Land & Water Law Review

Volume 18 | Issue 2 Article 3

1983

Sporhase v. Nebraska ex rel. Douglas: State Control of Water under the Constraints of the Commerce Clause

Anne B. Tallmadge

SPORHASE v. NEBRASKA ex rel. DOUGLAS: STATE CONTROL OF WATER UNDER THE CONSTRAINTS OF THE COMMERCE CLAUSE

Historically, water in the arid West has been successfully apportioned among competing demands by an intricate legal system developed and managed almost entirely by the states.[1] Today, the ability of a state to effectively manage and utilize water to achieve desired social and economic conditions remains contingent upon the extent to which the state may control or influence the disposition and use of its most valued natural resource.

In recent years, energy, industrial development, and a rapidly growing population have contributed to increase greatly the demands upon western water resources.[2] Quantification of federal reserved rights,[3] and legislative provisions designed to safeguard the environment through preservation of instream flows and salinity control have also increased demand for the scarce resource.[4]

Many states have responded by enacting legislation that restricts or conditions the use of water for both intrastate and interstate purposes.[5] The United States Supreme Court's recent decision in *Sporhase v. Nebraska ex rel. Douglas,*[6] calls the validity of many restrictive state water laws into question.

In *Sporhase,* for the first time, the Supreme Court declared that groundwater is an article of commerce, and is

1. In the discussion of issues concerning water, the western states are the 17 contiguous states that follow the doctrine of prior appropriation in the allocation of their water resources. These states are: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.
2. *See* WYOMING WATER RESOURCES RESEARCH INSTITUTE, FIVE YEAR WATER RESOURCES RESEARCH AND DEVELOPMENT GOALS AND OBJECTIVES FOR WYOMING (July 1981).
3. In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court acknowledged the power of the federal government to reserve the waters on Indian reservations and exempt them from appropriation under state law. The principle underlying the reservation of waters for Indian reservations was subsequently held applicable to other federal lands such as national forests and national recreation areas in Arizona v. California, 373 U.S. 546, 601 (1963).
4. BALLARD, DEVINE AND ASSOCIATES, WATER AND WESTERN ENERGY: IMPACTS, ISSUES AND CHOICES 97 (1982).
5. *See* NEB. REV. STAT. § 46-613.01 (Reissue 1978); S.D. COMP. LAWS ANN. § 46-5-20.1 (Supp. 1981); WYO. STAT. § 41-3-104, 105 and 115 (1977).
6. _____ U.S. _____, 102 S.Ct. 3456 (1982).

therefore susceptible to congressional regulation.[7] The Court in *Sporhase* further held that a Nebraska statute[8] which prohibited the export of water to any state that did not provide reciprocal rights violated the commerce clause of the United States Constitution.[9]

THE SPORHASE DECISION

Facts and Proceedings Below

The essential facts in the case arose from a set of fairly simple localized circumstances. Nebraska sought to conserve diminishing supplies of groundwater through a statutory scheme which provided, in part, that a transfer of Nebraska groundwater across state lines was allowable only when a permit was obtained from the Nebraska Department of Water Resources.[10] The permit statute provided that the Director of the Water Resources Department could issue a permit only upon a finding that the proposed transfer 1) was reasonable, 2) was not contrary to the conservation and use of groundwater, 3) was not otherwise detrimental to the public welfare, and 4) the state into which the groundwater was proposed to be transferred granted reciprocal rights providing for the transfer of groundwater from that state into Nebraska.[11]

Joy Sporhase and his son-in-law and partner, Delmar Moss, owned and farmed contiguous tracts of land in Nebraska and Colorado.[12] A well located on the Nebraska tract was used to pump water for irrigation of both the Colorado tract and the Nebraska tract.[13] The well was properly registered with the State of Nebraska,[14] but Sporhase and Moss did not apply for the permit required to transfer groundwater for use outside the state.[15]

7. *Id.* at 3463.
8. NEB. REV. STAT. § 46-613.01 (Reissue 1978).
9. 102 S.Ct. at 3467.
10. NEB. REV. STAT. § 46-613.01 (Reissue 1978).
11. NEB. REV. STAT. § 46-613.01 (Reissue 1978).
12. Sporhase v. Nebraska *ex rel.* Douglas, 102 S.Ct. at 3458 (1982).
13. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614, 616 (1981).
14. *Id.*
15. Since Colorado law forbids the transfer of groundwater outside its borders and has no reciprocity division, COLO. REV. STAT. § 37-81-101 (1973 & Supp. 1981), the permit required by NEB. REV. STAT. § 46-613.01 (Reissue 1978), would not have been granted even if application had properly been made.

