COMMERCE CLAUSE RESTRICTIONS ON STATE EXPORT BANS OF GROUND WATERS

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COMMERCE CLAUSE RESTRICTIONS ON STATE EXPORT BANS OF GROUND WATER

ABSTRACT: Recent U.S Supreme Court and federal district court decisions have found statutes prohibiting the export of ground water across state boundaries to be an impermissable burden on the Commerce Clause of the U.S. Constitution. These judicial decrees will have far-reaching implications on the future of the federal-state role in the allocation of interstate ground waters. Interstate compacts negotiated between the states and ratified by Congress will continue to prove an effective mechanism to accomplish the states' management objectives to preserve and conserve water as a valuable resource. Interstate compacts will also offer the states protection against possible erosion of their authority to act in this area arising from subsequent interpretations of the case law described.

KEY WORDS: Water law, interstate ground water allocation, Commerce Clause, interstate compacts.

I. INTRODUCTION

A. Congressional and Judicial Deference to State Allocation of Water

A major controversial issue facing the arid Western states is the equitable allocation of scarce waters. Historically, the federal government has acknowledged the vastly different geographic, climatic, and economic regions of the nation by leaving much of the allocation and regulation of water resources to the states. Forced uniformity in water regulation is impractical in states with divergent water resources and needs.[1] Any effort to do so on the part of the Federal Government would

undoubtedly be met by a storm of opposition from the states.

> From a more general, policy-oriented perspective, it is clear that any effort on the part of Congress to move toward unitary federal management of interstate water resources [whether surface or ground] would be inherently ineffective because it would fail to recognize the tremendous diversity in the fifty different water law systems in this country (Greenfield and Doerksen, 1984, p.5).

Moreover, the Supreme Court has repeatedly attested to the superior competence of the individual states in conserving and preserving scarce water resources.[2] Mr. Justice Rehnquist addressed the issue for the U.S. Supreme Court in 1978 stating, "The history of the relationship between the federal government and the states in the reclamation of the arid lands of the Western states is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."[3] Abstracts of the relevant sections of 37 Federal statutes which establish the framework of Congressional deference to state control of state water resources were submitted in 1964 in connection with the Senate hearings on S.1275 before the Senate Subcommitte on Irrigation and Reclamation, (U.S. Congress, 1964, pp.302-310).

Early statutes which establish deference to state control of water resources are the Act of July 26, 1866 (14 Stat. 253); the Act of July 9, 1870 (16 Stat. 218); and the Desert Lands Act of 1877 (19 Stat. 377). The U.S Supreme Court held in <u>California Oregon Power Co. v. Beaver Portland Cement Co.</u>, 295 U.S. 142 (1934) that by

the time of passage of the Desert Lands Act of 1877 (if not before), all non-navigable water then part of the public domain in the Western states covered by the 1877 Act became juris publici (in effect, waters of public right). These waters are subject to the plenary control of the designated states, including those since created out of the territories designated in the Act. A key purpose of the Desert Lands Act was merely to give each state the freedom to establish its own allocation system, that is, the right to determine for itself to what extent the rule of appropriation or the rule of riparian rights would apply (Greenfield and Doerksen, 1984).

Other outstanding examples of congressional deference to the principle of state primacy in water resources management are Section 8 of the Reclamation Act of 1902 the McCarran Amendment (Act of July 10, 1952). The pertinent section of the Reclamation Act of 1902 provides that no provision of the Act be construed as affecting or interfering with the laws of any state relating to the control, appropriation, use, or distribution of water used in irrigation. The Act further provides that the Secretary of the Interior in carrying out the provisions of the Reclamation laws, shall proceed in conformity with state laws and that water rights vested under state laws be similarly protected.

The McCarran Amendment waives sovereign immunity of the United States, thus permitting the United States to be

joined as one of the parties in general state stream adjudications in state courts along with other water right claimants for the administration of such rights. The Amendment was applied in United States v. Eagle County, 401 U.S. 520 (1971). In this case, the U.S. Supreme Court held that the McCarran Amendment constituted consent to join the Federal Government and its reserved water rights for a river system or other sources, clearly marking the decision a victory for uniform state administration of water rights. The interpretation as to whether Indian reserved water claims came within the scope of the McCarran Amendment was decided in Colorado River Water Conservation District v. United States, (the Akin case) 424 U.S. 800 (1976). The U.S. Supreme Court held in the affirmative, ruling that state courts were competent to consider Indian reserved rights, and were enpowered to do so under the McCarren Amendment. The Court has recently reaffirmed and extended the Akin case in its decision in Arizona v. San Carlos Apache Tribe of Arizona, 51 U.S.L.W. 5095 (July, 1983). The Court rejected the notion that a state forum would provide an inherently less that fair adjudicatory setting. The general rule which can be extrapolated from this case is that the Federal district courts may employ a form of judicial abstention when faced with water rights suits brought by Indian tribes, rather that the United States, provided[4]: (1) the ongoing state adjudications are adequate to quantify the Indian water

rights at issue, (2) the fact situation meets the requirements of the McCarren Amendment, (3) the Federal litigation is inchoate, and (4) the expertise and facilities of the State Courts are adequate to meet the demands of the task.

