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COMMERCE CLAUSE SCRUTINY OF MONTANA'S WATER EXPORT STATUTES

Connie L. Eaton

INTRODUCTION

In 1983 the Montana Legislature created a Select Committee on Water Marketing to study Montana's water statutes and policies. The results of that study led to the 1985 revision of Montana's water marketing statutes. The purpose of the new statutes is to "maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and beneficial future uses by Montanans."¹ This comment will focus on the water export provisions adopted by the 1985 Legislature.²

In each of four areas of water use³ the Legislature adopted the same policy for water export. The applicant for a proposed out-of-state use must meet all the criteria that an applicant for an in-state use must meet but must show these criteria to a higher degree of proof, clear and convincing evidence rather than substantial credible evidence. In addition, the proposing out-of-state user must show two additional criteria: the proposed use is not contrary to water conservation in Montana and is not detrimental to Montana citizens' welfare.

These statutes may be challenged as unconstitutional as infringing upon interstate commerce. Under the new Montana water export statutes the in-state user need not show that the proposed use either conserves water or protects the citizens' welfare. The entire burden of preserving or conserving Montana's water is borne by out-of-state users who will not

1. 1985 Mont. Laws 573.

2. The bill containing the water export provisions, House Bill 680, covered the entire scope of Montana's water policy. H.B. 680 contained nine important subparts:

- a. Revising state water policy to maximize Montana's interests in the interstate allocation of water;
- b. Amending criteria for water appropriation and changes in appropriation;
- c. Providing for a limited water leasing program;
- d. Exempting water reservations from the leasing program;
- e. Placing certain pipelines under the Montana Major Facility Siting Act;
- f. Providing for water reservations in the Missouri River Basin;
- g. Establishing a water resources data management system;
- h. Creating a permanent water policy committee;
- i. Repealing the ban on the use of water for coal slurry.

Id.

3. The four areas include: water appropriations, MONT. CODE ANN. § 85-2-302 to -311 (1985); water reservations § 85-2-316; water leasing § 85-2-141; and changes in water appropriations § 85-2-402.

receive water permits until they meet the two additional factors. Placing this extra burden on out-of-state users is potentially a violation of the commerce clause under *Sporhase v. Nebraska*.⁴

The United States Supreme Court in *Sporhase* established a three prong test to determine the constitutionality of statutes affecting the interstate transfer of water.⁵ In *El Paso v. Reynolds*,⁶ the United States District Court of New Mexico applied the *Sporhase* test to New Mexico's water export statutes. The portion of New Mexico's water export statutes which required proof of additional criteria by out-of-state users was found unconstitutional.⁷ The Montana statutes and New Mexico statutes are similar in that both apply additional criteria to out-of-state users. Thus, if challenged as New Mexico's water export statutes were in *El Paso*, Montana's statutes would probably be found unconstitutional.

This Comment has four parts. Part I examines the Montana statutes, Part II analyzes *Sporhase v. Nebraska*, Part III evaluates *El Paso v. Reynolds*, and Part IV shows how Montana's statutes might fail constitutional muster if challenged under the *El Paso* analysis.

I. THE MONTANA STATUTES

Prior to the 1985 statutes, Montana had no statutory water export policy; export was frowned upon by some and hallowed by others.⁸ The new statutes establish both a basic policy for water management in Montana and procedures for obtaining water export applications.

The statutes concerning water export cover four areas: water appropriations,⁹ water reservations,¹⁰ water leasing,¹¹ and changes in water appropriations.¹² To receive a permit for in-state uses, an applicant must meet certain criteria. To receive a permit for out-of-state uses in any of the four areas, applicants must meet these plus additional criteria and must carry a higher burden of proof for all the criteria.

4. 458 U.S. 941 (1982).

5. *Id.* at 954; see *infra* notes 72-73 and accompanying text.

6. 597 F. Supp. 694 (D.N.M. 1984).

7. *Id.* at 703-04.

8. Report of the Select Committee on Water Marketing, 49th Legislature pp. VII 24-31 (1985). Montana did have a statute preventing the export of water from the state without consent of the legislature. MONT. CODE ANN. § 85-1-121 (1983). This statute was repealed in 1985 in H.B. 680.

9. See *infra* notes 13-19 and accompanying text.

10. See *infra* notes 20-29 and accompanying text.

11. See *infra* notes 30-34 and accompanying text.

12. See *infra* notes 35-38 and accompanying text.

A. Water Appropriations¹³

The water appropriations statute states that no person may appropri-

13. MONT. CODE ANN. § 85-2-302:

Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department.

