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It's Our Water - Can Wyoming Constitutionally Prohibit the Exportation of State Waters

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"IT'S OUR WATER!"--CAN WYOMING CONSTITUTIONALLY PROHIBIT THE EXPORTATION OF STATE WATERS?*

INTRODUCTION

Water has always been an indispensable ingredient in the development of the western states. During the last generation, the demands upon surface and ground waters have increased dramatically. It is estimated that, while the water supply for the entire United States is sufficient to meet foreseeable needs well into the next century, the consumption of water in the western states is exceeding the estimated dependable supply.[1] For example, it is estimated that the western states used 95 percent of the 73 billion gallons per day of water consumed nationally for irrigation in 1970, and that their citizens also consumed from 30 to 50 percent more water than the citizens of the eastern states.[2] Increasing demands for water from farmers, ranchers, municipalities, and industry have, no doubt, significantly increased these rates of consumption.

The federal government has, by and large, left the control and regulation of the use of water to the states,[3] and the Supreme Court has affirmed the wisdom of this policy.[4] As a result, western water users have relied upon state laws relative to water use and water appropriation.

Increasing demands upon these limited water resources have created a new public consciousness, which, in turn, has led to demands upon public officials to take steps to preserve these vital water resources. This public awareness, coupled with the traditional rights of states to regulate the appropriation and use of water, has resulted in legislation in Wyoming designed to preserve the state's waters for its inhabi-

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1. THE WORLD ALMANAC 432 (1974 ed.).
2. *Id.*
3. Trelease. *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).
4. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

tants by prohibiting exportation of state waters unless specifically authorized by the state legislature.[5]

Such a statute creates a serious dilemma. While a state may be justifiably concerned with preventing the rapid and uneconomic dissipation of one of its chief natural resources, it does not have unlimited power to exercise its police power to preserve its natural resources.[6] The state may exercise its police powers to prevent waste;[7] however, it may not exercise that power in such a manner as to restrict or interfere with interstate commerce.[8] All such attempts by the states to stymie the national government or to put their interests above the national interests or the interests of a sister state have failed.[9]

Thus, the action which the 1974 Wyoming Legislature has taken raises a fundamental constitutional question: whether the prohibition against the exportation of state waters without special authorization from the state legislature is a legitimate exercise of the police power, or whether it is an interference with and an unreasonabe burden upon interstate commerce.

Two contrary views exist on the issue of the constitutionality of such a statute. The older of these two views upholds

5. WYO. STAT. § 41-10.5 (Supp. 1974). The statute reads as follows:
§ 41-10.5. Applications for use of water outside the state.—
(a) All water being the property of the state and part of the natural resources of the state shall be controlled and managed by the state for the purpose of protecting and assuring the maximum permanent beneficial use of waters within the state.
(b) None of the water of the state either surface or underground may be appropriated, stored or diverted for use outside of the state or for use as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature on the advice of the state engineer.
(c) No holder of either a permit to appropriate water or a certificate to appropriate water, nor any applicant for a right to appropriate the unappropriated water of this state, may transfer or use the water so appropriated, certificated or applied for outside the State of Wyoming without prior aproval of the legislature of Wyoming, provided further, that as a prerequisite to any use or transfer any adjoining state in which any such water is used shall grant reciprocal rights for the use of water in Wyoming.
6. 15 AM. JUR.2d *Commerce* § 77 (1964) and cases cited therein.
7. Annot., 24 A.L.R. 307 (1923); Annot., 78 A.L.R. 834 (1932).
8. 15 AM. JUR.2d *Commerce* § 77 (1964) and cases cited therein.
9. Trelease, *Water Rights of Various Levels of Government—States' Rights vs. National Powers*, 19 WYO. L.J. 189 (1965).

such a prohibition as a legitimate exercise of the police power.[10] In *Hudson County Water Co. v. McCarter,* the Supreme Court upheld a New Jersey statute which read as follows:

> It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein.[11]

In so doing, it enforced an injunction sought by the State of New Jersey which prevented the appellant from withdrawing three million gallons of water a day from the Passaic River and delivering it to the City of New York pursuant to a contract entered into between appellant and the city after the statute had been adopted.

In upholding the statute's constitutionality, the Court both expressly and impliedly relied upon the following theories. First, there is a great public interest in preserving the water and forests within a state's territory.[12] Secondly, the Court said that if it were a legitimate exercise of the state police power to regulate the taking of wild animals, even to the point of prohibiting their being taken in-state and shipped out of state,[13] then it should be able to protect its water and forests from interference in the name of property by statute.[14] Thirdly, the Court said that this principle of public interest and the exercise of the police power provides a greater justification for regulation than does any theory of the right of the state to act as a quasi-sovereign.[15] Lastly, there appears to be an even more fundamental view which is latent in the Court's opinion that water is not an article of commerce until it is actually started to a point outside the state which initially seeks to regulate it.[16]

10. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).
11. *Id.* at 353.
12. *Id.* at 355.
13. Geer v. Connecticut, 161 U.S. 519 (1895).
14. Hudson County Water Co. v. McCarter, *supra* note 10, at 356.
15. *Id.* at 355.
16. Although language to this effect does not appear in *McCarter,* this conclusion is supported by language employed in the dissent in Pennsylvania v. West Virginia, 262 U.S. 553, 600 (1922), by Mr. Justice Holmes, the author of the *McCarter* opinion.