B. The Role of Ground Water

Ground water, as opposed to surface water, has received relatively little attention by institutions responsible for its allocation and management. As Pendley has observed, "ground water concepts have remained comparatively undeveloped" (1976, p.104). The increasing demand being placed on frequently scarce supplies of water of the Western states and a concomitant increase in conjunctive use strategies to meet those demands necessitate that equal emphasis now be given to considerations for the management and development of ground water resources.

Until recently, little has been written with regard to management aspects of interstate ground water aquifers and their potential for interstate confrontations (Bittinger and Moses, 1970). According to Corker (1971), few technical areas have been surrounded by so much "misinformation, misunderstanding, and mysticism" as ground water hydrology. Fischer (1974) attributes some of the confusion to legal definitions and ground water doctrines[5] which have no logical relationship to the scientific realities of geology or hydrology. The disparity between surface and ground water legislation is evinced in

recent U.S. Supreme Court and federal district court decisions relating to interstate allocation of ground water.

Moreover, these decisions have challenged state primacy in the management of their water resources.

II. STATE EMBARGO STATUTES ON EXPORTATION OF GROUND WATER

With the increasing pressure being placed on the limited availability of water of sufficient quanity and quality in the Western states, pressure is also being applied to export water resources from one state to another. Embargo legislation has been enacted by several Western states [6] in response to this pressure in an effort to retain the states' water supplies for the general health and economic welfare of their own citizens. In addressing the intent of such prohibitions, Clyde notes that,

> The ostensible purpose of this legislation is to preserve the limited water resources necessary for the health and prosperity of the citizens of the state. The practical effect, however, has been to impede resource development through the creation of legal but often artificial water shortages (1982, p.234).

Water is essential to the economic development in the arid West; it is bought and sold daily as a commodity for use in municipal, industrial, and commercial settings. The agricultural markets supplied by irrigated farms are worldwide and thus provide an archtypical example of commerce among the states[7]. As an article of commerce, water is without question subject to federal regulation and

control. State regulations that unreasonably interfere or burden interstate commerce cannot challenge, nor withstand the scrutiny of the Commerce Clause of the U.S. Constitution.[8] The purpose of the commerce clause is to encourage and sustain a national market for all resources and goods and promote the most efficient use of those resources.

When state regulations involving water have been challenged on commerce clause grounds, the states have commonly relied on three general theories to defend their laws (Liepas, 1984, p.472):

1. Water as a unique resource should not be considered an article of commerce.
2. Congress has authorized the states to impose these burdens on interstate commerce.
3. The state is the owner of the resource and the state's decision regarding the resource is a valid exercise of its police power.

Three statutes presenting such challenges have all been struck down as creating an impermissable burdens on interstate commerce. Each is considered below.

III. CASE I: THE CITY OF ALTUS DECISION

A. Background

In 1966 a Texas statute was struck down by the U.S. Supreme Court in City of Altus v. Carr, 255 F.Supp. 828 (W.D. Tex.), aff'd per curiam, 385 U.S. 35, (1966). The City of Altus, located near the Oklahoma-Texas border, was experiencing increasing pressures on its municipal water supply system as the result of the city's burgeoning population, contracted the right to pump ground water in

an adjacent Texas county. The Texas legislature passed a statute which forbade the interstate exportation of ground water without prior approval of the legislature. The City filed suit in federal district court, claiming that the prohibitory statute violated the commerce clause.

B. Private Market Rationale of the Court

The Court in following the private market rationale of two natural gas cases, West v. Kansas Natural Gas Co., 221 U.S. 229, (1910), and Pennsylvania v. West Virginia, 262 U.S. 552, (1923) ruled in favor of the City on the ground that the requirement of prior legislative approval was facially discriminating and created an unreasonable burden on interstate commerce. As in the West and Pennsylvania cases, the Court found that the Texas statute restricted interstate shipments of a resource while indulging in its unrestricted intrastate production and transportation. In West, Oklahoma sought to confine the use of natural gas to the inhabitants of the state for the purpose of conservation, as in the Pennsylvania case which accorded a preference to the citizens of the State in the purchase of natural gas produced therein. In the Pennsylvania case the Court held,

> ...natural gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therfore a legitimate measure of conservation in the interest of the people of the state....it affords no ground for the assumption by the state of the power to regu-

> late interstate commerce, which is what the act attempts to do. That power is lodged elsewhere (262 U.S. 553, 598).

The Court has ruled that statutes which attempt to conserve the natural resources of a state and are based solely on commercial welfare considerations for its people, impose an impermissible burden on interstate commerce. However, in examining the opinion of the Court in the next case under consideration, it becomes evident that the Court does offer some guidance as to when discrimination in a statute regulating the exportation of water may be legitimately recognized.