MONT. CODE ANN. § 85-2-311:

(1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

- (a) the criteria in subsection (1) are met;
- (b) the rights of a prior appropriator will not be adversely affected;
- (c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:
 - (i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;
 - (ii) the benefits to the applicant and the state;
 - (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;
 - (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;
 - (v) the effects on private property rights by any creation of or contribution to saline seep; and
 - (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3)(a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal

ate water in Montana except by receiving a permit¹⁴ from the Department of Natural Resources and Conservation.¹⁵

The Department shall issue a permit for an in-state use if the applicant proves by substantial credible evidence that unappropriated water is available from the source at the time and in the amount the applicant seeks, that a prior appropriator's rights won't be adversely affected, that the plans for water use are adequate, that the proposed use is a beneficial use, and that the proposed use will not unreasonably interfere with other planned uses for which a permit has been issued or water reserved. For the in-state user of less than 4,000 acre feet and less than 5.5 cubic feet per second, these factors are all that need to be proved.¹⁶

An applicant for out-of-state uses must prove the same criteria as an applicant for in-state uses but must prove the criteria by clear and convincing evidence.¹⁷ In addition, the out-of-state user must show, by clear and convincing evidence, two additional criteria: that the proposed use "is not contrary to water conservation in Montana"¹⁸ and "is not

and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

- (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;
 - (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
 - (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.
- (c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:
- (i) whether there are present or projected water shortages within the state of Montana;
 - (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;
 - (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
 - (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

14. MONT. CODE ANN. § 85-2-302. Receiving a water appropriation permit is important as Montana is an appropriation priority state; the first appropriation in time is the first in right. MONT. CODE ANN. § 85-2-401.

15. MONT. CODE ANN. § 85-1-102(3). "'Department' means the department of natural resources and conservation"

16. If the proposed appropriation is for 4,000 acre feet or more a year and 5.5 or more cubic feet per second, the burden of proof for all applications for both in-state uses, MONT. CODE ANN. § 85-2-311(2), and out-of-state uses, MONT. CODE ANN. § 85-2-311(3)(b)(i), increases to clear and convincing. The proposed user of this larger amount of water must also prove that the proposed appropriation is for a reasonable use. MONT. CODE ANN. § 85-2-311(2)(c).

17. MONT. CODE ANN. § 85-2-311(3)(b)(i).

18. MONT. CODE ANN. § 85-2-311(3)(b)(ii).

otherwise detrimental to the public welfare of the citizens of Montana.”¹⁹

B. *Water Reservations*²⁰

The water reservation statute allows a political body or agency, either state or federal, to reserve water for beneficial uses²¹ or to maintain stream flow to protect a certain water level or quality.²²

To obtain a water reservation for in-state or out-of-state purposes, a governmental entity must prove to the satisfaction of the board²³ that the

19. MONT. CODE ANN. § 85-2-311(3)(b)(iii). The department is to consider four factors in determining whether these two additional criteria have been sufficiently proved: whether Montana has present or projected water shortages, whether the water subject to the proposed appropriation could be transported intrastate to alleviate water shortages, the supply and sources of water available in the state where the appropriated water is proposed to be used, and the demands on the supply in the state of use. MONT. CODE ANN. § 85-2-311(3)(c).

20. MONT. CODE ANN. § 85-2-316:

(1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

* * *

(4)(a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

- (i) the purpose of the reservation;
- (ii) the need for the reservation;
- (iii) the amount of water necessary for the purpose of the reservation;
- (iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

- (i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
- (ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board shall consider the following factors:

- (i) whether there are present or projected water shortages within the state of Montana;
- (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;
- (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

21. MONT. CODE ANN. § 85-2-102(2)(a). Beneficial use means “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141.”

22. MONT. CODE ANN. § 85-2-316(1).

23. MONT. CODE ANN. § 85-1-102(1). “‘Board’ means the board of natural resources and

purpose of the reservation is a beneficial use or is to maintain stream flow, there is a need for the reservation, the amount of water sought is in fact necessary to meet the reservation purpose, and the reservation is in the public interest.²⁴

There is no definition of public interest in the portion of the statute applicable to in-state users.²⁵ The portion of the statute applicable to out-of-state users²⁶ however, states that public interest is proved by showing two additional criteria by clear and convincing evidence. These criteria, "not contrary to water conservation in Montana"²⁷ and "not otherwise detrimental to the public welfare of the citizens of Montana,"²⁸ are the same as the additional criteria which must be shown under the water appropriations statute.²⁹

C. *Water Leasing*³⁰

Any party desiring to lease water from the state for in-state or out-of-state use must apply to the Department.³¹ In determining whether a lease is desirable, the Department is to examine the environmental impact statement,³² whether the leasing program has sufficient water available for the lease,³³ and whether the criteria for issuances of an appropriation permit have been met.³⁴ Thus, the applicant desiring to use leased water

conservation. . . ."

24. MONT. CODE ANN. § 85-2-316(4).

25. MONT. CODE ANN. § 85-2-316(4)(a).

26. MONT. CODE ANN. § 85-2-316(4)(b).

27. MONT. CODE ANN. § 85-2-316(4)(b)(i).

28. MONT. CODE ANN. § 85-2-316(4)(b)(ii).

29. MONT. CODE ANN. § 85-2-311(3)(b)(ii) and (iii); *see supra* notes 18-19 and accompanying text.

30. MONT. CODE ANN. § 85-2-141:

(1) There is a water leasing program administered by the department on behalf of the state of Montana. Water leases issued under this program must be approved by the board.