The more recent view, invoving a statute which sought to prohibit the exportation of state water, is that such a statute is an unconstitutional interference with and an unreasonable burden upon interstate commerce. In *Altus v. Carr*,[17] the Supreme Court, per curiam and without opinion, affirmed the decision of a three-judge federal district court striking down a Texas statute which had been passed after the plaintiff had entered into a contract with a Texas resident to purchase his ground water and export it to Oklahoma. The offending statute read as follows:

> No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specificaly authorized by an Act of the Texas Legislature and thereafter as approved by it.[18]

While appearing to limit its holding to the question of the statute's interference with the transportation and use of ground water after it has been withdrawn from a well and has become personal property,[19] the federal district court, nonetheless, assumed a substantially different view of the propriety of a state's attempt to restrict the exportation of state waters from that of the Supreme Court in *McCarter*. This divergent view seems to have rested upon the following theories. First, the district court considers water to be an article of commerce.[20] Secondly, the district court did not find a sufficient public interest to support the state action.[21] Finally, the federal district court said that, in any event, such a statutory attempt to restrict water exportation was an impermissible interference with and burden upon interstate commerce.[22]

The first portion of this article sets out in detail those arguments growing out of *McCarter* and those growing out of public policy which may be advanced in support of statutory

17. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966).
18. *Id.* at 830.
19. *Id.* at 839.
20. *Id.* at 840.
21. *Id.* at 839.
22. *Id.* at 840.

prohibitions against the exportation of state waters. The second part of the article details those arguments which support the conclusion that such statutory prohibitions are constitutionally impermissible. The third part of the article sets forth reasons why the Supreme Court's per curiam affirmation of the *Altus* opinion has not necessarily overruled *McCarter* sub silentio. Finally, assuming that *McCarter* has not been overruled, but that the rationale of *McCarter* must be reassessed, the last part of the article considers the constitutionality of the Wyoming statute in light of those tests currently employed by the Supreme Court to determine whether or not a particular activity is a legitimate exercise of the police power or is an impermissible interference with the scope of the commerce clause.[23]

ARGUMENTS IN SUPPORT OF PROHIBITING EXPORTATION OF STATE WATERS AS A PROPER EXERCISE OF THE STATE'S POLICE POWER

The specific holding of *McCarter* clearly permits a state to prohibit the exportation of those waters found within its boundaries on the theory that a state may in the public interest and as a proper exercise of its police power prohibit such exportation.[24] The purpose of this section is to examine the arguments of *McCarter* and other policy arguments which may be used to support the constitutionality of the Wyoming statute.

The State Ownership Argument

First, it may be said that because the state owns the water in Wyoming,[25] it may legitimately prescribe rules and regulations relative to its use.[26] Furthermore, because this ownership is more like that of a trustee than of a proprietor,[27] it exists for the benefit of the people of the state. Thus, in the exercise of that ownership the state has an obligation to

23. U.S. CONST. art. I, § 8.
24. *See* text pp. 135-46 for the critical analysis of these arguments and those appearing in pp. 128-32.
25. WYO. CONST. art. 8, § 1.
26. Hudson County Water Co. v. McCarter, *supra* note 10, at 356.
27. Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955).

promote the public convenience and prosperity.[28] It also has the obligation to preserve a valuable natural resource,[29] and few public interests are more indisputable or independent of property theory than the public interest in maintaining those rivers or other water sources, wholly within a state's boundaries, in a condition which is substantially undiminished except by such drafts upon them as the state, as guardian of the public welfare, may permit for the purpose of turning them to a more perfect use.[30] Therefore, it is arguably a legitimate exercise of the state police power for the legislature to determine that exportation of state waters is not in the public welfare because it does not promote a more perfect use of this valuable natural resource.

Furthermore, because the state owns the water, the appropriator can acquire only a limited ownership in the water.[31] He is like the taker of wild animals in that he has no pre-existing right to the water he seeks to appropriate,[32] for the appropriator must take his permit subject to those conditions and limitations which the legislature has seen fit to impose.[33] It is only after he has received a permit from the State Engineer that the appropriator may be said to have a property interest.[34] Even then, that right is merely a right to use the water[35] and not to its corpus.[36] Since the use of that water may be initially limited by the state,[37] and since the appropriator cannot enlarge this limited and qualified right once he has received it,[38] it is probable that there is no unconstitutional deprivation of any right of the appropriator nor any interference with interstate commerce.

The Local Concern Argument

Another argument supporting the contention that the statute does not violate the commerce clause is that it deals

28. Sligh v. Kirkwood, 237 U.S. 52, 59 (1915).
29. Geer v. Connecticut, *supra* note 13, at 534.
30. Hudson County Water Co. v. McCarter, *supra* note 10.
31. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 P. 764 (1925).
32. State v. Rodman, 58 Minn. 393, 59 N.W. 1098, 1099 (1894).
33. Wyoming Hereford Ranch v. Hammond Packing Co., *supra* note 31, at 770.
34. WYO. STAT. § 41-138 (Supp. 1973); WYO. STAT. § 41-201 (1957).
35. Wyoming Hereford Ranch v. Hammond Packing Co., *supra* note 31, at 770.
36. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).
37. Hudson County Water Co. v. McCarter, *supra* note 10.
38. *Id.* at 357.

solely with a matter of local concern over which the state may properly exercise its police power. For example, both Congress and the Constitution recognize the sovereignty of the state in local regulation for the protection of natural resources.[39] Where states are subject to interstate water compacts, the Congress has recognized the rights of the states to regulate and control those waters within their jurisdictions.[40] The Supreme Court has also recognized the rights of states to regulate their water resources.[41] In short, there may be said to exist a right of the state to prohibit the exportation of those waters found wholly within its boundaries— a right which the federal government should recognize as a legitimate regulation of a matter of local concern.

However, assuming that the statute can be shown to touch interstate commerce, it is arguable that the statute is still a legitimate exercise of the police power because of the significant public interest in regulating a matter of local concern whose effect upon interstate commerce is only indirect and incidental.[42] The prohibition against the use of state waters to transport minerals, chemicals or other products out of the state without the prior approval of the legislature[43] does not prevent their transportation out of state by more conventional means. Neither does the statute prevent items of commerce from moving into the state. Nor does the statute prevent these items from being exported out of state on the navigable waterways of the state.