IV. CASE II: THE SPORHASE DECISION

A. Water as an Article of Commerce

In 1972, J. Sporhase purchased contiguous tracts of farmland bounding on the border of Chase County, Nebraska and Phillips County, Colorado. An application submitted by Sporhase to the Colorado Ground Water Commission to appropriate water for irrigation in Colorado was denied on the grounds that water at the proposed location was over-appropriated. He subsequently invested a large sum of money for irrigation equipment to pump water from an adjacent tract of land he owned in Nebraska to irriagate his land in Colorado.

In 1977 the state of Nebraska obtained an injuction prohibiting Sporhase from transporting Nebraska ground water into Colorado without a permit as required by

Nebraska statute.[9] That statute provided that the Director of the Department of Water Resources shall issue a permit to transport ground water from any well or pit located in the state of Nebraska providing:

1) that the withdrawl of ground water requested is reasonable,
2) is not contrary to the conservation and use of ground water,
3) is not otherwise detrimental to the public welfare, and,
4) the state in which the water is to used grants reciprocal rights to withdraw and transport ground water from that state for use in the state of Nebraska (Nev. Rev. Stat. Sec. 46-613.01).

Since Colorado law forbids the export of ground water for use outside of the state, Sporhase was not granted a permit due to the reciprocity requirement of the Nebraska statute.[10] Both the Nebraska District Court and Supreme Court upheld the injunction and the constitutionality of the Nebraska statute including the mandatory reciprocity requirement.[11]

On appeal to the U.S.Supreme Court, in a 7-2 decision, the Court in Sporhase v. Nebraska, 458 U.S. 941, 102 S.Ct. 3456 (1982) rejected the State's argument of public ownership of ground water and held that ground water is an article of commerce and therefore subject to Congressional regulations.[12] In delivering the opinion of the Court, Mr. Justice Stevens held that the reciprocity requirement of Nebraska statutory restriction on withdrawal of ground water from any well within Nebraska intended for use in a adjoining state, violated the commerce clause by imposing

an impermissible burden on interstate commerce.

In Sporhase, Nebraska argued the ground water should not be considered an article of commerce because of the severe restrictions placed on ownership by the state. Furthermore, the state argued that it could legitimately use the grant of the state's police power to conserve this essential natural resource, and relied on Hudson County Water Co. v McCarter, 209 U.S. 349 (1908) for authority. In Hudson County, Mr. Justice Holmes delivering the opinion of the Court upheld a New Jersey statute that prohibited the transfer of surface water for use in another state, ruling the state's interest in preserving its water was well within its police powers.[13] The Nebraska Court held that since the state was in possession of a commodity subject to strict regulations controlling the intrastate transfer of ground water, it was thus a publically owned resource precluded from entering into interstate commerce.

Hudson County had held that Geer v. Connecticut, 161 U.S. 519 (1896) was the controlling precedent on the commerce clause issue in that case. Geer, upheld the state's authority to qualify personal ownership and prohibition of interstate transportation of captured game birds. However, the Geer decision was overturned in 1979 in Hughes v. Oklahoma, 441 U.S. 322 (1979) dispelling the notion of state ownership of a natural resource, free-swimming minnows.[14]

The Sporhase Court however, relied on City of Altus v. Carr as the only case presenting a realistic alternative to Hudson County (Kelly, 1983, p.556). Recall from the discussion above that in City of Altus, the district court rejected Texas' contention that ground water was not an article of commerce. Nonetheless, as Green writes,

> City of Altus should not control in Sporhase, however, because the Texas water system is unique in the West. A Texas landowner has the right to sell water, and the transfer of water, a private commodity in Texas, falls under the authority of the commerce clause....Therefore, the City of Altus decision that interstate transportation of privately owned water cannot be prohibited because it is an article of commerce is not necessarily inconsistent with the Nebraska State Court ruling that approved the prohibition on interstate transfer of state owned water (1983, p.927).

The inherent problem appears to be the attempt to reconcile the holding of Hudson County with that of City of Altus. In the Court's summary affirmation of City of Altus, it did not necessarily adopt the lower court's reasoning, but simply indicated an agreement with the results reached by that court.[15] In recognizing Texas' characterization of captured ground water as a article of personal property, subject to the regulations of commerce, it gave no indication whether it adopted the personal property distinction (Kelly, 1983).

The Court ruled that the Nebraska decision and Hudson County were proposing a public ownership theory to rationalize state regulation over transportation and regulation of ground water. The Court further found public ownership

of ground water a legal fiction, and that ground water was fundamentally indistinguishable from other natural resources.[16] The Court traced the demise of the public ownership theory[17] and definitively recast it as "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."[18]

B. The Bearing of the Commerce Clause on the Conservation and Preservation Rationale

As the state has an interest to promote the economic growth and well being of its citizens, so also does the federal government have a responsibility to protect interstate commerce from undue restrictions. This is the root of the conflict when attempting to reconcile the commerce clause with the conservation and preservation rationale asserted in the arguments below.