In district court, the State of Nebraska obtained an injunction prohibiting Sporhase and Moss from transporting groundwater into Colorado without the requisite permit. The Nebraska Supreme Court upheld the district court decision,[16] ruling specifically that groundwater was not subject to free sale or transfer under Nebraska law, and therefore was not an article of commerce.[17] The Chief Justice dissented, viewing the reciprocity provision of the statute as an undue burden on interstate commerce.[18]

The Supreme Court's Opinion

The United States Supreme Court, in a 7-2 decision, reversed the Nebraska Supreme Court and declared groundwater to be an article of commerce.[19] Rejecting Nebraska's theory and defense espousing the state ownership of water, the Court declared that the reciprocity provision of the Nebraska statute violated the commerce clause of the United States Constitution.[20]

The Court's holding was based upon its resolution of three distinct issues:

> 1) whether groundwater is an article of commerce and therefore subject to Congressional regulation; 2) whether the Nebraska restriction on the interstate transfer of groundwater imposes an impermissible burden on commerce; and 3) whether Congress has granted the states permission to engage in groundwater regulation that otherwise would be impermissible.[21]

The first portion of Justice Stevens' opinion for the majority held that groundwater was, in fact, an article of commerce and therefore its regulation was subject to the restraints of the commerce clause.[22] The State of Nebraska had asserted that water was owned by the state in its sovereign capacity, and

16. 305 N.W.2d at 616.
17. *Id.*
18. *Id.* at 620.
19. 102 S.Ct. at 3463.
20. *Id.* at 3465.
21. *Id.* at 3458.
22. *Id.* at 3463. *See also* U.S. CONST. art. I, § 8, cl. 3 which provides: "The Congress shall have the power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes. . . ."

accordingly was not an article of commerce.[23] The State relied upon the Court's decision in *Hudson County Water Co. v. McCarter*[24] for the proposition that publicly owned resources were subject to exclusive state regulation and were thus immune to commerce clause attack.

Reviewing the *McCarter* decision, the Court determined that the theory of public ownership of natural resources had been overruled by the Court's decision in *Hughes v. Oklahoma.*[25] Therefore, the Court rejected the Nebraska argument based upon the "legal fiction" of state ownership of natural resources.[26] The Court noted that the public ownership theory with regard to groundwater had previously been rejected as a defense at the district court level in *City of Altus v. Carr,*[27] a case which had subsequently received per curiam affirmation by the Court.[28]

Nebraska sought to distinguish water from natural resources since, under Nebraska law, water may not be reduced to private ownership for intrastate trade, but remains subject to the ownership interest of the state.[29] Additionally, the State asserted a vital interest in the conservation and preservation of scarce water resources because water, unlike other natural resources, is essential to human survival.[30]

23. 102 S.Ct. at 3458.
24. 209 U.S. 349 (1908). In *Hudson County,* the Court upheld a New Jersey statute making it unlawful to export the waters of the state into any other state for use therein. *Id.* The state's alleged "ownership" of the water provided at least partial grounds for the Court's holding. *Id.*
25. 441 U.S. 322 (1979). The theory of state ownership of its natural resources (wildlife) was discounted in *Hughes.* For an excellent discussion of the *Hughes* case see, e.g., Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources,* 1979 SUP. CT. REV. 51.
26. Sporhase v. Nebraska, 102 S.Ct. at 3462 (1982).
27. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.,* 385 U.S. 35 (1966).
28. A careful examination of the holding in *City of Altus* reveals that it did not depart from the Court's previous position on the state control of water. Texas law was applied to determine that water was an article of commerce in the *Altus* case. The holding was understandable, since in Texas, groundwater, once withdrawn from the ground, may be freely bought and sold. The Supreme Court in *Sporhase* recognized this distinction, finding the result in *City of Altus* to be "not necessarily inconsistent with the Nebraska Supreme Court's holding. . . ." 102 S.Ct. at 3461.
29. Sporhase v. Nebraska, 102 S.Ct. at 3461 (1982). Nebraska has adopted a modified form of the "Reasonable Use" rule regarding the use of groundwater. In Prather v. Eisenmann, 200 Neb. 1, 261 N.W.2d 766, 769 (1978), the rule was stated that a landowner:
> [I]s entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of reasonable and beneficial use upon the land in which he owns, especially of such use is injurious to others who have substantial rights to the waters, *and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. . . .*

