among agricultural, railroad, and environmental interests.¹⁴⁸ Many opponents

139. See H.B. 893, 48th Leg., Regular Sess. (1983); H.B. 894, 48th Leg., Regular Sess. (1983); H.B. 908, 48th Leg., Regular Sess. (1983).

140. For a discussion of the ETSI proposal, see DNRC WATER PROTECTION STRATEGY STUDY, *supra* note 128, at 6-7.

141. Great Falls Tribune, Mar. 15, 1983, at 1-A, col. 1.

142. Great Falls Tribune, Apr. 3, 1983, at 11-A, cols. 2-3. Powder River Pipeline Company, the organization interested in construction of a Montana based slurry line, will probably not begin construction, if at all, until the late 1980's. Hearing on Montana Water Marketing Legislation, *supra* note 125 (statement of Leo Berry, director of DNRC). Montana Governor Ted Schwinden has predicted that the "major pressure seeking Montana water will not come from coal slurry pipelines but from rapidly growing urban areas in the [western United States]." Great Falls Tribune, Mar. 30, 1983, at 2-A, col. 1.

143. See H.B. 893, *supra* note 139, § 6, at 12-15; H.B. 893, *supra* note 139, § 7, at 13-16.

144. See, e.g., H.B. 893, *supra* note 139, §§ 4, 5, and 6.

145. *Id.*, § 7, at 15-16 (50 percent to water development projects, 25 percent to long range soil and water conservation programs, and 25 percent to state general fund).

146. H.B. 893, *supra* note 139, § 6(5), at 14 (forty years); H.B. 894, *supra* note 139, § 7(9), at 15.

147. *Id.*, (forty-five years).

148. See Hearings on Montana Water Marketing Legislation, *supra* note 125 (statements of Burlington Northern Railroad, various railway unions, Sierra Club, Northern Plains Resource Council, Montana Environmental Information Center, and several local agricultural preservation groups). But some organizations have come to support some type of water marketing proposal, especially if the revenues from an interstate sale are devoted to instate irrigation and storage projects. *Id.* (statements of Montana Stockgrowers' Association, Women Involved in Farm Economics, and

have argued that the impact of *Sporhase* is not well known, and that perhaps Montana's anti-export laws only need "shoring up."¹⁴⁹ If the interest of these groups is to prevent industrialization from interfering with the existing agricultural base, then the opposition is futile. *Sporhase* and its retinue do not envision protection of an economic activity as a legitimate conservation goal. Some opponents have recognized this fact and have suggested that the legislature amend its laws, but only after a thorough inventory of Montana's water resources.¹⁵⁰ Any upcoming water export proposals would hopefully await a completed inventory.¹⁵¹ Although this approach has been criticized by advocates of immediate water marketing,¹⁵² a rush into the latter policy is not without legal and political problems.¹⁵³

Montana Farmers' Union).

149. *Id.* An attorney and former legislator argued that *Sporhase* may not seriously affect Montana's ban on water use in slurry pipelines because that decision was (1) about groundwater only and not surface water; (2) concerned with reciprocity clauses and not beneficial use statutes; and (3) supportive of a conservation rationale for export control laws. While these arguments were received warmly by opponents of water marketing, they are undoubtedly the product of limited research. That the reasoning of *Sporhase* is easily extended to all waters and all means of regulating their interstate transfer seems unquestionable. And, the "conservation" rationale is not as broad as some have been led to believe. *See supra* text accompanying notes 86-122. Of course, the attorney's arguments may be the basis of a future defense of Montana's statute, should it ever be challenged in court.

150. *See* H.B. 908, 48th Legis., Regular Sess. (1983) (bringing slurry pipeline construction under the Major Facility Siting Act, MONT. CODE ANN. §§ 75-20-101 to -1205 (1981); requiring legislative approval for water permits of 10,000 acre-feet or more per year; requiring two-year study of impacts of water marketing). H.B. 908, if passed, would also repeal the existing law requiring legislative approval for interstate water exports. *Id.*, § 9, at 19. The ban on water use in slurry pipelines would continue. H.B. 893, *supra* note 139, if passed, would revise the procedures for legislative approval and prohibit the use of water in slurry pipelines only until July 1, 1987. *Id.*, §§ 3, 9. H.B. 894, *supra* note 139, contains similar revisions regarding legislative approval, but repeals the slurry statute outright. *Id.* §§ 3, 24.