Nebraska argued that within the preservation and conservation rationale of its police power, it was the state's legitimate responsibility to protect the public health and welfare of the state's citizens by providing adequate supplies of safe drinking water. The Court has long recognized a difference between economic protectionism and the state's health and safety regulation for the benefit of its citizens. In the absence of an express mandate from Congress, the Court expressed reluctance to intercede in ground water regulatory schemes of the states. Mr. Justice Stevens writes of the case at bar,

> we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource during times of severe shortage....a state's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens--and not simply the health of its economy--is at the core of its police powers (441 U.S. at 956).

Secondly, the Court found that the states have a legal expectation fostered over the years not only by equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts, to legitimately restrict the use and allocation of water within the boundaries of the state.[19]

Thirdly, the Court ruled that a state's claim to public ownership of water may support a "limited preference" in its own citizens utilization of the water. The Court in citing Hicklin v. Orbeck, 437 U.S. 518 (1978) found that a state may for economic reasons alone, prefer it's own citizens in the utilization of a natural resource as long as this preference does not impose an impermissble burden on interstate commerce.[20]

The Sporhase Court relied on Pike v. Church, 398 U.S. 137 (1970) to determine the validity of the Nebraska statute as it affects interstate commerce. The Pike test[21] outlines a number of factors to determine whether there is a close fit between the means and the asserted local purpose of a regulatory statute, and whether this purpose clearly outweighs a reasonable burden on interstate commerce. The Court found that the state's interest

in conservation and preservation of ground water is advanced by the first three criteria of the Nebraska statute. However, the Court was less sympathetic to the reciprocity requirement and ruled this condition to be facially discriminatory and an unreasonable burden on interstate commerce.

C. Unilateral Imposition of Burden on Interstate Commerce

Nebraska argued that Congress had given de facto authorization to engage in what would otherwise be impermissible ground water regulation by its unexercised federal power in this area. The Sporhase Court rejected this argument on the ground that neither failure of Congress to enact federal ground water legislation nor Congress' willingness to allow states to enter into mutual agreement to resolve water right differences[22] were persuasive evidence to command the conclusion that Congress consented to the unilateral imposition of unreasonable burdens on commerce. As the majority opinion pointed out, congressional authorization must be direct and "expressly stated."[23]

Acceptance of such a contention would have severely curtailed Congress' ability to act affirmatively in this area. Congress has recognized ground water overdraft as a problem of national proportion. Showing that such a problem could have a substantial economic effect on interstate commerce, Congress arguably could regulate ground water even if it was not considered an article of commerce. As Tallmadge (1983, p.535) concludes:

> Congress may change the existing federal-state balance by explicit legislation which serves to preempt the otherwise valid exercise of state police power. The Sporhase ruling on the commerce question opens the door for federal preemption, since it provided the necessary relationship between an enumerated power and federal control over interstate water development.

V. CASE III: THE CITY of EL PASO DECISION

A. Background

In 1980 the City of El Paso filed suit in the federal district court of New Mexico challenging New Mexico's prohibitory statute against interstate exportation of ground water as unconstitutional under the commerce clause of the United States Constitution, City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983). El Paso, proporting to need additional supplies of water to meet the demands of its citizens, applied for a permit with the State Engineer of New Mexico to appropriate 296,000 acre feet of ground water in the Hueco and Mesilla basins underlying New Mexico. The City also planned to appropriate ground water from a tract of land it owned in New Mexico for use in Texas. Interpreting the state constitution to preclude the export of ground water, the State Engineer denied the City a permit. The U.S. District Court of New Mexico, in interpreting the July, 1982 U.S. Supreme Court decision in Sporhase v. Nebraska to hold that export bans of ground water in excess of the amount necessary for the protection of the public health and safety were a unreasonable burden on interstate com-

merce, found the New Mexico embargo statute to be unconstitutional (El Paso I). Judge Bratton, in writing the opinion for the court, held that the New Mexico statute[24] was unconstitutional because,

> it facially discriminated against interstate commerce by treating in-state water use differently from out-of-state use and because it was not narrowly tailored to a health purpose.[25]

The federal district court also rejected New Mexico's argument that the federal court lacked jurisdiction over the case because the 1938 Rio Grande Compact governed allocation of waters below Elephant Butte Dam by mutual agreement between the states. The court determined that the compact did not deprive El Paso of standing because (1) the compact did not specifically quantify the amount of water apportioned, and (2) New Mexico could administratively require Texas to offset the amount of ground water used against the amount of surface water used to maintain a balance between the states (Gross, 1984, p.213).

