Tulsa Law Review

Volume 18 | Number 4

Summer 1983

Federal Intervention in Groundwater Regulation: Sporhase v. Nebraska Ex Rel. Douglas

J. S. Garrett

FEDERAL INTERVENTION IN GROUNDWATER REGULATION: *SPORHASE v. NEBRASKA EX REL. DOUGLAS*

I. INTRODUCTION

"American water law is in a period of ferment."[1] As the nation's economy has expanded, the country's demand for water has spiraled. What once seemed a plentiful and endless resource is becoming scarce.[2] Particularly in the West and Southwest, effective management of water resources is a matter of critical importance.[3] In addition to the needs of human consumption, water is essential for municipal, agricultural, and industrial use as well as for the development of energy related resources.[4] The problem of maintaining an adequate water supply in these states is much more than an important regional issue.

Since the energy shortages of the 1970's, the need for developing domestic energy resources has become a matter of national significance. Many of these sources of potential energy are found in the West;[5] energy development in these states is contingent upon the availability of an adequate water supply.[6] The increased development of

---

1. F. TRELEASE, CASES AND MATERIALS ON WATER LAW 15 (3d ed. 1979).

2. *See* 1 U.S. WATER RESOURCES COUNCIL, THE NATIONAL WATER RESOURCES 1975-2000, SECOND NATIONAL WATER ASSESSMENT (1978); Sheets, *Water, Will We Have Enough to Go Around?*, U.S. News & World Rep., June 29, 1981, at 34. *But see* COMPTROLLER GENERAL, WATER SUPPLY SHOULD NOT BE AN OBSTACLE TO MEETING ENERGY DEVELOPMENT GOALS 47-50 (Jan. 24, 1980) (report to Congress) (concluding that the energy industry's "thirst for water" will not necessarily create shortages throughout the West).

3. As one notewriter has observed: "The distribution of water, its geographical and temporal variability, is the overriding influence that shapes the West. Just as it is impossible to dismiss the role of water in the historical development of the region, it is foolhardy to ignore its limited availability as a constraint on future growth." Note, Bubb v. Christensen: *The Rights of the Private Landowner Yield to the Rights of the Water Appropriator Under the Colorado Doctrine*, 58 DEN. L.J. 825, 825 (1981).

4. Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L.J. 1, 76 (1982).

5. *Id.* at 3.

6. Recent Development, *Interstate Transfers of Water: South Dakota's Decision to Market Water for Coal Slurry Operations*, 18 TULSA L.J. 515, 515 & n.1 (1983). One commentator characterizes the importance of water as follows:

> Today a second war between the states is raging—this time over the control and exploitation of the nation's natural resources. At the frontlines of this natural resources conflict is water—water to develop new energy sources such as coal and oil shale; water to transport these new energy sources in interstate slurry lines, water to generate electric-

these natural resources, however, has seriously depleted the region's limited water supply.[7] Therefore, many cities and states requiring an additional water supply seek to import water from areas of surplus.[8] As a result, several states,

> fearing that demands from outside their borders will prevent them from ensuring adequate supplies of water for their own citizens, have passed legislation to prohibit or limit interstate transfers of groundwater. At present, 14 states plus the District of Columbia have adopted such legislation. Not surprisingly, as the competition for limited supplies becomes more intense, some of these statutes have been attacked as unconstitutional burdens of interstate commerce.[9]

The United States Supreme Court reviewed the propriety of the Nebraska water embargo statute in *Sporhase v. Nebraska ex rel. Douglas*.[10] Although the expressed purpose of the Nebraska groundwater

---

> ity; water to meet the demands of the industries and people migrating to the arid Sunbelt; and water to irrigate the expansive farming operations of the Southwest. The increase in water consumption throughout the United States has led to both local and regional shortages.

Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249, 1249 (1981) (footnotes omitted).