151. H.B. 908 does provide a mechanism for legislative approval of large scale water marketing proposals (except for coal slurry pipelines). *Id.* § 8, at 16-19. Nevertheless, the provisions for a two-year study of impacts associated with such proposals suggests that the state legislature would not seriously consider major proposals until the study was completed. Other requirements in the bill providing for extensive review of proposals by state water resource agencies prior to legislative approval virtually assure a two-year *de facto* moratorium on water exports.

152. Hearings on Montana Water Marketing Legislation, *supra* note 125 (statements of Leo Berry, Director of DNRC; Ted Doney, former director of DNRC; Ken Kelly, lobbyist for the Montana Water Development Association; Mike Fitzgerald, director of the Montana International Trade Commission). Generally, proponents of "immediate" marketing want the state to follow South Dakota's example by authorizing reasonable projects now for both short-term and long-term benefits. In the short-run, the state could realize significant revenues for various in-state projects. In the long run, in addition to maximizing revenues, the state would establish a priority for consumptive water uses that would improve the chances for retaining waters within the state after any future congressional or court apportionment of waters in the Greater Missouri River Basin. Thus, the sooner Montana enters the water marketing business, the better. *See infra* discussion in note 157.

153. Opponents of H.B. 893 and 894 claim that the provisions in both bills for marketing water could run afoul of an equal protection challenge. According to this argument, both bills would allow the DNRC to obtain water use permits for subsequent sale or transfer to private companies after certain

What the western states do over the next few years is certainly an open question. What is not open is the fact that the states must change their anti-export laws. Despite the opinion of one water law expert that *Sporhase* itself takes "the first steps" toward "reinforc[ing] existing state water law structures,"¹⁵⁴ the steps are indeed small. The fear of "economic Balkanization," a frequently raised concern in commerce clause case law,¹⁵⁵ will apparently apply to water as to other commodities. This leaves the states in the position of seriously rethinking their laws. It also puts Congress in the position of deciding whether, in the interests of "states' rights," it will pass legislation sanctioning the export restriction schemes frowned upon by the Court,¹⁵⁶ or whether it will "one-up" the Court by federalizing the whole of water law. Either course of action is bound to be controversial.¹⁵⁷

environmental conditions were satisfied. Yet those same companies could not obtain permits outright, without the intermediate stage of DNRC approval, even though they would have to meet the same conditions. See Hearings on Montana Water Marketing Legislation, *supra* note 125 (statement of Rep. Dan Kemmis). Arguably, a challenge based on equal protection grounds might be meritorious. States will have to examine any proposed marketing procedures for unreasonable discrimination in the treatment of water customers.

154. Letter from Gary L. Widman, of counsel to Fulbright & Jaworski, Washington, D.C., to Sen. Malcolm Wallop, R.-Wyo. (Sept. 14, 1982) (discussing impact of *Sporhase*).

155. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (Commerce clause reflects a "central concern. . .to avoid the tendencies toward economic Balkanization. . .").

156. See S. REP. NO. 528, 97TH CONG., 2D SESS., 16-17 (1982) (discussion of proposed coal slurry legislation and amendments designed to protect state water laws in light of *Sporhase*). Arguably, many federal officials concerned with the *Sporhase* decision do not yet appreciate its potential impact on state water laws. Compare *Sporhase Hearings*, *supra* note 85, at 8-9 (statement of Carol Dinkins, Assistant Attorney General, Land and Natural Resources Div'n, Dep't of Justice) (arguing that most states could probably justify existing export control laws after *Sporhase*) with *id.* at 151-52 (statement of Interstate Conference on Water Problems) (arguing that Court's disdain for economic protectionism jeopardizes these same laws). See *supra* text accompanying notes 108-122.