Rather, it may be said the statute simply implies that the use of its water as a conduit for moving other natural resources or products out of the state is not a per se beneficial use of the state's waters. Therefore, before such a use will be permitted, the legislature, upon the advice of the State Engineer, will have to determine if such a proposed use is beneficial. For, the argument goes, the legislature and not the appropriator has the right to determine if such a use, or

39. Corsa v. Tawes, 149 F. Supp. 771, 776 (D. Md. 1957), *aff'd*, 355 U.S. 37 (1957).
40. 43 U.S.C. § 617(q) (1971).
41. California Oregon Power Co. v. Beaver Portland Cement Co., *supra* note 4.
42. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
43. WYO. STAT. § 41-10.5 (Supp. 1974).

any other use of state waters outside the state, promotes a more perfect use,[44] is in the public's water interest,[45] or is, instead, detrimental to the public welfare.[46] In other words, the state, it is said, should have considerable leeway in analyzing local evils and in prescribing appropriate cures.[47] So long as the local benefit which the statute is designed to achieve outweighs a minor inconvenience to interstate commerce, the statute must be seen as a legitimate exercise of the police power.[48] The commerce clause does not require the state to yield to the mere convenience and advantage of particular industries when it may reasonably consider conservation to be of paramount importance.[49]

The Public Policy Arguments

Another line of argument in favor of the constitutionality of such prohibitions is that, even though the statute does discriminate against those who intend to use Wyoming water out of state by requiring them to get the prior approval of the legislature, there are substantial, valid and independent reasons for doing so.[50] These reasons grow out of a substantial public interest and are based upon desirable public policy.

For example, when water is appropriated for use within the state, the state derives a variety of economic benefits therefrom. The state experiences increased production and property values. These, in turn, generate more income for the state's residents and more revenue for the state. Such advantages must necessarily be considered an integral part of the concept of a beneficial use. Thus, it is contended, the state must be permitted the right to determine whether or not proposed uses of state waters outside the state will generate economic benefits of a similar nature for the state.

Another policy reason which may be said to justify the statutory restrictions derives from the paradoxical nature of

44. Hudson County Water Co. v. McCarter, *supra* note 10.
45. WYO. STAT. § 41-139 (Supp. 1973).
46. WYO. STAT. § 41-203 (1957).
47. Toomer v. Witsell, 334 U.S. 385 (1948).
48. Corsa v. Tawes, *supra* note 39, at 776.
49. *Id.* at 777.
50. Toomer v. Witsell, *supra* note 47, at 396.

water. On the one hand, water is commonplace. It is found in sufficient quantities in all states to permit some economic development. No state is so devoid of water that its very economic livelihood must depend upon those surface or ground waters found wholly within the boundaries of a sister state. There is no justifiable reason which should require that sister state to sacrifice its future growth for the immediate growth of the requesting state.

On the other hand, water is unique. Unlike any other natural resource there can be no growth without it. For that reason, those states which are part of an interstate water system are assured by the federal government through various water compacts and by the Supreme Court through its holdings that they will have access to an equitable portion of the waters within those systems. These compacts and court holdings suggest other vital concepts. One is that no state will be permitted to substantially impair or deprive a sister state of those natural resources necessary to its development.[51] Another is that the federal government has generally been willing to allow the states to regulate the appropriation and use of those waters found within their boundaries.[52] Most importantly, the compacts and the holdings reflect federal acceptance of the unique nature of water as a natural resource in that neither the Government nor the courts have allowed such state latitude with respect to other natural resources.[53] Thus, it is arguable that such policies must permit a state to pass prohibition statutes such as Wyoming's as an attestation that water is the one building block which is essential to the economic growth of any state, municipality, industry or agricultural endeavor.

Additionally, public policy must permit water to be treated as a resource which is different from all other resources and to allow the states to regulate the ways in which it will permit this unique natural resource to be exploited,

51. Kansas v. Colorado, 206 U.S. 46 (1906).
52. 43 U.S.C. § 617(q) (1971); California Oregon Power Co. v. Beaver Portland Cement Co., *supra* note 4.
53. Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1910); Pennsylvania v. West Virginia, 262 U.S. 533 (1922); State *ex rel.* Corwin v. Indiana and Ohio Oil, Gas & Mining Co., 120 Ind. 575, 22 N.E. 778 (1889).

even if such regulation incidentally and indirectly affects interstate commerce. Public policy must require the federal government to continue to refrain from interfering in the state's regulation of this particular natural resource. These public interests are especially strong when that resource is owned by the state for the beneficial use of its people and the federal government has recognized this ownership.[54]

The "Water Is Not a Commodity" Argument

A final argument which may be advanced in support of such prohibitions as a legitimate exercise of the state police power is that water has not been treated as a commodity or article of interstate commerce.[55] While navigable waterways have long been subject to the commerce clause,[56] water itself has not been viewed as subject to the clause. Rather, decisions involving interstate water problems have been decided upon concepts of the sovereign power.[57] The major water cases have involved navigable interstate streams[58] and have not spoken of water in terms of a commodity of interstate commerce. Therefore, there is no precedent for the federal district court's treatment in *Altus* of water as a commodity of interstate commerce.

ARGUMENTS IN SUPPORT OF FINDING THE PROHIBITION OF EXPORTATION OF STATE WATERS TO BE AN UNCONSTITUTIONAL INTERFERENCE WITH AND A BURDEN UPON INTERSTATE COMMERCE

The demarcation line which separates the legitimate exercise by the state of the police power from an unreasonable interference by the state in interstate commerce cannot be determined by any general formula.[59] Nonetheless, there are certain guiding principles which, when applied to a given fact

54. California Oregon Power Co. v. Beaver Portland Cement Co., *supra* note 4, at 162; Merrill v. Bishop, *supra* note 27, at 624.
55. This is the view implicit in *Hudson County Water Co. v. McCarter, supra* note 10.
56. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
57. Trelease, *supra* note 3, at 651.
58. Kansas v. Colorado, *supra* note 51; Arizona v. California, 373 U.S. 546 (1962).
59. Hudson County Water Co. v. McCarter, *supra* note 10, at 355.

situation, assist in the determination of whether a particular action by the state is within its police power or is outside it and is, therefore, unconstitutional. This section considers those arguments which may be advanced in support of the view that such statutory prohibitions of water use are unconstitutional.