* * *

(7) Upon application by any person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant.

Such a determination of desirability shall be made solely on the following considerations:

(a) the content of the environmental impact statement, if required;
(b) whether there is sufficient water available under the water leasing program; and
(c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

31. MONT. CODE ANN. § 85-2-141(7).

32. MONT. CODE ANN. § 85-2-141(7)(a). An EIS is required only if the lease would result in the consumption of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more of water as required by law. MONT. CODE ANN. § 85-2-141(6).

33. MONT. CODE ANN. § 85-2-141(7)(b) A maximum of 50,000 acre-feet can be leased under the program. MONT. CODE ANN. § 85-2-141(4).

34. MONT. CODE ANN. § 85-2-141(7)(c). For the discussion on appropriation requirements *see supra* notes 18-19 and accompanying text.

out-of-state must show the same basic requirements as the in-state user but, as in the appropriation statute, must also show the two additional criteria of conservation and public welfare.

D. *Water Appropriation Changes*³⁵

In-state and out-of-state appropriators seeking to change their appropriation rights must seek approval of the Department³⁶ or, if the change results in consumption of 4,000 or more acre-feet per year or 5.5 or more

35. MONT. CODE ANN. § 85-2-402.

(1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

36. MONT. CODE ANN. § 85-2-402(1).

cubic feet per second, approval of the legislature.³⁷

To obtain permission for a change of use the in-state user must prove by substantial credible evidence that the new use meets the same criteria as the original use: that it will not adversely affect any present or future uses, that the plans are adequate, and the use is beneficial.³⁸

The statute concerning changes in water appropriation for out-of-state use³⁹ is identical to the water appropriation statutes.⁴⁰ To change an appropriation for out-of-state use the applicants must meet a higher burden of proof and prove the two additional criteria of conservation and public welfare protection.

II. SPORHASE V. NEBRASKA

The Montana water export statutes may be challenged as a violation of the commerce clause under *Sporhase v. Nebraska*.⁴¹ In *Sporhase* the Supreme Court scrutinized Nebraska's water export statutes for possible burdens on interstate commerce under the commerce clause.⁴² The Court in *Sporhase* held that water was a subject of commerce and therefore water regulations must be examined for commerce clause violations.⁴³

Although the *Sporhase* decision was based on a ground water regulation,⁴⁴ the decision can be applied to all water sources. The Court reasoned that the federal interest in conserving and allocating water comes from its uses in agriculture and the interstate nature of water bodies.⁴⁵ The Court recognized "that over 80% of our water supplies is used for agricultural purposes. The agricultural markets . . . provide the archtypical example of commerce among the several states."⁴⁶ Further, the Court

37. MONT. CODE ANN. § 85-2-402(4).

38. MONT. CODE ANN. § 85-2-402(2). If the proposed use concerns an appropriation of 4,000 or more acre-feet per year and 5.5 or more cubic feet per second, the applicant must prove by substantial credible evidence that the new use meets the same criteria as the old use. If the proposed use results in a consumption of 4,000 or more acre feet per year and 5.5 or more cubic feet per second then the burden of proof for all the above criteria increases to clear and convincing, and the applicant must receive approval from the legislature.

39. MONT. CODE ANN. § 85-2-402(5).

40. MONT. CODE ANN. § 85-2-311. See *supra* notes 13-19 and accompanying text.

41. 458 U.S. 941 (1982).

42. U.S. Constitution, Art. I, § 8, cl. 3. For a general explanation of the commerce clause see, e.g., *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-53 (1981); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 766-70 (1945).

43. 458 U.S. 941.

44. *Id.* at 954-55. In Montana groundwater and surface water are not to be distinguished for appropriation purposes under Title 85, Chapter 2, Part 5 of Montana Code Annotated, The Montana Constitution, Art. IX § 3, and the Water Use Act § 85-2-102(14). *Department of State Lands v. Pettibone*, ___ Mont. ___, ___, 702 P.2d 948, 957 (1985).

45. 458 U.S. at 953.

46. *Id.*

recognized the "multistate character" of the Ogallala aquifer, which underlies lands in Colorado, Nebraska, Texas, New Mexico, Oklahoma, and Kansas.⁴⁷ Ground and surface waters are both used for agricultural irrigation and both share multistate characteristics. As both ground and surface waters share the characteristics upon which *Sporhase* is based, the decision should be extended to both water sources.

In *Sporhase* the appellants owned contiguous tracts of land in Colorado and Nebraska both of which were irrigated from a ground water well located in Nebraska. The well was registered but neither landowner applied for a permit to transfer ground water out of state as required by Nebraska statute.⁴⁸ The statute in question was Nebraska Revised Statutes section 46.613.01 (1978):

Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

The State of Nebraska brought suit to enjoin appellants from further transfer of water across the state line without a permit. As Colorado did not allow water exports to Nebraska, the appellant, *Sporhase*, could never

47. *Id.*

48. The statute evaluated in *Sporhase* has since been amended to the following:

The Legislature recognizes and declares that the maintenance of an adequate source of ground water within this state is essential to the social stability of the state and the health, safety, and welfare of its citizens and that reasonable restrictions on the transportation of ground water from this state are a proper exercise of the police powers of the state. The need for such restrictions, which protect the health, safety, and general welfare of the citizens of this state, is hereby declared a matter of legislative determination.