New Mexico filed an appeal of the district court decision.[26] While the case was on appeal, the New Mexico legislature repealed the embargo statute (Senate Bill 295) and enacted a new statute which established a procedure and conservational guidelines for the granting of permits to export water out of the state.[27] Subsequently, New Mexico motioned that the Tenth Circuit Court of Appeals vacate the judgement in El Paso I and remand the case with instructions to dismiss it as moot in light of the devel-

opment of new legislation (El Paso II). In turn, El Paso has asked the federal district court to modify its final judgement and to declare Senate Bill 295 to be economic protectionism and therefore unconstitutional. El Paso asserts that, under the guidelines established under Senate Bill 295, the State Engineer will only consider New Mexico's welfare and the state's water needs when reviewing applications. The appelate court in an unpublished order and judgment, vacated the district court's decision in El Paso I and remanded the case for such "further proceedings as deemed necessary and appropriate."[28] The case is once again before the district court which now must determine the constitutionality of Senate Bill 295.

B. Precedent of the Sporhase Decision

The district court decision in El Paso was based on the commerce clause analysis used in Sporhase. Although there are many similarities between the two cases, some jurist have expressed disagreement with the logic used by the district court in its determination of El Paso (Liepas, 1984; Utton, 1983).

The two cases are similar because both Nebraska and New Mexico affirm the theory of public ownership and the prior apporpriation doctrine with regard to ground water. By contrast, New Mexico had an explicit ground water embargo statute, not a reciprocity requirement. Moreover, the court also held in El Paso that New Mexico might be regarded as a "demonstrably arid state" in which a total

ban on exportation might be appropriate. The court in El Paso I determined that for a discriminatory statute to survive the commerce clause scrutiny, the state must show the embargo to promote a legitimate local purpose, is narrowly tailored to that purpose, and that no other nondiscriminatory alternatives exist.[29] The facts however, demonstrated that there was no current shortage of water for meeting the health and safety needs of the people. The district court found that in determining the "public welfare needs," New Mexico included estimates for industry, energy production, and irrigated agriculture. The court thus determined that rather than protecting the health and safety of its citizens, the embargo was tantamount to economic protectionism.[30]

The district court may have too narrowly interpreted the decision in Sporhase. The issue in El Paso was whether through state regulation, the flow of ground water out of the state could be restricted for solely economic reasons. The Sporhase Court, in citing Hicklin as authority for "limited preference", found a state can favor its own citizens in the use of a resource for economic purposes.[31] The Court in Sporhase has indicated that, although a state cannot justify a total denial of federal regulatory power, it is relevant that this preference was "logically more substantial than claims to public ownership of other natural resources."[32] To what degree this limited preference is intended to provide a state's citi-

zens with and economic benefit, and to what extent it is "circumscribed" by the commerce clause, however, has yet to be fully addressed by the Court (Liepas, 1984, p.478).

Utton (1983) notes that the El Paso case was argued in the wrong court under the wrong theory of federalism. He believes that the court, "instead of being beguiled by the Sprohase case and the commerce clause," should follow the doctrine of equitable apportionment. Under equitable apportionment, each state is allocated a fair share of interstate streams. There can be no doubt that ground waters of the Rio Grande Valley are inextricably part of an interstate stream, and that these waters are functionally and hydrologically interdependent with surface waters. If the laws of hydrology dictate that these waters are of an interstate nature, then does not the U.S. Supreme Court hold original jurisdiction over their allocation? Interpretation of the December, 1982 Supreme Court opinion in Colorado v. New Mexico, 103 S.Ct. 345, would seemingly answer this question in the affirmative. The Court in this case noted in the majority opinion,

> equitable apportionment is the doctrine...that governs disputes between states concerning their rights to use the water of an interstate streams.[33]

The difficulty appears to lie, at least to some degree, within institutions; which contrary to hydrologic reality has not yet recognized the interrelationships between surface water and ground water.

VI. GUIDELINES FOR FUTURE ALLOCATION OF INTERSTATE GROUND WATERS

A. Interstate Compacts as a Remedy for Ground Water Conflicts

In the absence of unreconciable disputes between states, the most efficient means of allocating water is the interstate compact, where a negotiated contractual apportionment is ratified by the participating states and the Congress. Where agreement cannot be reached between the states, the federal government may intervene through direct congressional apportionment or judicial equitable apportionment decrees. Of these alternatives, judicial decree is the least desirable since the courts do not have the hydrological expertise necessary to resolve the very complex issues involved. In weighing the merits of litigation between the states against those of the interstate compact as an alternative apportionment mechanism, Fischer writes,

> Regretably, our conclusions must also be that, between these two alternatives, it [the interstate compact] is the less likely [to be recommended]; that litigations between states resulting in equitable apportionment of available ground waters can be expected unless there is an unprecedented awakening to responsibility and to reality among the water users and water administrators of the affected states (1976, p.546)

It is possible that the judicial decisions in Sporhase and El Paso are the "unprecendented awakening" of which Fischer has written.