(emphasis in original).
30. 102 S.Ct. at 3462.

While recognizing that the western states' interest and asserted superior competence in conserving and preserving scarce water resources were "not irrelevant in the commerce clause inquiry,"[31] the Court also recognized an interstate dimension to the regulation of groundwater.[32] Pointing to the worldwide agricultural market for products from irrigated farms, and the multistate character of many groundwater aquifers, the Court found that groundwater overdraft may clearly be viewed as a national problem. Congressional power to legislate in the area, said the Court, cannot be limited depending on whether specific state property laws assert state ownership of water.[33]

The Court's conclusion that water is an article of commerce gave rise to the necessary inquiry whether the Nebraska statute placed an unconstitutional burden on the resource. Applying the traditional commerce clause analysis described in *Pike v. Bruce Church, Inc.*,[34] the Court answered in the affirmative.

The majority agreed with the State that the expressed and genuine purpose of the Nebraska statute—to conserve and preserve diminishing sources of groundwater—was "unquestionably legitimate and highly important."[35] The Court proclaimed that the criteria expressed by the challenged statute, other than the reciprocity requirement, served to advance the State's legitimate purpose, and therefore were not facially violative of the commerce clause.[36] Significantly, the Court was not concerned that the restrictions applied solely to interstate transfers, justifying the special treatment accorded to transport of water across state lines for four reasons: 1) a state's regulation of water is at the core of its police power;[37]

31. *Id.* at 3463.
32. *Id.* at 3462.
33. *Id.* at 3462-63.
34. 397 U.S. 137 (1970). The determinative test requires:
> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce.

Id. at 142 (citation omitted).
35. 102 S.Ct. at 3463.
36. *Id.* at 3464-65.
37. *Id.* at 3464.

2) the states have a *legal* expectation, fostered by judicial decrees and congressional approval of interstate compacts and other interstate water regulation, that they may restrict water within their borders;[38] 3) the asserted ownership claims of the state, while not sufficient to totally exclude federal regulatory power, are sufficient to support a limited preference for a state's own citizens;[39] and 4) conservation efforts by the states have given water some of the attributes of a good publicly owned and produced by the states, thereby possibly allowing the state to favor its own citizens in times of shortage.[40]

After outlining these factors, the Court held that the reciprocity requirement of the Nebraska statute was the only requirement failing to survive scrutiny based upon the commerce clause. The restriction was held to be "facially discriminatory" because it acted to impose a total ban on the export of water to Colorado.[41] Citing *Hughes v. Oklahoma,* the majority opinion in *Sporhase* acknowledged that such facially discriminatory legislation must have a "close fit" with its avowed purpose in order to be declared constitutional. The Court held that the appellees had failed to produce an adequate showing that the reciprocity requirement was "narrowly tailored"[42] to meet the purposes of conservation and preservation. However, the opinion strongly suggested that a particularly arid state might be able to support a similar reci-

38. *Id.* The Court's declaration that the *law* recognizes the relevance of state boundaries in the allocation of scarce water resources has applicability to the state's reservation of waters apportioned to them by congressional and judicial decrees of equitable apportionment. If a state were not entitled as a quasi-sovereign to reserve for use within its boundaries waters apportioned to it, then reciprocity agreements between the states would undoubtedly prevail as the means for a state to acquire more water from an interstate stream. Such a result would defeat the whole purpose of equitable apportionment, which is to allow each state to enjoy and manage the use of waters within its boundaries consistent with similar uses by sister states. The right to exclusive control of waters equitably apportioned to a state therefore gives meaning to equitable apportionment decrees and the idea of equality between the states upon which they are based. Brief of Amicus Curiae Colorado and Wyoming at 11, Sporhase v. Nebraska *ex rel.* Douglas, _____ U.S. _____, 102 S.Ct. at 3456 (1982).