Any person, firm, city, village, municipal corporation, or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in another state shall apply to the Department of Water Resources for a permit to do so. In determining whether to grant such permit, the Director of Water Resources shall consider:

- 1) Whether the proposed use is a beneficial use of ground water;
- 2) The availability to the applicant of alternative sources of surface or ground water;
- 3) Any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal; and
- 4) Any other factors consistent with the purposes of this section that the director deems relevant to protect the interests of the state and its citizens.

NEB. REV. STAT. § 46.613.01 (1984).

receive a permit under this statute. The trial court granted the injunction based upon appellant's defense that the statute placed an unconstitutional burden on interstate commerce. The Nebraska Supreme Court affirmed.

In *Sporhase*, the Court addressed three questions, only two of which are important here: "(1) whether ground water is an article of commerce and therefore subject to congressional regulation; [and] (2) whether the Nebraska restriction on the interstate transfer of groundwater imposes an impermissible burden on commerce. . . ." ⁴⁹

A. *Is Water an Article of Commerce?*

In addressing the first question of whether water is an article of commerce, the Court compared the two main cases relied upon by the parties.

Nebraska relied on *Hudson County Water Co. v. McCarter*,⁵⁰ in which the Supreme Court held constitutional a New Jersey statute prohibiting the interstate transfer of surface water located in the state.⁵¹ The *Hudson County* case was primarily a just compensation case although a commerce claim was also raised. The Court refused to base its just compensation decision on the idea of state ownership of water.⁵² Instead, the statute was found to be a reasonable state regulation not requiring compensation.⁵³ As to the commerce clause claim, the Court in *Hudson County* relied on the public ownership theory of *Geer v. Connecticut*,⁵⁴ to hold that a person cannot make an article a subject of commerce by his capture of the article and subsequent desire to sell it.⁵⁵

Appellant, *Sporhase*, relied upon the Court's summary affirmance in *Altus v. Carr* in which the lower court held unconstitutional a Texas statute prohibiting interstate transfer of water.⁵⁶ This decision was based upon a unique Texas statute which expressly made water an article of commerce.⁵⁷ In *Sporhase* the Court stated that its affirmance of the lower court's holding in *Altus* did not necessarily adopt the lower court's reasoning but merely indicated agreement with the result.⁵⁸ The *Sporhase*

49. 458 U.S. at 943. The third question was "whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible." *Id.* The Court recognized that Congress had not consented to states placing unreasonable burdens on commerce through ground water regulations. *Id.* at 960.

50. 209 U.S. 349 (1908).

51. *Id.*

52. *Id.* at 355.

53. *Id.* at 356.

54. 161 U.S. 519 (1896).

55. 209 U.S. at 357.

56. 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966).

57. 255 F. Supp. at 839-40.

58. 458 U.S. at 949.

Court found that the *Altus* decision could not be applied to find the Nebraska statute unconstitutional because Nebraska does not have a statute making water an article of commerce.⁵⁹

The *Sporhase* Court also refused to apply the *Hudson County* decision as it was based on the *Geer* theory of public ownership, a theory the Court overruled.⁶⁰ In overruling *Geer*, the Court said the public ownership theory is "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."⁶¹

In determining if water is an article of commerce, the *Sporhase* Court then addressed Nebraska's argument that Nebraska water is distinguishable from other natural resources.

Nebraska argued that water is a distinguishable natural resource as the surface owner who captures water enjoys a lesser ownership interest in the water than does a captor of birds in Connecticut,⁶² minnows in Oklahoma,⁶³ or water in Texas.⁶⁴ This is so, argued Nebraska, because in the three cases listed, the state allowed interstate transfer of the natural resource once it was captured whereas Nebraska does not allow such a transfer. The Court rejected this argument saying that, although this greater ownership may not be irrelevant to the analysis, it does not completely remove Nebraska's water from commerce clause scrutiny.⁶⁵

Nebraska also argued that water is a distinguishable natural resource as "water, unlike other natural resources, is essential for human survival."⁶⁶ The Court's response to this argument is the heart of the decision that water is an article of commerce:

Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multi-state character of the Ogallala aquifer—underlying appellant's tract of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas—confirms the view that

59. *Id.* 949-50.

60. *Id.* at 951.

61. *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) quoted in *Sporhase* at 458 U.S. at 951. See also *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 384-87 (1978).

62. *Geer*, 161 U.S. 519.

63. *Hughes*, 441 U.S. 322.

64. *Altus*, 255 F. Supp. 828.