7. Recent Development, *supra* note 6, at 515-16 ("[I]ncreased demand for western water from higher consumptive uses in agriculture, industry, and energy production has outstripped local surface and groundwater supplies, causing shortages." (footnote omitted)); *see also* Clyde, *State Prohibitions on the Interstate Exportation of Scarce Water Resources*, 53 U. COLO. L. REV. 529, 529 (1982) (In the 1970's, there was "a tremendous population shift to the West and Southwest . . . [which,] coupled with increased industrialization and development of energy resources, created heavy demands upon the region's limited water resources.").

8. *Commerce Clause Limits States' Ability to Stop Groundwater Exports: Supreme Court Overturns Nebraska Reciprocity Rule*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10,083, 10,083 (1982) [hereinafter cited as *Commerce Clause Limits*]; *see* City of Altus v. Carr, 255 F. Supp. 828, 831-32 (W.D. Tex.) (growing city in southern Oklahoma acquired water rights to Texas groundwater and imported this water to Oklahoma), *aff'd per curiam*, 385 U.S. 35 (1966); Recent Development, *supra* note 6 (discussing South Dakota's decision to sell water for use in the proposed Energy Transportation Systems, Inc. (ETSI) interstate coal slurry pipeline).

9. *See Commerce Clause Limits*, *supra* note 8, at 10,083 (footnote omitted).

> The competition for water has been fiercest in the Western States, where high consumptive uses in agriculture, industry, and energy production have increased the demand for water beyond the capacity of limited surface and ground water supplies. The Western States have reacted to the rapid exploitation of their diminishing water supplies by enacting various prohibitions on the exportation of water for interstate uses. These water embargo statutes prohibit, or at least severely restrict, the exportation of water to neighboring states. The statutes constitute the Western States' primary defense in their attempts to exclude nonresidents from using their water supplies.

Note, *supra* note 6, at 1249-50 (footnotes omitted).

Oklahoma is one such state that has enacted a water embargo statute which generally prohibits its diverting Oklahoma water to neighboring states. OKLA. STAT. tit. 82, § 1085.22 (1981). For a compendium of those states with water embargo statutes, see Recent Development, *supra* note 6, at 523 n.41.

10. 102 S. Ct. 3456 (1982).

statute was to promote the state's welfare,[11] the Court found that the Nebraska Legislature accomplished this purpose in a manner that violated the commerce clause. The Court held that groundwater is an article of commerce and thus subject to judicial restraints on state control and potential affirmative federal regulation.[12]

As a result, the *Sporhase* decision has sparked a great amount of interest in the constitutional propriety of water embargo statutes and has generated numerous questions concerning how and to what extent a state may control its groundwater. This Recent Development analyzes the *Sporhase* decision and discusses its impact on western groundwater law.

II. STATEMENT OF THE CASE

Sporhase owned contiguous tracts of land in Nebraska and Colorado. A well located on the Nebraska tract pumped groundwater to irrigate crops on both tracts.[13] A Nebraska statute[14] required the per-

11. *See* NEB. REV. STAT. § 46-613.01 (1978). One commentator writes that "the ostensible purpose of all these statutes is to preserve the state's limited water resources, necessary for the health and prosperity of their [sic] citizens, and to promote the general welfare." Clyde, *supra* note 7, at 530 (citing COLO. REV. STAT. § 37-81-101 (1973 & Supp. 1981); WYO. STAT. § 41-3-115 (1977)).

12. 102 S. Ct. at 3463, 3466.

13. *Id.* at 3458.

14. The Nebraska groundwater regulation provides:

> 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 [DWR] 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.

NEB. REV. STAT. § 46-613.01 (1978) (emphasis added).

There are three distinct types of embargo regulations. The first type completely prohibits any exportation of water from the state. The second type permits interstate transportation of water on a discretionary basis with prior legislative approval. The third type allows interstate water transfers only on a reciprocal basis. Note, *supra* note 6, at 1251-53 (categorizing each of the various states according to its specific statutory scheme).