"Water Is an Article and Instrumentality of Commerce" Argument

First, it may be asserted that water is both an article and an instrumentality of commerce, and, as such, is subject to regulation under the commerce clause. For example, it has been held that natural resources are commodities of interstate commerce,[60] especially when they have assumed a form which is suited for interstate transportation.[61] Once the transformation has occurred, it has been held that no state can keep that commodity within its borders by passing a law forbidding its interstate transportation.[62] It does not matter if the natural resource is gas[63] or water.[64]

Because the Wyoming statute explicitly recognizes water as a part of the natural resources of the state,[65] it may be argued that Wyoming water is capable of becoming a commercial commodity according to the general rule. Thus, it may be contended that, because the statute interferes with and burdens the use of that commodity in interstate commerce,[66] it is unconstitutional.[67]

Furthermore, mediums of transportation are instrumentalities of interstate commerce,[68] which are subject to the commerce clause.[69] Arguably, this statute seeks to prohibit

60. Altus v. Carr, *supra* note 17; Oklahoma v. Kanssa Natural Gas Co., *supra* note 53; Pennsylvania v. West Virginia, *supra* note 53.
61. State *ex. rel.* Corwin v. Indiana and Ohio Oil, Gas & Mining Co., *supra* note 53.
62. *Id.* at 779.
63. Oklahoma v. Kansas Natural Gas Co., Pennsylvania v. West Virginia, State *ex rel.* Corwin v. Indiana and Ohio Oil, Gas & Mining Co., *supra* note 53.
64. Altus v. Carr, *supra* note 17.
65. WYO. STAT. § 41-10.5(a) (Supp. 1974).
66. WYO. STAT. § 41-10.5(b) (Supp. 1974).
67. Altus v. Carr, *supra* note 17, at 839.
68. The Daniel Ball, 77 U.S. (10 Wall.) 999 (1871).
69. *Id.*

or interfere with or place a burden upon the use of state waters as a medium of transportation.[70] The Supreme Court has held that state regulations which obstruct the interstate operations of transportation or which adversely affect transportation to the detriment of the national interest in efficiency and economy are unconstitutional.[71] Therefore, it may be maintained that the Wyoming statute is unconstitutional because it interferes with an instrumentality of interstate commerce to the detriment of the national interest in efficiency and economy.

The Discrimination Argument

The statute may also be considered unconstitutional because it discriminates against a single type of water user.[72] Disparities in treatment are permissible, but only when those discriminated against are a peculiar source of the evil which the statute seeks to regulate.[73] Moreover, such discrimination requires an adequate explanation before it will be sustained as a valid exercise of the police power.[74]

Measured against this standard, it may be said that the statute unreasonaby discriminates because there is nothing in the statute which indicates that the out of state use to which the water may be put is more harmful to the state than an in-state use. While the statute implies that the use of water as a medium of transportation is not one which will assure the maximum permanent beneficial use of waters within the state,[75] there is no prohibition against using Wyoming water to transport mineral, chemical or other products within the state. Thus, there appears to be no adequate explanation for this discrimination. "In the name of conservation the statute seeks to prohibit interstate shipment of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of

70. WYO. STAT. § 41-10.5(b) (Supp. 1974).
71. Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1944).
72. WYO. STAT. § 41-10.5(b), (c) (Supp. 1974).
73. Toomer v. Witsell, *supra* note 47, at 398.
74. Edwards v. Leaver, 102 F. Supp. 698, 702 (D. R.I. 1952).
75. WYO. STAT. § 41-10.5(a), (b) (Supp. 1974).

water. . . .'"[76] Such a discrimination against an article or instrumentality of commerce is unconstitutional.[77]

The "Close and Substantial Relation" Argument

Lastly, it may be asserted that the statute fails to pass constitutional muster when it is measured against the so-called "close and substantial relation" test. Here, the critical factor is not if the statutory purpose is to regulate an activity which may be intrastate when considered separately, but if the activity which the statute seeks to regulate has such a close and substantial relation to interstate commerce that it is essential and appropriate for Congress to exercise control over the activity in order to protect commerce from burdens and obstructions.[78] When a statute proceeds to regulate commerce, it is exercising the very power granted to Congress and is doing the very thing which Congress is authorized to do.[79] Therefore, it is not necessary that Congress have enacted legislation in the particular area before the commerce clause will protect against state legislation which is inimical to the national interest.[80]

This standard is a particularly appropriate touchstone when the challenged statute purports only to regulate a matter of local concern,[81] or only to affect interstate commerce indirectly rather than directly.[82] Consequently, a statute may be recognized to touch upon a local concern and still come under the purview of the commerce clause.[83] This is especially true when the statute purports to conserve or preserve a natural resource.[84] Such statutes may bear a close and substantial relation to interstate commerce in that they attempt to halt commerce at state lines.[85]

76. Altus v. Carr, *supra* note 17, at 840.
77. *Id.*
78. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
79. Gibbons v. Ogden, *supra* note 56.
80. Southern Pac. Co. v. Arizona, *supra* note 71, at 769.
81. Altus v. Carr, *supra* note 17.
82. Carter v. Carter Coal Co., *supra* note 42.
83. NLRB v. Jones & Laughlin Steel Corp., *supra* note 78.
84. Oklahoma v. Kansas Natural Gas Co., *supra* note 53.
85. State *ex rel.* Corwin v. Indiana and Ohio Oil, Gas & Mining Co., *supra* note 53.

Where the real motivation of such statutes is actually the commercial conservation and preservation of the natural resource,[86] the close and substantial relation test becomes critical. For it has been said that if such a regulation were recognized as a legitimate local concern, not subject to the commerce clause, then nothing would keep any other state from keeping its corn, wheat, cotton, fruit, lead, iron, or petroleum within its borders.[87] To permit this would be to permit the destruction of interstate commerce.[88] Arguably it is just exactly this kind of thing which the Wyoming statute appears to do,[89] and it is precisely this kind of invidious restraint which the Constitution prohibits.[90]

Nonetheless, it may still be said in support of the statute that even though it appears to affect interstate commerce, it does so indirectly; therefore, the measure of interference should not be the magnitude of the cause or effect, but the manner in which the effect is brought about.[91] This argument is no longer recognized by the Supreme Court.[92] Thus, the Wyoming statute which, on the surface, appears to regulate a local matter and to touch upon interstate commerce only indirectly, may be unconstitutional because it actually bears such a close and substantial relation to interstate commerce that it is in the national interest that Congress regulate the activity.[93]

THE PROBLEM OF *McCarter* AND *Altus*

The language and certainly the intent of the Texas statute which the federal district court declared unconstitutional in *Altus* is virtually identical to that in the New Jersey statute in *McCarter* and that in the Wyoming statute. Thus, it is necessary to show that *Altus* has not overruled *McCarter*

86. Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 255.
87. State *ex rel.* Corwin v. Indiana and Ohio Oil, Gas & Mining Co., *supra* note 53, at 779.
88. Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 255.
89. WYO. STAT. § 41-10.5 (Supp. 1974).
90. Pennsylvania v. West Virginia, *supra* note 53.
91. Carter v. Carter Coal Co., *supra* note 42.
92. United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., *supra* note 78; Wickard v. Filburn, 317 U.S. 111 (1942).
93. NLRB v. Jones & Laughlin Steel Corp., *supra* note 78.

sub silentio in order to prevent the Wyoming statute from being considered unconstitutional on its face. This section suggests reasons why it may be argued that *Altus* has not overrruled *McCarter*. However, before those arguments can be set forth, it is necessary to confront serious questions which are raised in *Altus*.