65. 458 U.S. at 951. The Court did in fact recognize this greater interest in expressing reluctance to condemn the state's interest in conserving and preserving its water. *Id.* at 956-57.

66. *Id.* at 952.

there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource.⁶⁷

The *Sporhase* Court found that water is an article of commerce and therefore can be regulated by Congress.⁶⁸ However, simply because Congress has regulatory power does not foreclose a state's regulation of its water resources both within the state or in interstate commerce.⁶⁹ The Court said the states' interest in conserving and preserving scarce water resources are not irrelevant in commerce clause inquiry.⁷⁰ Indeed, the Court stated these factors were to be considered in determining whether state water regulations were reasonable or were unreasonable burdens on interstate commerce.⁷¹

B. *Is Water Regulation A Burden on Interstate Commerce?*

The Court, once it had determined that water regulation was subject to commerce clause scrutiny, stated the test for such scrutiny and applied that test to Nebraska's water export statute. The test to determine the validity of state statutes affecting interstate commerce is:

Where 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 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 activities.⁷²

This test is commonly stated in three elements: (1) whether the statute is based on a legitimate local purpose; (2) whether the statute operates evenhandedly on both in-state and out-of-state residents, and (3) whether the statute is narrowly tailored to meet the legitimate local purpose.⁷³

The Court first looked to see upon what "legitimate local public interest" the Nebraska statute was based. The only purpose Nebraska advanced was "to conserve and preserve diminishing sources of ground water."⁷⁴ The Court found this purpose was legitimately based on regulations and special rules which required water meters, limited water

67. *Id.* at 953 (footnotes omitted).

68. *Id.* at 954.

69. *Id.*

70. *Id.* at 953.

71. *Id.*

72. *Id.* at 954 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

73. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

74. *Sporhase*, 458 U.S. 954.

use, and defined the area in question as suffering from a water shortage.⁷⁵

Next, the Court examined whether the statute was narrowly tailored to advance the conservation and preservation purpose. The Court initially focused its attention on the first three requirements of Nebraska's statute, "that the withdrawal of ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare."⁷⁶ The Court did not expressly apply the evenhanded prong of commerce clause analyses. However, the Court noted that commerce clause concerns were raised in that the statutory requirements applied only to interstate transfers but not intrastate transfers.⁷⁷ This differing application of the laws is exactly what the evenhanded requirement seeks to address. The Court determined that because the statute was based on legitimate local purposes, the special treatment was justified.⁷⁸ The Court stated that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."⁷⁹

Furthermore, the Court expressed reluctance to condemn state regulations taken to conserve and preserve scarce water resources "in times of severe shortage."⁸⁰ This reluctance stemmed from several sources: the state's police power to protect its citizens' health;⁸¹ the case law allowing states to restrict the use of water within its borders;⁸² the limited public ownership of the water;⁸³ and that the water was available for use partly because of Nebraska's conservation efforts and, therefore, "had some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage."⁸⁴

Finally, the Court examined the reciprocity requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."⁸⁵ This requirement was examined in light of the third prong of

75. *Id.* at 955.

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

77. 458 U.S. at 955.

78. *Id.*

79. *Id.* at 955-56.

80. *Id.* at 956.

81. The Court specifically stated the police power was to be used to protect citizens' health not the health of the state's economy. *Id.*

82. The Court referred especially to case law regarding equitable apportionment and interstate compacts. *Id.*

83. The Court stated that this public ownership could not justify a total denial of federal regulatory power but it could support a limited preference for the state's citizens. *Id.*

84. *Id.* at 957.

85. NEB. REV. STAT. § 46-613.01 (1978). This reciprocal requirement has been removed. *See*

the commerce clause test, whether the statute was narrowly tailored to meet the legitimate local purpose. The Court found this requirement to be an explicit barrier to interstate commerce and therefore subject to the strictest scrutiny reserved for facially discriminatory statutes.⁸⁶ Because of this strict scrutiny, Nebraska had to do more than merely show the requirement advanced a local purpose.⁸⁷ Nebraska had to show the reciprocity provision was narrowly tailored to fit the conservation and preservation criteria.⁸⁸

The reciprocity provision failed strict scrutiny as it was not narrowly tailored. Under Nebraska's statute, even though water may be abundant in one area, and even though the water could be put to its most beneficial use in another state, the water could not be transported interstate.⁸⁹ The Court found that the reciprocity provisions were not narrowly tailored to serve the conservation and preservation purposes.⁹⁰ These provisions were found unconstitutional as a violation of the commerce clause.

C. Summary

In summary, the *Sporhase* case specified a three element test to apply to state regulation of water use. The regulation had to be based on a legitimate local interest, evenhandedly applied to in-state and out-of-state residents, and narrowly tailored to meet that interest.⁹¹ The next section discusses how this test was applied to New Mexico's water export statute, which is nearly identical to Montana's water export statute.