Professor Aiken explains the Nebraska law as follows:

> A DWR permit is required before ground water withdrawn in Nebraska can be used in another state. The permit may be granted if the ground water withdrawal is reasonable. A withdrawal is reasonable if it is not contrary to the conservation and use of ground water, is not detrimental to the public welfare, and the state into which the ground water is to be transferred grants reciprocal rights to transport into and use ground water in Nebraska. Failure to obtain a permit is a class IV misdemeanor. Ground water withdrawals can be enjoined until the DWR permit has been obtained. Wells in violation of this permit requirement are illegal wells, the construction or use of which may be stopped by a natural resources district.

Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917, 983 (1980). Thus,

mission of the Director of Water Resources before groundwater could be transferred across state lines. Sporhase never obtained the required permission[15] and thus Nebraska sued to enjoin Sporhase from transporting its groundwater into Colorado.[16] In issuing the injunction, the trial court rejected the argument that the statute placed an impermissible burden on interstate commerce.[17] The Nebraska Supreme Court agreed with the trial court and found that, under Nebraska law, groundwater is not an article of commerce; thus the Nebraska regulation did not violate the commerce clause.[18]

In reversing the Nebraska decision,[19] the United States Supreme Court specifically addressed the following three issues:

1) Whether groundwater is an article of interstate commerce;
2) whether the Nebraska regulatory scheme imposes impermissible burdens on interstate commerce; and
3) whether Congress has authorized the states to regulate groundwater in a manner that otherwise would be forbidden.[20]

The Court concluded that groundwater is an article of interstate commerce and that portions of the Nebraska statute violated the commerce clause.[21]

---

the Nebraska law denies out-of-state water appropriations to those states that deny appropriations for import into Nebraska. *Contra* Note, *supra* note 6, at 1252 & n. 19 (classifies Nebraska statute as discretionary embargo regulation).

15. 102 S. Ct. at 3458. Sporhase never applied for the required permit. Since Colorado law prohibits interstate water transfer and has no reciprocity provision, see COLO. REV. STAT. § 37-90-136 (Supp. 1982), it is certain that Nebraska would not have issued the permit. Because of the impossibility of obtaining a permit, the Court concluded that the failure to submit an application did not deprive Sporhase of standing to challenge the legality of the reciprocity requirement. 102 S. Ct. at 3458 n.2.

Conversely, the permit could have issued if Sporhase had owned contiguous tracts of land in Nebraska and Kansas, since a Kansas statute allowed reciprocal use of water in Nebraska. *See* KAN. STAT. ANN. § 82a-726 (1977).

16. 102 S. Ct. at 3458.

17. *Id.* The commerce clause provides in part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8.

18. 102 S. Ct. at 3458. The Nebraska Supreme Court's decision in State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981), is the subject of Note, State *ex rel.* Douglas v. Sporhase: *Public Ownership of Ground Water*, 15 CREIGHTON L. REV. 263 (1981).

19. 102 S. Ct. at 3467.

20. *Id.* at 3457-58.

21. *Id.* at 3463, 3465. The Court found that the reciprocity requirement of NEB. REV. STAT. § 46-613.01 (1978) violated the commerce clause and left to the Nebraska state courts the question of "whether the invalid portion is severable." 102 S. Ct. at 3467.

Prior to the *Sporhase* decision, some Nebraska commentators speculated that the Nebraska groundwater embargo statute was unconstitutional. *E.g.*, Aiken, *supra* note 14, at 988 ("Federal

III. ANALYSIS

A. *Groundwater*[22] *as an Article of Interstate Commerce*

Nebraska contended that groundwater is not an article of commerce under the "public ownership of natural resources theory."[23] The state, therefore, could regulate its groundwater and prohibit interstate transfers without commerce clause interference. The Supreme Court, however, had previously addressed and rejected the public ownership theory in *Hughes v. Oklahoma*.[24]

In *Hughes*, the Court considered the validity of an Oklahoma statute prohibiting the interstate transport of minnows caught in the state. Oklahoma argued that the ban was constitutional because the state also prohibited both private ownership and intrastate commerce in the resource.[25] The Court rejected this argument and concluded that the mere regulation of the resource necessarily involved interstate commerce. Accordingly, the statute was struck down.[26]

Sporhase adopted the *Hughes* reasoning in rejecting the public ownership of resources theory.[27] While the Court conceded that the states have a legitimate interest in water conservation, it expressly found that the states' interests in water regulation "clearly have an interstate dimension."[28] The Court noted:

[O]ver 80% of our water supplies is used for agricultural pur-

---

court decisions suggest that state prohibition of interstate groundwater transfers is an unconstitutional burden on interstate commerce if intrastate groundwater transfers are authorized."); Note, *supra* note 18, at 271.