If however, the states are to continue to maintain

primacy in the allocation of their own ground water resources, then the interstate compact may well prove to be the best mechanism to offer immunity from subsequent future interpretations of the Sporhase decision. A review of the literature indicates that at least twenty-one water apportionment compacts have already been entered into by the States (Appendix II). Of these, only one, the Upper Niobrara River Compact (1969) deals specifically with ground water apportionment (Greenfield and Doerksen, 1984).

As interstate compacts are a primary mechanism available to the States to circumvent institutional barriers to regional development (Frankfurter and Landis, 1925), so may they be used to assure continued state control in the allocation of their ground water resources. But the interstate compact as a mechanism for the allocation of interstate waters was challenged in Intake Wate Company v. Yellowston River Compact Commission, Civil No. 1184, (D.M., 1973) (Loble and Loble, 1980). Stayed until 1980, Intake Water Company sought a declaratory judgement regarding Article X of the Yellowstone River Compact, an agreement among the states of Montana, North Dakota, and Wyoming. Intake Water Company argued that Article X of the Compact, a provision prohibiting the transfer of water from the Yellowstone River basin without unanimous consent of the signatory states, violates the Commerce Clause of the U.S. Constitution.

In October, 1983, the district court issued a memorandum opinion in Intake Water which dismissed the company's commerce clause challenge on the grounds that since the Compact was ratified by Congress, it must be regarded as Federal legislation and therefore not subject to the commerce clause scrutiny cited in Sporhase.

Congress, unlike the States, may enact legislation which affects interstate commerce. This theory is supported by the Sporhase Court citing of New England Power Co. v. New Hampshire. In that case the Court found that,

> [it is] well settled that Congress may use its powers under the commerce clause to confer upon the States an ability to restrict the flow of interstate commerce that they otherwise do not enjoy (102 S.Ct. at 1102).

However, the Court further concluded that such congressional intent and policy must be "expressly stated,"[34] and that the courts "have no authority to engage in mere speculation as to what Congress has in mind."[35]

It is still possible Congress yet may choose to affect the balance of federal-state authority for the allocation of interstate ground waters by enacting explicit legislation which would serve to preempt existing state control in this area. However, in light of the current administration's policy to the contrary, such action appears improbable. It is the policy of the Reagan administration that appropriation and use of surface and ground waters should remain within the sovereign control of the states. Recognition of congressional deference to

state water law has recently been reaffirmed by a recent Justice Department opinion stating that this deference is the rule, and preemption of state law is the exception when resolving federal-state water conflicts.[36]

In her statement before the Senate Committee on Environment and Public Works, Assistant Attorney General, Carol Dinkins cited basic alternatives available to Congress to modify the portion of the Sporhase decision susceptible to legislative oversight. It could pass general legislation establishing guidelines concerning what types of state export restrictions are considered permissible. Or, it could pass a law listing all current state statutory export restrictions and authorize them pursuant to its commerce clause power. Congress also could enact legislation designed to encourage the establishment of interstate compacts on the theory that interstate compacts are the best legal avenue for the efficient and equitable resolution of interstate water disputes (U.S. Congress, 1982). In light of the recent Supreme Court decision in the Intake Water case, it is widely held that the interstate compact will be the most effective mechanism available for preventing an erosion of State authority in the control their water resources.

B. Summary and Conclusions

Water has long been recognized as a critical element in the development and growth of the West. So it is understandable that the States oppose attempts by the

federal government to affect the balance of the federal-state relationship by preemption of state water allocation law. As the demand for water increases in the arid Western states, ground waters will increasingly be used to supplement available supplies of this unique and valuable resource.

Since surface and ground waters are not co-extensive with the political boundaries, conflicts arising over states acting to preserve and conserve ground waters for the welfare of their citizens should be expected to continue in the future.

In the wake of the U.S. Supreme Court decision in Sporhase v. Nebraska that water is an article of interstate commerce, and therefore subject to the scrutiny of the Commerce Clause of the U.S. Constitution, broad statutes prohibiting the export of ground water across state boundaries will be impossible to sustain. That Congress has in the past deferred to the States in the appropriation and management of water resources within the states is supported by thirty-seven federal statutes and a number of interstate compacts. However, as the Sporhase Court observed, such deference is not evidence that Congress has consented to unilateral imposition of impermissable burdens on interstate commerce. Moreover, failure of Congress to enact federal legislation relating to the allocation of interstate ground water does not preclude Congress from acting in this area in the future.

Although the Court rejected the legal doctrine of public ownership of water, it recognized that a states claim to public ownership of water may support a "limited preference" in its own citizens in the utilization of the water. In doing so, the Court has afforded the states some latitude in tailoring legislation for the conservation and allocation of limited supplies of ground water. for economic as well as health and safety purposes.