III. EL PASO V. REYNOLDS

In *El Paso v. Reynolds*,⁹² the United States District Court of New Mexico found unconstitutional those sections of New Mexico's water export statutes⁹³ requiring proof of different criteria in applications for water used in-state and out-of-state.⁹⁴ These statutes required the state

supra note 48.

86. *Id.* at 958.

87. *Id.* at 957.

88. *Id.* (citing *Hughes*, 441 U.S. at 336).

89. *Id.*

90. *Id.*

91. *Id.* at 954.

92. 597 F. Supp. 694 (D.N.M. 1984).

93. N.M. STAT. ANN. §§ 72-12-3E, 72-12B-1C, 72-12B-10 (1978).

94. In the original suit, 563 F. Supp. 379 (D.N.M. 1983), El Paso received declaratory relief enjoining officials from enforcing the New Mexico statute, embargoing out-of-state use of ground water, N.M. STAT. ANN. § 72-12-19 (1978). Thereafter, the 1983 New Mexico Legislature repealed the embargo statute and enacted provisions dealing with water export. The original suit was appealed to the Tenth Circuit Court of Appeals following these amendments. The Tenth Circuit vacated judgment and remanded the entire matter. El Paso then filed this suit. 597 F. Supp. at 696-697.

engineer to find that a proposed appropriation "is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state" before granting a permit for a new appropriation for use of in-state ground water from a declared basin.⁹⁵ No similar evaluation was needed for other in-state applications such as new appropriations from undeclared basins, new surface water appropriations, transfers of water rights, or supplemental and domestic wells.⁹⁶

However, the state engineer, before granting *any* export, was to find that the export "is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico."⁹⁷ In determining whether these criteria were met and whether the export application should be granted, the New Mexico state engineer was to consider six factors.⁹⁸

In *El Paso* the court applied the *Sporhase* three element analysis to the conservation and public welfare criteria and to the six factors.⁹⁹

95. N.M. STAT. ANN. § 72-12-3E (1978).

96. See N.M. STAT. ANN. §§ 72-12-1 & -7 (1978).

97. N.M. STAT. ANN. § 72-12B-1C (1978). These two criteria apply to all interstate uses of public waters in New Mexico: new appropriators from both declared and undeclared basins, new surface water appropriations, transfers of water rights, and supplemental and domestic wells.

98. N.M. STAT. ANN. § 72-12B-1D (1978). The six factors are:

- 1) the supply of water available to the state of New Mexico;
- 2) water demands of the state of New Mexico;
- 3) whether there are water shortages within the state of New Mexico;
- 4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the state of New Mexico;
- 5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- 6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

99. 597 F. Supp. at 698. The City of El Paso raised three points in arguing that the *Sporhase* test was not met. The city's first argument was that "conservation within the state" prohibits interstate use of water as water transported out-of-state is not conserved or kept in that state. The court said that the statute cannot be interpreted so literally especially as the prefatory section to the statute states that "under appropriate conditions the out-of-state transportation and use of . . . waters is not in conflict with . . . the conservation of its waters." [Note the similarity to Mont. Code Ann. § 85-2-311 *supra* note 13.] The court held that "within the state" merely defined the water to be conserved and did not prohibit use of water outside the state.

The city next argued that "contrary to conservation of water within the state [or] detrimental to the public welfare of the state" was meaningless for in-state users as use of water in-state would automatically aid the public welfare and conserve water in-state. Therefore, El Paso argued, the statute is only superficially evenhanded. The court responded to this argument by citing New Mexico case law denying water use in-state as such use was contrary to the public interest. The court held that as public interest had substance in other cases, it has meaning in this statute. Conservation and public welfare therefore are not meaningless for in-state uses. The court held that the statute, at least in regard to new appropriations, appears to apply the conservation and public criteria evenhandedly. *Id.*

Third, the city argued that "the public welfare of the citizens of New Mexico" is intrinsically discriminatory. The city relied on the argument that in *Sporhase* there was no declaration of *whose* public welfare was to be protected by application of the phrase "is not otherwise detrimental to public

A. *Legitimate Local Purpose*

The first element of the *Sporhase* analysis allows a state to exercise a limited preference for its citizens if the preference is based upon a legitimate local purpose.¹⁰⁰ The *El Paso* court analyzed whether the conservation and public welfare requirements were based upon such a purpose and whether evaluation of the six factors were a legitimate means of obtaining the purpose.