While it is true that *Altus*, when read closely, indicates that the federal district court limited its holding,[94] it may well be that to rely upon such an argument is too legalistic. Certainly, such an argument seems to ignore the bulk of the court's discussion. Read broadly, there can be little doubt that the district court placed water in exactly the same category of natural resources as natural gas, for the entire analysis[95] of the Texas statute amounts to little more than extensive quotations from the leading natural gas cases which struck down attempts by gas-producing states to prohibit exportation for the benefit of its citizens. As far as the *Altus* court was concerned, water was like natural gas in that it was viewed as an article of commerce, and its transmission in interstate commerce was viewed as interstate commerce.[96]

Additionally, it cannot be overlooked that the federal district court was unwilling to be persuaded by the reasoning in *McCarter*,[97] and that on appeal the Supreme Court may also have been unwilling to be further bound by the rationale of *McCarter*. Because the district court in *Altus* chose to rest its holding upon the reasoning of the Supreme Court in the natural gas cases,[98] which developed after *McCarter*, the possibility exists that the per curiam affirmation indicates the Supreme Court's own willingness to abandon *McCarter*. Credence is given to this argument when it is noted that the Supreme Court itself refused to extend *McCarter* to the natural gas cases.[99] Finally, it may be significant that the

94. Altus v. Carr, *supra* note 17, at 839.
95. *Id.* at 837-39.
96. *Id.* at 839.
97. *Id.*
98. Oklahoma v. Kansas Natural Gas Co.,; Pennsylvania v. West Virginia, *supra* note 53.
99. Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 258.

theory of interstate commerce, upon which Justice Holmes implicity relied[100] in *McCarter,* is now outmoded.[101]

However there is nothing in these Supreme Court decisions which conclusively determines that the Court has abandoned *McCarter* in water regulation cases. In fact, the Supreme Court has implied that there is a fundamental difference between water and natural gas as natural resources, and that this difference is sufficient to allow the states to prohibit the exportation of water even though the same rationale will not permit them to prohibit the exportation of natural gas.[102] Thus, this apparent distinction itself becomes an initial reason for suggesting that the Supreme Court's affirmation of *Altus* has not overruled *McCarter.*

Another reason for suggesting that *Altus* has not overruled *McCarter* is that the former, and the natural gas cases upon which it relies, are deeply rooted in a property theory, and the Supreme Court has traditionally refused to decide conflicts between states over water on property theories.[103] Instead, it has decided such cases on the basis of a proper allocation of the sovereign powers.[104] The question has not been one of ownership of water but of the power of the federal government and of the appropriate exercise thereof.[105]

Thirdly, while navigable waters have long been recognized as subject to the commerce clause,[106] there is no indication that water itself is to be treated as a commodity of interstate commerce. Excepting *Altus,* there is no precedent

100. Although no view of interstate commerce is expressed in *McCarter,* in *Pennsylvania v. West Virigna, supra* note 53, at 600, Holmes, in dissent, argued that products of a state, until actually started to a point outside it, were not objects of interstate commerce and could be regulated by the state. This view had its origin in Kidd v. Pearson, 128 U.S. 1, 20-21 (1888), where the Court expressed the view that interstate commerce consisted only of buying, selling, and transporting goods, and did not include the preparation of the product for such activity.

101. United States v. Darby, *supra* note 92, at 113.

102. Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 258-60.

103. Trelease, *supra* note 3, at 651.

104. *Id.*

105. *Id.*

106. Gibbons v. Ogden, *supra* note 56.

to suggest that the Supreme Court has changed its fundamental view of the uniqueness of water.[107]

On the contrary, given the Supreme Court's penchant for limiting its holdings to the facts before it and for authoring lengthy opinions when it moves to alter dramatically a longstanding legal view, it seems reasonable to say that *Altus* is not intended to be seen as overruling *McCarter*. It cannot be overlooked that *Altus* was before the Court on direct appeal. The Court had to confront it. It could not avoid the holding. The Court may well have affirmed solely on the basis of the narrow holding in *Altus* without adopting the broader language of the decision. While there is a danger that this kind of reasoning is too legalistic, it is no more strained than to say that the Supreme Court has abandoned a long-held view and adopted, without so much as a word, an entirely new view of the right of the states to regulate the use of their water. This seems to be particularly possible when the new view is embodied in a federal district court decision which is marked by its mixture of sweeping generalizations and narrow holding and by its incomplete analysis.

Nonetheless, these arguments must be tempered. While the Supreme Court has implied that a separate standard is to be used where a statute prohibits the exportation of water, the truth may be that such a statement is more a symptom of stare decisis than of a strong commitment to the wisdom of that view. It may be that, by affirming *Altus,* the Court has signalled the direction it intends to take when another case like *McCarter* comes before it and the issue is deemed ripe for adjudication. Until such time, it is doubtful that by affirming *Altus* per curiam and without opinion, the Supreme Court has tacitly overruled *McCarter*.

THE STATUS OF THE WYOMING STATUTE

As the discussion above has attempted to indicate, strong arguments can be made that the Supreme Court has not

107. Hudson County Water Co. v. McCarter, *supra* note 10, at 356; Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 258-60.

adopted the broad language of *Altus* which treats water as any other natural resource. However, this conclusion is not meant to imply that the court will continue to follow *McCarter in toto* when another case comes before it, in which a similar prohibition against the exportation of water is challenged, and the Court decides that the entire concept embodied in *McCarter* is ripe for review. Therefore, a valid reason exists for considering the scope and intent of the Wyoming statute in light of current Court doctrine on the reach of the commerce clause, rather than just in terms of *McCarter* and *Altus*.