In the management of ground water, it is essential to recognize the interrelationships surface and ground waters. Where surface water comprise an interstate stream, the interstate compact will remain the most efficient and effective mechanism for the resolution of water disputes. Of the alternatives available to the states for the allocation of interstate ground waters, the interstate compact also offers the greatest immunity to subsequent interpretations of the many ramifications raised in the Court's decision in Sporhase.

FOOTNOTES

1. California v. United States, 438 U.S. 645,653 (1978).

2. Sporhase v. Nebraska ex rel. Douglas, 102 S.Ct. 3463 (1982). See also California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142,163 (1935).

3. California v. United States, 438 U.S. 653, 98 S.Ct. 2990.

4. Arizona v. San Carlos Apache Tribe of Arizona, 51 U.S.L.W. 5102 (Quoting Greenfield and Doerksen at at 4.)

5. Fischer's article (cited by Pendley, note 77) discloses the following "workable summaries" of the various ground water doctrines:
   Common Law Rule: The waters underlying the land are the property of the landowner who may withdraw them without reference to the effect upon others.
   Modified Common Law Rules: Most states embracing the common law concept have modified it to avoid the harshness of its strict application. These modified rules include:
   1. Reasonable Use Rule: Although the landowner has a right to the use of his property, including the right to the use of the property's underground waters, he must nontheless recognize that adjoining owners have similar rights, which would necessarily be affected by his unreasonable withdrawal of ground water.
   2. Correlative Rights Doctrine: The landowner has the right to make use of the waters underlying his lands, subject, however, to the co-extensive and co-equal rights existing in adjoining land-owners.
   The Appropriation Doctrine: As between conflicting claimants, he who has first put the water to beneficial use has the first right to continue such beneficial use, without waste, and to the extent of his former usage. By definition, such first use, being first in legal right, cannot cause legal injury by depriving a subsequent appropriator of water in time of shortage.

6. Embargo statutes enacted by the following Western states:
   Colo. Rev. Stat. Sec. 37-81-101 (1973 and Suppl. 1981); Mont. Code Ann. Secs. 85-1-121, 85-2-104 (1983); Neb. Rev. Stat. Sec. 46-613.01 (1973); Nev. Rev. Stat. Sec. 533.515 (1979); N.M. Stat. Sec.72-12-19 (1979); Okla. Stat. Tit. 27, Sec. 7.6 (West Supp.

1981-1982); Or. Rev. Stat. Sec.537.810 (1979); S.D.C.L. Sec. 46-5-20.1 (Supp. 1981); Wash. Rev. Code Ann. Sec. 90.03.300 (1962); Wyo. Stat. Sec. 41-3-105 (1977). (Greenfield R.R., and Doerksen H.R. 1984).

7. Sporhase v. Nebraska, 102 S.Ct. at 3462.

8. Article I, Sec.8, cl.3 of the United States Constitution provides: "The Congress shall have Power.... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...."

9. Nebraska v. Sporhase, 208 Neb. 703, N.W.2d 614.

10. Neb. Rev. Stat. Sec. 46-613.01 provides: Any person...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 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 stat in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state and use in the State of Nebraska.

11. Nebraska v. Sporhase, 208 Neb. 703, 305 N.W.2d. 614 (1981).

12. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982). On remand, the Nebraska Supreme Court held the reciprocity provision severable and upheld the remainder of the statute. Nebraska v. Sporhase, 213 Neb. 484, 329 N.W.2d. 855 (1983).

13. 209 U.S. 349 (1908). Justice Holmes in delivering the opinion for the Court, primarily addressed the "police powers" aspect of the Hudson County case. (Citing Kelly, J. note 18 at 556.)

14. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. 441 U.S. at 334 (quoting Geer V. Connecticut, 161 U.S. 519, 539-40 (1896). [Emphasis added].

15. 102 S.Ct. at 3461

16. Id. at 3462

17. Id. at 3462. The Court offered the following example to illustrate its reasoning for finding the public ownership theory of ground water not to be outside the jurisdiction of the commerce clause. "The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transfered to urban areas....Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs [of capture or recovery of the resource], the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation." Thus, the commerce clause controls on the resource whether owned publically or privately.

18. Id. at 3461, citing Hughes v. Oklahoma, 441 U.S. 322, 334, 99 S.Ct. 1727, 1735, 60 L.Ed.2d 250 (1979) (quoting Toomer v. Witsell, 334 U.S. 385, 402, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460 (1948)).

19. 102 S.Ct. at 3464.

20. Hicklin v. Orbeck, 437 U.S. 518, 533 (1978).

21. Pike v. Church, 397 U.S. 137 (1970). The Court framed the burden on commerce clause analysis in Pike as follows:

> Where the statue regulates to effectuate a legitimate local public interest, and it effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to 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 commerce.

22. The U.S. Supreme Court in fact has expressed a preference for the interstate compact over equitable apportionment adjudication as a means by which the States should resolve their water right conflicts. See Colorado v. Kansas, 320 U.S. 383, 392, 64 S.Ct. 176, 180, 88 L.Ed. 116 (1943).