22. For background information on groundwater, see Aiken, *supra* note 14; Clark & Clyde, *Western Ground-Water Law*, in 5 WATERS AND WATER RIGHTS §§ 440-446 (R. Clark ed. 1972 & Supp. 1978); Jensen, *The Allocation of Percolating Water Under the Oklahoma Ground Water Law of 1972*, 14 TULSA L.J. 437 (1979); Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U. COLO. L. REV. 471 (1982).

23. 102 S. Ct. at 3458-62. States often assert a public ownership interest in natural resources as a justification for prohibitive and restrictive statutes. Note, *supra* note 6, at 1259. It was once believed that public ownership prevented natural resources, such as groundwater, from being articles of commerce and thus exempted prohibitive and restrictive statutes from commerce clause sanctions. *See* Geer v. Connecticut, 161 U.S. 519 (1896) (upholding Connecticut statute prohibiting export of game birds).

24. 441 U.S. 322 (1979).

25. *Id.* at 325.

26. *Id.* at 338.

27. 102 S. Ct. at 3461.

> In expressly overruling *Geer* three years ago, this Court traced the demise of the public ownership theory 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."

Id. (citing *Hughes*, 441 U.S. at 334).

28. 102 S. Ct. at 3462.

> poses. 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 multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas—confirms . . . a significant federal interest in conservation as well as in fair allocation of this diminishing resource.[29]

Having emphasized the interstate dimensions, the Court thus found that groundwater is an article of interstate commerce.[30]

B. *Nebraska Regulatory Scheme Impermissibly Burdens Interstate Commerce*[31]

Prior to *Sporhase*, the only federal decision questioning the constitutionality of a state water embargo statute was *City of Altus v. Carr*.[32] Altus, Oklahoma, attempted to augment its inadequate water supply by obtaining groundwater from Texas lands owned by Altus residents. Texas thereafter enacted a statute prohibiting the transportation of groundwater without prior approval of the state legislature.[33] The city sued to enjoin enforcement of the statute. A three judge federal district court struck down the statute as an impermissible burden on interstate commerce.[34]

When a state exhibits a legitimate state interest, the Court balances the competing federal and state interests to determine if the state interest can be achieved by other means less restrictive on interstate commerce.[35] Using this balancing analysis, the Court noted that

---

29. *Id.* at 3462-63 (citations omitted).

30. *Id.* A fair reading of the *Sporhase* opinion indicates that this threshold issue had to be resolved before a commerce clause infringement analysis could be made. *See Commerce Clause Limits*, *supra* note 8, at 10,085.

31. "[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders." Hicklin v. Orbeck, 437 U.S. 518, 533 (1978) (Alaska statute requiring employers to prefer residents in all employment resulting from oil and gas transactions to which the state was a party invalidated as discriminatory).

32. 255 F. Supp. 828 (W.D. Tex.) (three judge federal district court struck down Texas embargo statute), *aff'd per curiam*, 385 U.S. 35 (1966). *City of Altus* is discussed in Note, *supra* note 6, at 1257-58.

33. 255 F. Supp. at 832.

34. *Id.* at 840.

35. This balancing test was established in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), where it was applied to a statute requiring all growers to pack cantaloupes in Arizona in containers approved by state supervisors.