Certain Basic Premises

Before reviewing the Wyoming statute in light of contemporary commerce clause doctrine, it is necessary to set down certain basic premises which will be essential to that review. The first is that because of its paradoxical nature, water is a unique natural resource. Another premise is that both the federal and the state governments traditionally have treated water differently from other resources where regulation or use is involved. A third premise is that such special treatment is justified and should permit a greater degree of infringement upon commerce than is permitted when other natural resources are involved. However, there will still exist a boundary at which conflicting interests balance,[108] so that a statute, such as the one here considered, may fall on either side of that boundary.[109] Thus, the purpose of this section is to apply the current commerce clause doctrines to the statute in order to determine if the purpose it seeks to achieve falls on the nearer or farther side of that boundary and is a permissible exercise of the police power or is an impermissible interference with and burden upon interstate commerce.

The Significance of the State Interest

The logical place to begin an analysis of the statute in light of current commerce clause doctrine is to look to see if

108. Hudson County Water Co. v. McCarter, *supra* note 10, at 355.
109. *Id.*

the statute seeks to protect a significant state interest. According to its own terms, the express purpose of the statute is to protect and to assure the maximum beneficial use of those waters within the state.[110] It is settled that a state may enact a statute whose purpose is to conserve, protect, control, and regulate the use, development and appropriation of water for beneficial and public purposes and to prevent waste and unreasonable use of water.[111] Since few public interests grow more pressing as population grows or are more obvious, indisputable and independent of particular theory than the public interest in the wise and judicious use of a state's water resources for the benefit of its citizens,[112] the statute may be said to have a legitimate purpose. It seeks, on its face, to protect a significant state interest.

A second elemental consideration is whether or not the prohibitions of the statute affect either an article or an instrumentality of commerce. This requires a two-pronged analysis. First, the prohibition must be considered as it applies to the use of water as a medium of transportation. Secondly, it must be considered as it applies to the use of water generally outside the state.

If such a consideration determines that neither use which the statute seeks to restrict is an article or instrumentality of commerce, then the conclusion must be that there is no violation of the commerce clause. The commerce clause does not operate upon activities which occur wholly within the state.[113]

The Effect of the Statute on the Use of Water as a Medium of Transportation

The statute expressly states that no waters of the state shall be used as a medium of transportation of mineral, chemical or other product to another state without the specific approval of the legislature.[114] This type of restriction is unlike any found in the statutes discussed in *McCarter* and

110. WYO. STAT. § 41-10.5(a) (Supp. 1974).
111. Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578, 595 (1962).
112. Hudson County Water Co. v. McCarter, *supra* note 10, at 356.
113. Gibbons v. Ogden, *supra* note 56.
114. WYO. STAT. § 41-10.5(b) (Supp. 1974).

Altus. To that extent, neither case would be controlling, and this restriction must, of necessity, be considered on its own terms with respect to current commercial clause doctrines.

First of all, such a restriction must necessarily be said to touch an instrumentality of commerce, since a medium of transportation to another state is, by its own force, an instrumentality of interstate commerce and subject to the reach of the commerce clause.[115] The power of the commerce clause is the power to regulate and when a state proceeds to regulate commerce among the several states, "it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do."[116] The attempt to place restrictions upon the use of state waters as a medium of transportation of products out of the state is an unconstitutional interference with and burden upon interstate commerce.

The proposed restriction is unconstitutional for two reasons. First, if a state cannot impose restrictions similar to the one found in the Wyoming statute upon trains moving in interstate commerce,[117] it most certainly should not be able to impose them upon water when it is to be used as a medium of transportation moving in interstate commerce. Secondly, the restriction upon the use of water as a medium of interstate transportation is inherently discriminatory. It is entirely possible that state waters may be used as a medium of transportation of mineral, chemical or other products within the state without requiring legislative approval. While a state may discriminate between in-state and out of state users, there must be sufficient justification for such discrimination.[118] Because the restriction imposes a discrimination against interstate commerce without substantial justification, the provision providing that none of the water of the state may be used as a medium of transportation to another state without legislative approval is most likely unconstitutional. The burden appears to be clearly excessive in relation to the putative local benefits the restriction purports to assure.[119]

115. The Daniel Ball, *supra* note 68.
116. Gibbons v. Ogden, *supra* note 56, at 199-200.
117. Southern Pac. Co. v. Arizona, *supra* note 71.
118. Toomer v. Witsell, *supra* note 47, at 396.
119. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The Effect of the Statute on the General Use of Water Outside the State

The newly enacted statute also requires legislative approval for any other use of state waters outside of the state.[120] These potential uses, unlike the use of water as a medium of transportation, do not of their own force qualify as an article of commerce or as an instrumentality of commerce. Thus, it must be determined if water may properly be classified as a commodity or article of commerce.

Water is a natural resource, and natural resources have traditionally been treated as commodities and articles of commerce.[121] A look at the way in which water is handled and used suggests an approach which is no different from that given to other natural resources. Water is capable of being bought and sold much like natural gas. For example, it is sold daily to household users and to industrial users. Because it is subject to such ordinary business functions, water may be regarded as an article of commerce, and the restrictions which the Wyoming statute seeks to place upon its use may be said to affect commerce. The problem is whether that burden is so unreasonable as to require that the restriction be declared unconstitutional.

It is apparent that the restrictions imposed upon the out of state uses by the statute impose a burden upon commerce. In the first place, the contention that the restrictions are no burden because they are a necessary adjunct to those other statutes and regulations which govern the appropriation and use of state water is unconvincing. A close review of a selected few of the applicable statutes[122] indicates that there exists sufficient statutory authority to ensure that the state's waters will not be wasted or unreasonably exploited. On the one hand, the statutes restrict all uses to beneficial uses.[123] On the other hand, they give ample authority to the State

120. WYO. STAT. § 41-10.5(b), (c) (Supp. 1974).
121. *See* the natural gas cases in note 53 *supra*.
122. WYO. STAT. §§ 41-2 to -3, -201 to -203 (1957); WYO. STAT. §§ 41-4.1, -124, -126, -129, -138, -139 (Supp. 1973).
123. WYO. STAT. § 41-2 (1957).