1. *The Conservation and Public Welfare Criteria*

In *El Paso*, the United States District Court defined public welfare as "a broad term including health and safety, recreational, aesthetic, environmental and economic interests."¹⁰¹ Relying on the *Sporhase* Court indication that a state cannot exercise a preference for citizens merely on an economic basis, the court in *El Paso* recognized that public welfare must be more than an economic protection to be a legitimate purpose for local regulation.¹⁰² The court acknowledged that each aspect of public welfare is based on economics, "except to the extent it refers to bare human survival."¹⁰³ The court urged that a state must be able to exercise some preference for its citizens before "human survival" is at stake. "[I]t would be unreasonable to require a state to wait until it is in the midst of a dire shortage before it can prefer its own citizens' use of the available water over out-of-state usage."¹⁰⁴

In *El Paso* the court also recognized the mere anticipation of future water shortages is not a basis for limiting exports.¹⁰⁵ The court proposed a list of factors for determining whether there was sufficient governmental interest to establish a preference for its own citizens: how soon the shortage was expected, the certainty a shortage would occur, its predicted severity, and whether the shortage could be prevented through other means.¹⁰⁶ Other factors in determining whether a state can exercise a preference for its citizens was how the state claimed public ownership of the water and whether the water was available in part because of the state's conservation

welfare." The court disagreed stating that the Nebraska statute in *Sporhase* implied the Nebraska citizens' public welfare. If there was no such implication, continued the court, the *Sporhase* Court's determination that, under certain circumstances, a state can give a limited preference would have been necessary to its own citizens. *Id.* at 699-700.

100. See *supra* note 73 and accompanying text.

101. 597 F. Supp. at 700.

102. 458 U.S. at 956.

103. 597 F. Supp. at 700.

104. *Id.* at 701.

105. *Id.*

106. *Id.*

efforts.¹⁰⁷

The court concluded that a state should be able to exercise a preference for its citizens to conserve a scarce water resource to protect the public welfare.¹⁰⁸ The court held that public welfare and conservation are legitimate local purposes which the state may advance by water export regulations.¹⁰⁹

2. *The Six Factors*

New Mexico's export statute sets out six factors which the state engineer is to consider in acting on a water export application: (1) the supply of water available in New Mexico; (2) the demands upon that supply; (3) whether New Mexico is suffering from water shortages; (4) whether the water subject to the export application could be transported to alleviate in-state water shortage; (5) the supply and sources of water in the state where the exported water is to be used; and (6) the demands on the supply of water in the state where the water is to be used.¹¹⁰

In *El Paso* the court concluded that merely considering these factors in evaluating an application for water export does not unconstitutionally burden interstate commerce.¹¹¹ The court rationalized that for a state to constitutionally exercise a preference for its citizens it must first determine the benefits and burdens of the export.¹¹² The first four factors allow the state engineer to determine whether there is a shortage of water in the state and whether in-state transfers could alleviate that shortage.¹¹³ The fifth and sixth factors allow examination of the need of the water in the state to which the water is exported.¹¹⁴ The Court held that evaluation of the six factors was based on the legitimate local purpose of determining whether the export was in the state's best interest.¹¹⁵

107. *Id.* (citing *Sporhase*, 458 U.S. at 956-57).

108. 597 F. Supp. at 702.

109. *Id.* at 701.

110. N.M. STAT. ANN. § 72-12B-1D.

111. 597 F. Supp. at 703. These factors, said the court, were a means of determining what burdens would be placed upon both states if a water export application was granted:

If the State Engineer is to constitutionally exercise a preference for the citizens of New Mexico in accordance with the precepts enunciated in *Sporhase* he must first determine if there is a shortage within the State. . . .

The local benefits cannot be weighed against the burdens on commerce without knowledge of the export applicant's need for the water relative to that of prospective in-state users.

112. *Id.*

113. *Id.* at 702.

114. *Id.* at 703.

115. *Id.*

B. *Evenhanded*

The second element of the *Sporhase* test requires that the statute be applied evenhandedly, to in-state and out-of-state users.¹¹⁶

The conservation and public welfare criteria of New Mexico's statutes apply to only one type of in-state application: for a new appropriation of ground water from a declared basin.¹¹⁷ On the other hand the same conservation and public welfare criteria apply to *all* types of export applications.¹¹⁸ The court held this difference in treatment unconstitutional as discriminatory on its face against interstate commerce.¹¹⁹ Thus, applying the criteria to out-of-state users and not in-state users violated the second element of the *Sporhase* test.

C. *Narrowly Tailored*

The third and final element of the *Sporhase* test is that the statute must be narrowly tailored to meet the legitimate local purpose.¹²⁰ The court in *El Paso* found that the statute did serve a legitimate purpose of "regulat[ing] water usage to promote the conservation of water and the public welfare of its citizens. . . ."¹²¹ However, the court indicated that the statute could have been more narrowly tailored by applying less discriminatory alternatives which required in-state users to also practice conservation.¹²² The court said that the state may not require interstate commerce to shoulder the entire burden of furthering those interests.¹²³ The state cannot just regulate out-of-state applicants; it must regulate *all* applicants or the regulation will unconstitutionally burden interstate commerce.

The court held that the statutes unconstitutionally burdened interstate commerce as New Mexico did not prove the statute was narrowly tailored to obtain the legitimate local purpose of conservation and public welfare protection.¹²⁴

116. See *supra* note 73 and accompanying text.

117. 597 F. Supp. at 703; N.M. STAT. ANN. § 72-12-36 (1978).