> 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

Nebraska's purpose in conservation and preservation of groundwater requires special deference for four reasons. First, in the absence of federal regulation, by negative implication the Constitution grants Nebraska the right to regulate its water resources.[36] Second, Nebraska's power to regulate water is a vital and legitimate exercise of its police power.[37] Third, Nebraska's claim of ownership, while not removing the water from commerce,[38] does justify a preference for its citizens to use the water.[39] Fourth, prior state conservation efforts give Nebraska groundwater attributes of a public rather than a private good.[40] With the scales weighted heavily by these considerations, the Court concluded that the first three provisions of the Nebraska statute[41] did not impermissibly burden interstate commerce.[42]

Even though the Court believed these first three provisions were not facially invalid, it found that the reciprocity provision of the Nebraska statute unduly interfered with interstate commerce and posed a definite barrier to commerce between Nebraska and neighboring states.[43] Thus the Court invalidated the reciprocity provision before even reaching the balancing stage. The burden placed on interstate

---

> 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.

Id. at 142.

As a general rule, any state legislation that interferes or unreasonably burdens interstate commerce is constitutionally invalid. For a discussion of limits on state power imposed by federalism, see J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 262-64 (1978 & Supp. 1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to -12 (1978 & Supp. 1979).

36. 102 S. Ct. at 3464. For a general discussion of negative implications of the commerce clause, see F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 51-52, 97-98 (2d ed. 1964); L. TRIBE, *supra* note 35, §§ 6-2 to -14 (discussing constitutional limitations upon state interference with interstate commerce); Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

37. 102 S. Ct. at 3464.

38. *Id.* at 3462.

39. *Id.* at 3464. In the dissenting opinion, Justice Rehnquist accepted the defense that a state's claim of public ownership would give the state greater authority to regulate natural resources which are essential to the well being and lives of its citizens. Since Nebraska recognizes only a limited right in the landowner to use groundwater, Justice Rehnquist believes that groundwater cannot be "commerce" as far as Nebraska is concerned and the limitation on the Nebraska landowner to use water on land he owns in an adjoining state does not run "afoul of Congress' unexercised authority to regulate interstate commerce." *Id.* at 3469 (Rehnquist, J., dissenting).

40. 102 S. Ct. at 3464-65.

41. The withdrawal of the groundwater must be 1) reasonable, 2) not contrary to the conservation and use of groundwater, and 3) not otherwise detrimental to the public welfare. NEB. REV. STAT. § 46-613.01 (1978).

42. 102 S. Ct. at 3465.

43. *Id.*

commerce by the provision was more than incidental. This defect alone would not invalidate the provision, but such a provision requires a close means-end relationship.[44] Applying a strict scrutiny standard of review,[45] the Court found no evidence that this provision closely fit the conservation and preservation purposes asserted.[46]

After invalidating the reciprocity provision, the Court detailed a situation in which a state might legitimately prohibit the export of its water. The *Sporhase* Court indicated that if a state prohibits or severely restricts the interstate transportation of water, that prohibition or restriction is valid only if the state has a shortage of water[47] and its purpose is to promote the health and welfare of its citizens—not the health of its economy.[48]

C. *Water Embargo Statutes Not Authorized by Congress*

Justice Stevens' opinion rejected Nebraska's argument that Congress has authorized impermissible burdens on commerce in groundwater by its deference to state water laws.[49] The thrust of the opinion

---

44: L. TRIBE, *supra* note 35, § 6-5, at 326 (1978) (State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation.).

45. [T]he idea of strict scrutiny acknowledges that . . . [some legislative] choices . . . must be subjected to close analysis. . . . [I]t may also be understood as admonishing lawmakers and regulators . . . to be particularly cautious of *their* own purposes and premises and of the effect of their choices.

When expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, "strict" in theory and usually "fatal" in fact.

Id. § 16-6, at 1000 (emphasis in original) (citing Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

46. 102 S. Ct. at 3465. The Court addressed the same issue in City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966):

Moreover . . . [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State . . . . Obviously, the statute had little relation to the cause of conservation.

Id. at 839-40; *see also* West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (invalidated Oklahoma statute denying right of eminent domain and right to use state highways to transport natural gas outside state).