39. 102 S.Ct. at 3464. *See also* Hicklin v. Orbeck, 437 U.S. 518 (1978), where the Supreme Court struck down under the privileges and immunity clause an Alaskan statute requiring preference to resident over non-residents for employment arising from oil and gas pipeline purposes such as leases, rights of way or permits, to which the state was a party. 437 U.S. at 534. The Court relied upon the commerce clause extensively to bolster its conclusion. Conceding that "[t]he fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the state from preferring its own citizens in the utilization of that resource . . . ," 437 U.S. at 533, the Court reinforced the conclusion advanced by the majority in *Sporhase.*

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

41. *Id.* at 3465.

42. *Id.*

procity requirement, or total ban on the export of water, where a close means-end relationship between the restriction and the conservation and preservation rationale was established.[43]

Nebraska's third contention, that Congress had authorized the reciprocity requirement by authorizing the states to impose otherwise impermissible burdens on interstate commerce in groundwater, was rejected by the Court. Congress may authorize the states to burden commerce in a manner which would otherwise be contrary to law.[44] However, as the majority opinion pointed out, congressional authorization must be direct and "expressly stated."[45]

Nebraska attempted to infer congressional consent to the state statutes burdening interstate commerce from a number of statutes in which Congress had deferred to state water law.[46] The Court clearly stated that, while Congress often desires to defer to state water law, there was no evidence in the instant case that Congress had consented to the unilateral imposition of an unreasonable burden on commerce.[47]

Justice Rehnquist, joined in dissent by Justice O'Connor, would have upheld the constitutionality of the reciprocity requirement. Justice Rehnquist concluded that the reach of the commerce clause is different depending on whether it is applied "affirmatively" to support a federal regulation or "negatively" to strike down a state regulation.[48] This negative-affirmative distinction, however, was expressly struck down by the Court in *Hughes v. Oklahoma* and again by the majority opinion in *Sporhase.* Justice Stevens explained: "[A]ppellee's claim that Nebraska groundwater is not an article of commerce goes too far: it would not only exempt

43. *Id.*
44. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).
45. 102 S.Ct. at 3466 (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982)).
46. 102 S.Ct. at 3465. The Supreme Court has described the history of federal-state water relations in terms of "the consistent thread of purposeful and continued deference to state water law by Congress." California v. United States, 438 U.S. 645, 653 (1978).
47. 102 S.Ct. at 3466.
48. *Id.* at 3467 (Rehnquist, J., dissenting). Justice Rehnquist asserted, "[T]he authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress." *Id.*

Nebraska groundwater regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation."[49] Nevertheless, the dissent would have applied the distinction to determine that under Nebraska law, no "commerce" could properly be said to exist in groundwater.[50]

The dissent interpreted the holding in *Hughes v. Oklahoma* to mean that state statutes which prohibit interstate transfers of a resource while allowing free intrastate transfers are discriminatory and thus invalid. By contrast, the dissent argued, the Nebraska groundwater regulation scheme was so pervasive that it could not be said that any intrastate or interstate "commerce" existed, and accordingly the regulations did not impose any discriminatory effects upon interstate commerce.[51]

ANALYSIS

Some observers predict that the Court's decision in *Sporhase* could produce a flood of law suits, resulting from the potential "water rush" as huge energy companies attempt to reach across state lines and appropriate water necessary for agriculture and other beneficial uses.[52] Others foresee that the impact will be gradual, and that many states may be able to justify existing restrictions by satisfying the legitimate governmental objectives set forth by the Supreme Court.[53]

A careful examination of the decision, viewed in light of the long-term congressional policy to promote and uphold regulation of water by the states,[54] reveals that the states will, in fact, retain considerable authority and ability to fashion