Engineer to determine if a use will be in the public interest[124] or if it will, instead, tend to impair the value of existing rights or be otherwise detrimental to the public welfare.[125] They also provide for a review of any subsequent transfer of use of a water right in order to assure that the state and the public interests are protected.[126] Therefore, to impose these additional restrictions serves no legitimate state interest and must be classified as a burden upon commerce.

Secondly, the restriction against the use of water generally outside the state without legislative approval is discriminatory. To the extent that the statute discriminates against this out of state use, it may be said to place a burden upon commerce. The question is whether that burden, like the burden upon the use of water as a medium of transportation in interstate commerce, is also so burdensome and bears such a close and substantial relation to interstate commerce[127] that it too must be stricken as an unconstitutional interference with and an unreasonable burden upon interstate commerce. However, this determination must be made in light of the fact that water is a unique natural resource which has been given special treatment by both the state and federal governments and that, as such, the state should be able to place a substantially greater burden upon its use and appropriation before that burden is declared unconstitutional.

The Flaw in the State Ownership Argument

Probably the most typical argument made in support of the statutory restrictions which have been placed upon the use of water outside the state is based upon the concept that all property in the water of the state resides in the state.[128] The argument goes that the appropriator has never had a property or possessory interest in state water prior to appropriation[129] and that even after appropriation the user has only a right to use the water and not to the water itself, sub-

124. WYO. STAT. § 41-139 (Supp. 1973).
125. WYO. STAT. § 41-203 (1957).
126. WYO. STAT. § 41-4.1 (Supp. 1973).
127. NLRB v. Jones & Laughlin Steel Corp., *supra* note 78, at 37.
128. WYO. CONST. art. 8, § 1.
129. Farm Investment Co. v. Carpenter, *supra* note 36.

ject to the rules and regulations which the state has seen fit to impose upon that use.[130] Therefore, when the state requires that any applicant or holder of a permit to appropriate state waters for use outside the state comply with these additional provisions which require reciprocity in adjoining states and approval of the legislature, the state is exercising a legitimate power for the purpose of preserving and regulating an important resource.

The last part of this argument is that the statute is not in conflict with the holdings of the gas cases and of *Altus* because in those cases no state claimed all property in either the gas or the water of the state because of a statutory or constitutional declaration to that effect. It is said that in those cases the water or the natural gas either belonged to the surface owner or was subject to the law of capture.

However, there are problems with relying upon this line of argument in order to support the contention that the burden is not so unreasonable as to be unconstitutional. First, the concept of state ownership is merely a fiction expressive of the importance to the people that a state have the power to preserve and regulate the exploitation of important resources.[131] More importantly, the particular property theory which a state has adopted with respect to its water should not make any significant difference in determining whether or not a statute unreasonably burdens or interferes with interstate commerce. The right to engage in interstate commerce is not a gift of the state, nor is it something that can be regulated or restrained by the state.[132] Therefore, the issue is not one of property or ownership,[133] but of accommodating the competing demands of the state and national interests involved.[134] If the activity the statute prohibits or restricts in order to accommodate that state interest has such a close and substantial relation to interstate commerce,[135] then the national interest will require that the statute be declared unconstitutional.

130. Wyoming Hereford Ranch v. Hammond Packing Co., *supra* note 31, at 770.
131. Toomer v. Witsell, *supra* note 47, at 402.
132. Oklahoma v. Kansas Natural Gas Co., *supra* note 53, at 260.
133. Trelease, *supra* note 3, at 652-53.
134. Parker v. Brown, 317 U.S. 341, 362 (1943).
135. NLRB v. Jones & Laughlin Steel Corp., *supra* note 78, at 37.

The "Local Interest v. the National Interest" Problem

The first question, then, is whether the prohibition against the appropriation, storage, or diversion of the water of the state for use outside the state without reciprocal rights being granted by the recipient state[136] consitutes a significant enough local interest to outweigh any competing national interest. If so, this portion of the statute should be upheld.[137]

Strong policy arguments support the contention that there is such a significant local interest. On the one hand, it is arguable that the granting of permits for use of water outside the state, absent reciprocal rights from the benefiting state[138] is not in the public's water interest,[139] but is detrimental to the public welfare and interest.[140] Availability of water in sufficient quantities is essential for social and economic development. Water taken out of the state to develop industry, agriculture or other forms of economic activity elsewhere deters or denies similar activity in Wyoming. Thus, requiring recipocal rights, it may be asserted, provides a possible source of water should the need arise. The restriction can be viewed as a form of cost to the appropriating state in exchange for benefits received as a result of the use of Wyoming water outside the state.

It is doubtful that this provision of the statute requiring reciprocity is inimical to the national interest or national commerce.[141] It is questionable if the national interest is better served by requiring one state to sacrifice the one natural resource absolutely essential to its own economic growth in order to promote the same kind of growth in a sister state. No state should be compelled to structure its laws for the mere convenience and advantage of a particular industry[142] or for a sister state.

On the other hand, it is also probable that when such local interest and public well-being exist and when the Federal

136. WYO. STAT. § 41-10.5(b), (c) (Supp. 1974).
137. Parker v. Brown, *supra* note 134, at 362.
138. WYO. STAT. § 41-10.5(c) (Supp. 1974).
139. WYO. STAT. § 41-139 (Supp. 1973).
140. WYO. STAT. § 41-203 (1957).
141. Southern Pac. Co. v. Arizona, *supra* note 71, at 769.
142. Corsa v. Tawes, *supra* note 39, at 777.

Congress has not legislated in the area and practical difficulties indicate the matter may never be adequately dealt with by Congress, the local regulation should be upheld.[143] It is also arguable that any adverse effect on interstate commerce is only incidental and indirect and is outweighed by the local benefits the provision is designed to achieve.[144] In any event, even if the provision does place a significant burden upon commerce, that burden, in light of water's unique attributes and its previous special treatment as a natural resource, is not so unreasonable as to constitute an impermissible interference with and burden upon interstate commerce.

The second question is whether the prohibition against the appropriation, storage, or diversion of the water of the state for use outside the state without prior legislative approval[145] constitutes a sufficient enough local interest to pass constitutional muster. Unfortunately, it is this portion of the statute which sweeps too broadly and is most probably unconstitutional.