47. 102 S. Ct. at 3465.

48. *Id.* at 3464. Actual conservation is a legitimate and necessary state purpose, but hoarding natural resources, including water, is an unacceptable practice which the commerce clause does not permit. *See* Note, *supra* note 6, at 1275; *see also* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 538 (1949) (state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition).

49. 102 S. Ct. at 3465. Nebraska's argument was "based on 37 statutes in which Congress has

was that Congress cannot maintain a "hands off" policy in all instances of water regulation by the states. The Court stated:

> Although the 37 statutes and interstate compacts demonstrate Congress' deferences to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws . . . . Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreements, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce.[50]

"Expressly stated" consent by Congress will remove state legislation from attack under the commerce clause,[51] but no such permission was given to Nebraska.

IV. CONCLUSION

In *Sporhase*, the United States Supreme Court rejected the argument that groundwater is beyond the reach of the commerce clause because it is a publicly owned resource. The Court found that the Nebraska reciprocity provision was not the least restrictive method of protecting the state's legitimate conservation interests. Thus, the reciprocity provision was voided under a strict commerce clause analysis. It therefore follows that if the reciprocity statutes place an impermissible burden on interstate commerce, then the discretionary and totally prohibitive statutes[52] must certainly violate the commerce clause.[53]

Nevertheless, the *Sporhase* Court recognized a state's vital interest in effectively managing its own groundwater resources. The Court

---

deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress." *Id.*

50. *Id.* at 3466 (citations omitted). It has been argued that the dictum regarding the extent to which Congress' regulatory power extends to groundwater was an "unnecessary detour." *Commerce Clause Limits*, *supra* note 8, at 10,087. "[T]he dictum stands out as a clear message to Congress, almost an invitation, that it will find the constitutional road clear should it decide to address the problem of groundwater conservation and management." *Id.*

51. *Id.*

52. For an explanation of the three types of water embargo statutes, see *supra* note 14.

53. *See* Note, *supra* note 6, at 1253-75; Comment, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause? or Will New Mexico's Embargo Law Hold Water?*, 21 NAT. RESOURCES J. 617 (1981) (discussing City of El Paso v. Reynolds, Civ. No. 730 M (D.N.M. filed Sept. 5, 1980) and its challenge to the constitutionality of New Mexico's embargo statute).

even explained that the demonstration of a legitimate state interest in conserving dwindling groundwater resources can preserve a ban on interstate transfers. Therefore, state legislatures will need to reevaluate the purpose of their laws, and perhaps restrict their own citizens' use of groundwater, in order to comply with the constitutional requirements established by *Sporhase*.

It is not yet clear what impact, if any, *Sporhase* will have on state regulation of surface water.[54] Moreover, the decision may be disruptive to groundwater regulation only in the short run. The Court's recognition of the continuing public interest in groundwater should be sufficient to enjoin the transfer until a state legislature has an opportunity to enact a nondiscriminatory statute.[55] Whether these western states can continue to prohibit exports of groundwater in the long run, however, remains to be seen.

J.S. Garrett

54. While *Sporhase* stands for only a limited intrusion of the Commerce Clause into the sacrosanct state domain of water resource management, it may have more serious short-term impacts on state law. Ever since the Court's decision to take jurisdiction over *Sporhase*, state water resource managers have feared that a decision against Nebraska would have an extremely adverse impact upon states' efforts to protect their groundwater resources and could severely disrupt regulation of surface water use as well. They supposed that if the Commerce Clause precludes state efforts to regulate interstate transfers of groundwater then logically it also would disrupt state regulation of surface water transfers. Such a decision would reverse the judicial and congressional recognition of states' authority over water resources. The legality of equitable apportionment decrees, which resolve disputes between states over shared water, would be suspect.
Commerce Clause Limits, *supra* note 8, at 10,087.

55. *Id.*; *see* Note, *supra* note 6, at 1276-77 (suggesting nondiscriminatory alternatives to embargo statutes).