157. Adding to the controversy in a potential donnybrook between upstream and downstream states along the Missouri River over water rights. The controversy began in late 1981 when the state of South Dakota entered into its now infamous water sale contract with Energy Transportation Systems, Inc., (ETSI). Several downstream states, especially Missouri, Iowa and Nebraska, perceive upper basin development as a threat to future water development projects in their region. Upstream states claim a preference for current consumptive uses under the terms of the Federal Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), and the O'Mahoney-Millikan Amendment to that Act, *id.* at § 1(b). Two lawsuits have already been filed by downstream states, urging a halt to the ETSI proposal and a reinterpretation of the Flood Control Act to favor water uses in the downstream basin. See *Missouri v. Andrews*, No. _____ (D. Neb., filed Aug. 1982); *Kansas City So. Ry. Co. v. Andrews*, No. _____ (D. Neb., filed Aug. 1982). See also DNRC WATER PROTECTION STRATEGY STUDY, *supra* note 128, at 6-8. Opponents of water marketing in Montana cite those lawsuits as a warning to the state not to provoke any further controversy until some kind of intrabasin allocation agreement can be reached. See Hearings on Montana Water Marketing Legislation, *supra* note 125 (Statement of Rep. Dan Kemmis).

The so-called High Plains Study, authorized by Congress to study methods of recharging the nearly depleted Ogalla Aquifer which underlies Oklahoma, Colorado, Kansas, Nebraska, New Mexico, and Texas, see 42 U.S.C. § 1962d-18 (1976), also poses a potential threat to water supplies in the upstream states, because the only long-term solution to water depletion in the area is importation of water from the Missouri River. See DNRC WATER PROTECTION STRATEGY STUDY, *supra* note 128, at

IV. CONCLUSION

To the careful observer, the result in *Sporhase* should not have been too surprising. That water would eventually be deemed an article of commerce has been a safe bet among water law aficionados for years.¹⁵⁸ What was uncertain was the limit the Court would put on a state's power to regulate the export of water. *Hudson County* remains good law insofar as a state has the right to constrain and even prohibit the interstate transfer of water in the event of a crisis affecting public health and safety. But *Sporhase* and the subsequent decision in *City of El Paso* clearly are a victory for economic interests that would desire "excess" water—that amount above the amount necessary for health and safety—for present and future development projects in the western United States. States may be able to make the best of this situation by marketing some water to out-of-state interests for a price, and using the proceeds to develop water conservation programs and projects in the state. Admittedly, new lawsuits may arise challenging the extent of changes in western water law, but the general course for the future does seem permanently fixed.

Courts cannot and will not necessarily speak the last words on regulation of interstate water transfers. They can at best define the parameters within which legislatures, industry, agriculturalists, environmentalists, and the general public can operate. And yet, in defining parameters, the courts may be solving nothing. There is something to be said for the judiciary's frequent pronouncements—echoed in *Sporhase*—that "our economic unit is the nation,"¹⁵⁹ and that unreasonable prohibitions on the export of water are not in the best interests of a nation of states. Nevertheless, the courts, by seemingly pursuing a relentless logic in commerce clause cases, may be doing the opposite or what they intend. Quite often—and the battle over water law is no exception—the commerce clause is invoked as a protective shield by one economic interest against another, without regard to the respective worth of each interest. In *City of El Paso*, the district court noted that the transfer of New Mexico groundwater would, in the long run, bring about the demise of that state's irrigated agriculture economy at the expense of expanding municipal and industrial uses in Texas.¹⁶⁰ Perhaps this outcome is right. But perhaps it is wrong, too, considering the realm of thought which questions where our current economic wisdom—in part protected by the Constitution—is leading us. The Supreme Court reminds us from time to

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158. See, e.g., Ladd, *supra* note 47, at 310.159. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 537 (1948).160. *City of El Paso v. Reynolds*, Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983) (memorandum opinion) at 32.

time that our Constitution "was founded upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."¹⁶¹ But if the "prosperity and salvation" are in reality short-lived, and for the benefit of a few at the expense of the many, we may be entitled to ask where the judiciary is taking us. Despite the Court's trite pronouncements, there is no advantage in sinking together.