49. Sporhase v. Nebraska, 102 S.Ct. at 3463 (1982).
50. *Id.* at 3468 (Rehnquist, J., dissenting).
51. *Id.* (Rehnquist, J., dissenting). The minority also cited Pennsylvania v. West Virginia, 262 U.S. 533 (1923), and West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), in support of the distinction between natural resources reduced to private possession, and the Nebraska water regulation which did not allow ownership by a private party, but rather restricted individuals to the "reasonable use" of groundwater. 102 S.Ct. at 3468 (Rehnquist, J., dissenting).
52. Russakoff, *Wheat Farmer Stuns the West with Water Suit*, Washington Post, Sept. 12, 1982, at A1, col. 4.
53. *See Hearing Before the Subcomm. on Water Resources of the Comm. in Envir. and Pub. Works, United States Senate, Regarding Sporhase v. Nebraska* (Sept. 15, 1982) (statement of Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, Justice Department).
54. *See supra* note 46.

legislation regulating both the export of water outside their borders and other intrastate water uses which may affect interstate trade.

A New View on the Nature of Water

To many of the western states, the Supreme Court's holding on the commerce clause question may have appeared, at first glance, to be surprising and without precedent. Recent case law suggests that the holding is, in fact, consistent with the Court's approach to commerce clause questions generally. Beginning with the landmark case of *Wickard v. Filburn,*[55] the Court has developed a line of cases which hold that the commerce clause reaches not only interstate commerce, but also those "wholly local intrastate" activities which may have a substantial effect on interstate commerce.[56] Recent natural resources cases reflect this analysis. In *Hughes v. Oklahoma* the Court, overruling its previous decision in *Geer v. Connecticut,* held that state assertions of sovereign ownership of minnows located in state waters did not protect state regulations from commerce clause scrutiny.[57] Shortly before the *Hughes* decision the Court had discredited the theory of state ownership of a natural resource (fish) by striking down a provision of state law which forbade fishing by non-resident federal licensees, in *Douglas v. Seacoast Products.*[58]

In *Douglas* the Court stated:

> The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. . . .' Under modern analysis, the question is simply whether the state has exercised its police power in conformity with the federal laws and Constitution.[59]

Accordingly, the *Sporhase* Court's rejection of the state ownership theory in favor of a ruling that groundwater is an

55. 317 U.S. 111 (1942).
56. *See, e.g.,* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).
57. 441 U.S. 322 (1979).
58. 431 U.S. 265 (1977).
59. *Id.* at 284-85 (citations omitted).

article of interstate commerce appears to be simply a predictable extension of existing precedent.[60]

The Distinction Between Water and Other Natural Resources in Commerce

The State's interest in preserving and conserving its water resources was recognized in *Sporhase* to reach a greater level of importance than similar concerns when applied to other natural resources.[61] The Court recognized that a state's power to regulate water in times and places of shortage for health and safety reasons is at the very core of its police power.[62] State boundaries are more relevant in the allocation of water resources because of the legal expectation, evidenced by judicial declarations and congressional approval of interstate water compacts and other interstate water regulations, that the states may be able to restrict water within their borders under certain circumstances.[63] Further, unlike the limited ownership interests of states which have allowed free intrastate trade in natural resources such as natural gas,[64] the ownership interests of a state which does not allow free intrastate trade in water are heightened, and may support a limited preference for its own citizens in the utilization of the resource.[65] Similarly, conservation efforts by the state may give rise to a situation where the state may favor its own citizens in times of shortage.[66]

The predominant effect of the ruling that groundwater is an article of commerce is thus not to dramatically limit a state's power to regulate water, but rather to assure that the federal government will be able to regulate water if it so desires.[67] In the absence of federal preemption, the Court pro-

60. *See* Statement of Carol E. Dinkins, *supra* note 53. It is interesting to note that the Supreme Court did not rely on the broader test of commerce clause applicability, i.e. whether or not groundwater regulation "affects" interstate commerce and is thus subject to commerce clause limitations, but rather worked its way through a lengthy analysis to reach the conclusion that groundwater is an article of commerce. 102 S.Ct. at 3456-63.
61. 102 S.Ct. at 3464.
62. *Id.*
63. *Id.*
64. *See, e.g.,* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
65. Sporhase v. Nebraska, 102 S.Ct. at 3464 (1982).
66. *Id.* at 3465. *See supra* note 41.
67. Congress has not been deemed to have any ownership over water; therefore in order to subject water to intensive congressional regulation by virtue of powers granted to it under the commerce clause, it was necessary to declare water an article of commerce. *See* Sporhase v. Nebraska, 102 S.Ct. at 3458 (1982).