23. 102 S.Ct. at 3466.

24. New Mexico Stat. Ann. Sec. 72-12-19 (1978).

25. City of El Paso v. Reynolds, CIV NO. 80-730 HB, memorandum opinion (D.N.M Jan. 17, 1983).

26. Appellant's Docketing Statement at 2, City of El Paso v. Reynolds, No. 83-1350 (10th Cir., 1983). (Citing, Liepas, A.M., at 471, note 8.)

27. New Mexico Stat. Ann. Sec. 72-12B-1 (1978)(Supp. 1983). Section 1(C) of the statute reads:
In order to approve an application under this act, the State Engineer must find that the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, 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.
Section 1(D) of the statute reads:
In acting upon an application under this act, the State Engineer shall consider, but not be limited to, the following factors:
   (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 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.

28. Order and Judgement at 3, City of El Paso v. Reynolds, No.83-1350 (10th Cir., 1983). (Citing Liepas, A.M. at 480.)

29. City of El Paso v. Reynolds, 563 F.Supp at 388.

30. Id. at 390.

31. Hicklin v. Orbeck, 437 U.S. 518, 533 (1978).

32. Sporhase v. Nebraska, 458 U.S. at 956-57.

33. Colorado v. New Mexico, (the Vermejo case), __U.S.__, 103 S.Ct. 345. [Emphasis added].

34. 102 S.Ct. at 3466

35. New England Power Co. v. New Hampshire, 102 S.Ct. at 1102-03 (1982).

36. Water Law Newsletter, No.2, 1982, at 15. (Citing Tallmadge at 536, note 155.

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APPENDIX II

Water apportionment compacts that have been entered into by the States:

1. La Plata River Compact (1925). Signatories: Colorado and New Mexico; approved by Congress pursuant to 43 Stat. 795.
2. Snake River Compact (1926). Signatories: Idaho and Wyoming; approved by Congress pursuant to 43 Stat. 31.
3. Colorado River Compact (1928). Signatories: Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; approved by Congress pursuant to 45 Stat. 1057.
4. Rio Grande Interstate Compact (1939). Signatories: Colorado, New Mexico, Texas; approved by Congress pursuant to 53 Stat. 785.
5. Republican River Compact (1943). Signatories: Colorado, Kansas, and Nebraska; approved by Congress pursuant to 78 Stat. 60.
6. Belle Fourche River Compact (1944). Signatories: South Dakota and Wyoming; approved by Congress pursuant to 58 Stat. 94.
7. Costilla Creek Compact (1946). Signatories: Colorado and New Mexico; approved by Congress pursuant to 60 Stat. 246.

8. Arkansas River Compact of 1949. Signatories: Colorado and Kansas; approved by Congress pursuant to 63 Stat. 145.
9. Pecos River Compact (1949). Signatories: New Mexico and Texas; approved by Congress pursuant to 63 Stat. 159.
10. Upper Colorado Basin Compact (1949). Signatories: Arizona, Colorado, New Mexico, Utah, and Wyoming; approved by Congress pursuant to 43 Stat. 31.
11. Yellowstone River Compact (1949). Signatories: Montana, North Dakota, and Wyoming; approved by Congress pursuant to 63 Stat. 152; modified pursuant to 65 Stat. 663 (1951).
12. Canadian River Compact (1950). Signatories: New Mexico, Okalahoma, and Texas; approved by Congress pursuant to 64 Stat. 93; modified pursuant to 66 Stat. 74 (1952).
13. Sabine River Compact (1951). Signatories: Louisiana and Texas; approved by Congress pursuant to 65 Stat. 736; modified pursuant to 68 Stat. 690.
14. Klamath River Compact (1955). Signatories: California and Oregon; approved by Congress pursuant to 69 Stat. 613; modified pursuant to 71 Stat. 497 (1957).

15. Bear River Compact (1958). Signatories: Idaho, Utah, and Wyoming; approved by Congress pursuant to 72 Stat. 38.

16. Arkansas River Compact of 1965. Signatories: Kansas and Oklahoma; approved by Congress pursuant to 80 Stat. 1405.

17. Animas-La Plata Project Compact (1968). Signatories: Colorado and New Mexico; approved by Congress pursuant to 82 Stat. 885.

18. Upper Niobrara River Compact (1969). Signatories: Nebraska and Wyoming; approved by Congress pursuant to 83 Stat. 86.

19. Big Blue River Compact (1971). Signatories: Kansas and Nebraska; approved by Congress pursuant to 86 Stat. 193.

20. Arkansas River Basin Compact of 1970 (1973). Signatories: Arkansas and Oklahoma; approved by Congress pursuant to 87 Stat. 569.

21. Goose Lake Basin Compact (1984). Signatories: California and Oregon; approved by Congress pursuant to 98 Stat. 291.