118. 597 F. Supp. at 703; N.M. STAT. ANN. § 72-12B-1C (1978). The statute applies to interstate applications for new appropriations from declared and undeclared basins, new surface water appropriations, transfers of water rights, and supplemental and domestic wells. The court held that El Paso had no standing to attack the conservation and public welfare criteria as applied to appropriations of surface water or ground water of undeclared basins as it had held no applications for water from these sources.

119. 597 F. Supp. at 704.

120. See *supra* note 73 and accompanying text.

121. 597 F. Supp. at 704.

122. *Id.*

123. *Id.*

124. *Id.* The court further held that a five-year moratorium on new ground water permits in the Mesilla Bolson to allow time for hydrological studies was unconstitutional as the purpose behind the moratorium was economic protection. The court found a protectionist purpose as there were other

IV. ANALYSIS OF MONTANA'S STATUTES

The Montana water export statutes would probably fail constitutional muster if attacked as New Mexico's water export statutes were attacked in *El Paso*.¹²⁵ Although *El Paso* is not binding precedent, it does address statutes nearly identical to Montana's, and it is based on sound legal analysis. The contents of the statutes themselves could be upheld, based on a legitimate governmental interest. However, the application of two additional criteria to export uses, but not to in-state uses, could be considered discriminatorily uneven and therefore unconstitutional.

The two additional criteria for water export applicants are that the water use "is not contrary to water conservation in Montana" and "is not otherwise detrimental to the public welfare of the citizens of Montana." These factors are exactly the same factors examined in *El Paso*. The United States District Court of New Mexico held that public welfare and conservation were legitimate governmental interests upon which a state could base a limited in-state preference.¹²⁶ Under *Sporhase*, if such legitimately based regulations are applied in a manner which does not unduly burden interstate commerce, the regulations are constitutionally permissible.¹²⁷ However, Montana's application of these criteria to export uses only may be considered an undue burden on interstate commerce.

Where a state imposes severe restrictions on in-state use, restricting water export is not discriminatory against interstate commerce.¹²⁸ In fact, in such circumstances, "[a]n exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation."¹²⁹ For example, the *Sporhase* Court held that Nebraska's statute as to conservation and preservation were applied evenhandedly, even though the statutes only applied to export application because similar restrictions applied in-state.¹³⁰ The Court found that Nebraska's export restrictions "may well be no more strict in application than the limitations upon intrastate transfers."¹³¹

In contrast, the New Mexico statutes in *El Paso* imposed conservation

basins in the state with unknown hydrological characteristics but no moratorium was placed on them.

125. The Montana Legislature was aware of the *El Paso* decision when they adopted the water export statutes. The lower court decision of *El Paso* was cited as authority for adopting the statutes in the Report of the Select Committee on Water Marketing at pages 5-10. It also appears that the committee was aware of the possible consequences of the later *El Paso* decision. Conversation with John Thorsen, legal advisor for the committee, April 11, 1986.

126. See *supra* notes 101-109 and accompanying text.

127. 458 U.S. at 954-57.

128. *Id.* at 956.

129. *Id.*

130. *Id.*

131. *Id.*

and preservation restrictions only on out-of-state uses. As there were no similar reservations on in-state uses the court found the statutes unconstitutional.¹³² The court found the statute, in fact, discriminated on its face and therefore was subject to stricter scrutiny.¹³³ The court held that the conservation and preservation criteria failed to meet strict scrutiny as they were not narrowly tailored.¹³⁴ "The intrastate transfer may also be detrimental to the public welfare yet the State Engineer is powerless to deny it on that ground."¹³⁵ The court required that both in-state and out-of-state users bear the burden of conserving the water and protecting the public welfare.

Like New Mexico's statute, Montana's statutes require application of the conservation and preservation criteria only to out-of-state applications. There is no similar strict regulation for in-state uses. This fact may make Montana's statutes facially discriminatory. Montana's statutes, therefore, would be subject to the strictest scrutiny test.

Montana's statutes may fail strict scrutiny as they are neither narrowly tailored nor evenhandedly applied. In-state uses may be more detrimental to Montana's conservation and public welfare efforts than out-of-state uses, but the statutes have no conservation or public welfare requirements for in-state users, thus the statutes are not narrowly tailored. In addition, Montana's statute places the burden of furthering the state's interest in water conservation solely on interstate users, and thus are not evenhandedly applied. This lack of narrow tailoring and inequitable application of the burden appear to violate the commerce clause making Montana's water export statutes unconstitutional.

Montana's statutes would probably meet the public interest element of the *Sporhase* test. Montana is an arid state and therefore has a legitimate interest in conservation and preservation of waters. However, the export statutes would likely fail the evenhanded and narrowly tailored elements of the *Sporhase* test as the conservation and preservation criteria apply only to out-of-state uses. Under *Sporhase*, Montana's water export statutes may be found unconstitutional as violating the commerce clause.

132. 597 F. Supp. at 703-04, *see supra* notes 116-119 and accompanying text.

133. 597 F. Supp. at 703-04, *see supra* notes 86-88 and accompanying text.

134. 597 F. Supp. at 704.

135. *Id.*