nounced, "we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage."[68]

Analysis under the Commerce Clause

The most noteworthy and illuminating portion of the Court's opinion in *Sporhase* revolves around the Court's treatment of the question of whether the Nebraska restriction constituted an "undue burden" on interstate commerce. Though the states may no longer be able to assert control over water based upon a theory of absolute ownership, *Sporhase* clearly left the states with considerable latitude to design statutes regulating the use of water so long as the goals of conservation and preservation are promoted.[69]

It is likely that most of the state legislation which touches upon interstate commerce in water will be tested in the courts.[70] Given the determinative language of the *Sporhase* decision, it is quite possible that many of the states will be able to justify existing restrictions in terms of the highly legitimate governmental objectives set forth by the Court.

Legislative Approaches Used by the Western States

State statutes dealing with the interstate movement of water are varied.[71] Some embargo-type legislation represents an outright prohibition on the interstate transportation of water.[72] A second type allows the exportation of water only on a reciprocal basis.[73] Finally, some states, like Wyoming, require legislative approval prior to the appropriation of water for use outside the state.[74]

The states creating total embargos on the export of water have generally done so either in response to severe problems

68. *Id.* at 3464.
69. *See* 102 S.Ct. at 3465. (Justice Stevens declared, "[a] demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve or preserve water.")
70. Clyde, *State Prohibitions on the Interstate Exportation of Scarce Water Resources*, 53 U. COLO. L. REV. 529, 532 (1982).
71. *See generally* Clyde, *Id.*
72. *See* COLO. REV. STAT. § 37-81-101 (1973 & Supp. 1981); MONT. CODE ANN. § 85-2-104 (1981).
73. IDAHO CODE § 42-408 (1977); NEV. REV. STAT. § 533.515 (Supp. 1979); WASH. REV. CODE ANN. § 90.03.300 (1962).
74. WYO. STAT. §§ 41-3-105, 115 (1977); S.D. COMP. LAWS ANN. § 46-5-20.1 (Supp. 1981).

related to groundwater overdrafts,[75] or in the face of potentially enormous appropriations for energy development, particularly those designed to utilize water in coal slurry pipelines.[76] A statute that imposes a complete ban on the export of water from within a state may be upheld only where the state has established that a close means-end relationship exists between the ban and a purpose to conserve and preserve water. The restriction must be necessary, i.e., the regulation must be narrowly tailored to serve a legitimate state purpose, without adequate nondiscriminatory alternatives.[77]

The difficulties that a state imposing such facially discriminatory legislation may face in response to a commerce clause challenge were recently enumerated in *City of El Paso v. Reynolds*,[78] decided January 17, 1983. At issue in *City of El Paso* was a New Mexico statute which decreed that no person shall withdraw water from any underground source for use in any other state.[79] El Paso, which lies near the New Mexico-Texas border, is seriously over-pumping the groundwater basin around the city and seeks to appropriate 300,000 acre feet of water from wells to be drilled in New Mexico.[80] The city sought to have the New Mexico statute declared unconstitutional because of the excessive burden it placed upon interstate commerce.

The United States District Court for the District of New Mexico, construing the Supreme Court's decision in *Sporhase* narrowly, struck down the New Mexico statute. The district court interpreted the *Sporhase* decision to mean that a state may discriminate in favor of its citizens only to the extent that water is essential to human survival.[81] The district court viewed water in precisely the same light as other natural resources for the purpose of analysis under the commerce clause. The *El Paso* court viewed the maximization of "public welfare" uses of water in New Mexico, as furthered by the statute, to be "tantamount to economic protectionism."[83]

75. *See* COLO. REV. STAT. § 37-81-101 (1973 & Supp. 1981).
76. *See* MONT. CODE ANN. § 85-2-104 (1981).
77. Sporhase v. Nebraska, 102 S.Ct. at 3465 (1982).
78. Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983).
79. N.M. STAT. ANN. § 72-12-19 (1978).
80. Clyde, *supra* note 70, at 533.
81. Civ. No. 80-730 HB, at 28 (D.N.M. Jan. 17, 1983).
82. *Id.*
83. *Id.* at 30.