While it may not be unreasonable or impermissible to require reciprocal rights be granted to Wyoming residents by those states who benefit from their citizens' appropriation of Wyoming water, it may well be an unreasonable burden upon and interference with interstate commerce to require any prospective diverter of Wyoming water for use outside the state to get legislative approval. The avowed purpose of the statute, to protect and to assure the maximum permanent beneficial use of waters within the state, can be accomplished when the water is to go outside the state just as easily within the framework of existing statutes[146] without imposing the additional burden of going to the state legislature for its specific approval. For example, there are specific statutory instructions to the State Engineer[147] to protect and to assure the maximum permanent benefical use of state waters. There are also sufficient provisions to protect those

143. Parker v. Brown, *supra* note 134, at 362.
144. Corsa v. Tawes, *supra* note 39, at 776-77.
145. WYO. STAT. § 41-10.5(b), (c) (Supp. 1974).
146. WYO. STAT. §§ 41-2 to -3, -201 to -203 (1957); WYO. STAT. §§ 41-4.1, -124, -126, -129, -138, -139 (Supp. 1973).
147. WYO. STAT. § 41-126 (Supp. 1973).

interests should there be an attempt to transfer existing uses to other uses or to uses outside the state,[148] without requiring special legislative approval.[149]

Furthermore, no guidelines, rules, or regulations are set out which are to guide the legislature in rendering any decision. When a statute prohibits an activity which touches interstate commerce, and does not set out such guidelines, rules, or regulations, it is placing an unreasonable burden upon interstate commerce.[150] No substantial or significant local interest is served by placing this additional burden upon potential out of state users. At its worst, this requirement makes a subjective and political decision out of a matter which should be decided objectively at an administrative level in accordance with all the available scientific data and in conformity with existing statutory guidelines and mandates. Thus, the burden of requiring legislative approval only for potential uses outside the state serves no useful purpose. It serves only to duplicate procedures and requirements already provided for by statute. Such a requirement discriminates against one kind of use of Wyoming water without substantial justification[151] and is clearly excessive in relation to any putative local benefit.[152]

In sum, subsection (a) is constitutionally permissible because it expresses a substantial local interest over which the state may exercise its police power. Subsection (b), it is contended, is unconstitutional in two respects. First, it creates an unreasonable burden upon and an interference with interstate commerce because its requirement of legislative approval for any out of state use is an excessive requirement in relation to the local benefit set out in subsection (a). Secondly,

148. WYO. STAT. § 41-4.1 (Supp. 1973).
149. A review of the so-called "ETSI" provisions of WYO. STAT. §§ 41-10.5(d), (e), (f) (Supp. 1974) shows that the legislature has basically required of Energy Transportation Systems, Inc. only those things already required by existing statutes of appropriators. The only exception is that the legislature has required the appropriator to draw its water from a source below a certain depth in the Madison Formation. Such a requirement could just as easily have been placed upon the appropriator by the State Engineer.
150. Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, 464 F.2d 1358, 1363 (3d Cir. 1972).
151. Toomer v. Witsell, *supra* note 47.
152. Pike v. Bruce Church, Inc., *supra* note 119, at 142.

subsection (b) is unconstitutional because the use of water as a medium of transportation bears such a close and subtantial relation to interstate commerce that the burden of the requirement of legislative approval prior to such a use is inimical to commerce.[153] For the same reasons, that portion of subsection (c) which requires specific legislative approval before any transfer of appropriated water can be made for use outside the state is also unconstitutional.

However, it is suggested that the unique attributes of water and the special treatment which it has received at the hands of the Federal Congress, the courts, and the states, may permit the state to regulate the use of its waters outside the state, even to the extent that such regulation may burden or interfere with interstate commerce. For example, it ought to be possible for the state to say, if it chooses, that no state water may be used as a medium of transportation for mineral, chemical or other products, *either inside or outside the state.* That is, the state should be permitted to say such a use is not a beneficial use so long as it does not say it is not a beneficial use only when the water is to go out of state. The state, it is contended, should also be able to require that no state waters may be appropriated for use outside its boundaries unless the benefiting state provides reciprocal rights for Wyoming citizens. Finally, the state should be given wide latitude in adopting those laws governing the use of water which it considers necessary to obtain the maximum benefits, both social and economic, from the use of its most valuable resource and in designing its law so as to permit people to do some things that will advance this aim and to prevent people from doing those things that would be contrary to this maximization ideal.[154]

CONCLUSION

Currently, two divergent views are taken of water as a natural resource. One view is that of *McCarter* which would

153. Southern Pac. Co. v. Arizona, *supra* note 71, at 769.

154. Trelease, *Law, Water and People: The Role of Water Law in Conserving and Developing Natural Resources in the West,* 18 WYO. L.J. 3, 4 (1963).

give a state virtually unlimited control over its water where interstate commerce is involved. The other view is that of *Altus* which would treat water like any other natural resource and which would not permit the state to restrict its use in interstate commerce to any greater degree than is permitted for other natural resources. This paper has suggested that, while it is doubtful that *Altus* is *the* law with respect to interstate use of water, it is also doubtful that the unlimited control permitted by *McCarter* remains viable in all respects.

Rather, it is suggested that any statute which seeks to restrict or prohibit the movement of waters found entirely within a state's boundaries be reviewed with two concepts in mind. The first is that the statute is to be considered in light of current doctrine relative to interstate commerce and the reach of the commerce clause. The second is that such a review be made with the ideas that water is a unique natural resource which has traditionally been treated specially by both the federal and the state governments and the courts and that such special treatment should justify the state's placing greater burdens upon interstate commerce for the purpose of protecting the public welfare of its residents without violating the commerce clause.

In light of these concepts, it is probable that the major provisions of the Wyoming statute are unconstitutional. Much of what it attempts to do is redundant in light of existing statutes. The entire thrust of the statute is misdirected. The concern should not be whether a particular use is to be in-state or out of state. The concern should be whether the use to which the water is to be put will help to effectuate the maximum social and economic benefits for the residents of the state.[155] The concern should be whether the state's resources are to be developed or are to be left on the shelf.[156]

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155. *Id.* at 4.
156. Trelease, *supra* note 9, at 198.