It may well be true that, when the smoke of battle is cleared, water supplies in the American West will be plentiful, and that they can be shared by the states in such a way as to promote the elusive "public good."¹⁶² Events may prove, however, that our current wisdom respecting the commerce clause—especially with respect to a precious resource like water—may operate in such a twisted fashion as to lead our economic order down a path of destruction. This wisdom reflects an unshakeable faith in the foundations of the existing order, and a curious optimism regarding the ability of society to adapt easily to economic and technological change. Now is the time to decide whether or not our vision of the current order is myopic. If it is, then consideration of humanly achievable alternatives is warranted.¹⁶³ And these are general welfare matters best left to legislative, and not judicial, deliberations.

At the very least, caution should be the watchword as the states, the federal government, and the courts plan the West's water future. Water is the lifeblood of the region. The inhabitants of this arid country cannot afford to sacrifice long-term survival for short term (and short-sighted) gain. To do otherwise would be tantamount to repeating the error of Esau, who sold his priceless birthright as leader of a chosen people for a pottage of

161. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935).

162. *See, e.g., City of El Paso v. Reynolds*, Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983) at 34 (current groundwater supplies municipal and industrial uses in Texas). Of course, there is always the specter of federal intervention as a means of apportioning available water supplies—a possibility that could result in a "loss of some or possibly all control by the states over the allocation and use of their limited water resources." Clyde, *supra* note 96, at 558.

163. One such alternative is a more decentralized, self-sufficient, and "limited growth" economy, which would presumably make fewer and less costly demands on our resource base. *See E. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973). Another possibility, coming from a completely different philosophical direction, is the prospect of "privatizing" more of our publically owned or controlled resources (water included,) thereby "depoliticizing" resource use and exchange and, again, tempering the course of resource depletion. *See Hearings on Montana Water Marketing Legislation, supra* note 125 (Statement of Larry Dodge, former Libertarian Party U.S. Senate candidate in Montana). The author makes no ringing endorsement of either alternative. Nevertheless, the author is convinced that some critics of the existing socioeconomic order may be the equivalent of "prophets in the wilderness," although their messages have more secular overtones. The need for solutions to our current resource problems certainly should not lead us to reach for abstract, ideological pipedreams. But we should be equally alert to the possibility that the current socioeconomic wisdom also contains elements of undesirability—elements readily alterable by changes in certain personal attitudes and institutional arrangements.

lentsils.¹⁶⁴ Critical thinking and rational discourse are absolute necessities in the water export debate. In their recent book on the socioeconomic challenges facing the American West, Colorado Governor Richard Lamm and journalist Michael McCarthy have fairly described the task ahead:

As takers converge on western water,. . .the West approaches flashpoint. Looking to the future, it is left with one choice: with all of the force it can muster, it must fight for its water. . . .If it does [this], it may stave off doomsday. If not, just as it once sprang from dust, so will the West return to it.¹⁶⁵

ADDENDUM

On April 21, 1983, the Montana Legislature passed a bill repealing the current law banning water exports without legislative approval. The same legislation includes criteria under which the Department of Natural Resources and Conservation could issue a permit for either an in-state or out-of-state appropriation of more than 10,000 acre feet of water. The criteria require consideration of (1) impacts on the state's water supply; (2) economic benefits to the state; (3) feasibility of the project; (4) effects on property rights; and (5) possible environmental impacts. Legislative ratification of each water marketing proposal is also required by the bill. The new legislation also calls for a two-year study of the impacts of interstate water transfers. Nevertheless, the ban on use of water in coal slurry pipelines is retained. The new legislation will terminate in two years, at which time the legislature will presumably consider and adopt a more carefully designed marketing policy.¹⁶⁶

164. *Genesis* 25:29-34.

165. R. LAMM & M. MCCARTHY, *supra* note 1, at 206.

166. See H.B. 908, 48th Leg., Regular Sess. (1983) (Conference Comm. version); Great Falls Tribune, Apr. 21, 1983, at 1-B, col. 1 (discussion of water marketing legislation). As this comment was going to print, it was unclear whether the permit issuance criteria of H.B. 908 were sufficiently tailored to meet the dictates of the *Sporhase* decision.