City of El Paso was the first water export case to be decided after the Supreme Court's ruling in *Sporhase*. While relevant therefore, it is arguable that the district court's conclusion was based upon an unduly narrow reading of *Sporhase*. In *Sporhase* the Supreme Court affirmed that state regulation of water for health and safety purposes in times of shortage is vital, and at the core of the state's police power.[84] The Court held that the state's interests in preservation and conservation were furthered not only by health and safety regulations, but also by the requirements 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."[85] The Court ruled that all three of these requirements as imposed under Nebraska law are constitutionally permissible.[86]

The New Mexico court's assertion that groundwater should be treated the same as other natural resources for commerce clause purposes[87] flies in the face of the language in *Sporhase* that specifically notes the difference between water and other resources. The Supreme Court stated that Nebraska's ownership interests in its groundwater are "logically more substantial than claims to public ownership of other natural resources."[88] The Court recognized the "relevance of state boundaries in the allocation of scarce water resources,"[89] citing the "legal expectation" that the states may be able, in some circumstances, to restrict water within their own borders.[90] Further, the Court acknowledged that conservation efforts by the state, not merely for the health of its citizens, but also for the public welfare and to assure the reasonableness of groundwater usage, give groundwater some indicia of a good publicly produced and owned by the state. Accordingly, said the Court, a state may have grounds to assert a limited preference for its own citizens in times of shortage.[91] Clearly, water is not viewed by the Supreme Court in precisely

84. 102 S.Ct. at 3464.
85. *Id.* (quoting NEB. REV. STAT. § 46-613.01 (Reissue 1978)).
86. *Id.* at 3465.
87. Civ. No. 80-730 HB, at 28 (D.N.M. Jan. 17, 1983).
88. Sporhase v. Nebraska, 102 S.Ct. at 3464 (1982).
89. *Id.*
90. *Id.*
91. *Id.* at 3464-65.

the same light as other natural resources such as natural gas or wildlife.[92] The differences are important, because they are factors which "inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable."[93]

When a state imposes an absolute ban on the export of its water, the determinative questions for commerce clause analysis are whether the restriction has been narrowly tailored to meet legitimate state interests, and whether adequate nondiscriminatory alternatives to the ban exist. The New Mexico Court found that New Mexico's embargo statute failed to survive such strict scrutiny, because the evidence presented failed to show that the embargo would actually preserve water to meet any future shortages. This is true in part because in New Mexico an in-state groundwater permit cannot be denied if unappropriated water is available and no other rights will be impaired.[94] The state would not be evenhanded in its regulation if a substantially more stringent standard were applied to out-of-state transfers. The evidence also failed to show that the intrastate transfer of water in New Mexico was feasible regardless of distance, as required by *Sporhase*.[95] New Mexico's groundwater management plan is not highly comprehensive, and the State conceded that it will be at least 40 years before there is a critical shortage of water within the state.[96] It was not altogether surprising then, that New Mexico was unable to demonstrate the constitutionality of its statute.

Colorado also has statutes creating total embargoes on the export of water from within the state.[97] After *Sporhase* and *City of El Paso,* it is doubtful that the state will be able to marshal sufficient evidence to sustain the embargo legislation.

A closer contest may be found in Montana. The Montana legislature has determined that the use of water for the transportation of coal in a slurry pipeline is harmful to the

92. *See* Hughes v. Oklahoma, 441 U.S. 322 (1979); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
93. Sporhase v. Nebraska, 102 S.Ct. at 3463 (1982).
94. N.M. STAT. ANN. § 72-12-3E. (1978).
95. City of El Paso v. Reynolds, Civ. No. 80-730 HB, at 34 (D.N.M. Jan. 17, 1983) (citing Sporhase v. Nebraska *ex rel.* Douglas, 102 S.Ct. at 3465 (1982)).
96. Civ. No. 80-730 HB, at 29 (D.N.M. Jan. 17, 1983).
97. COLO. REV. STAT. § 37-81-101 (Supp. 1982); COLO. REV. STAT. § 37-90-136 (1973).

protection and conservation of the state's water resources. The legislature has consequently stated that the use of water for coal slurry transport is not a beneficial use of water.[98] Since water can only be appropriated for beneficial uses, the rather novel approach of the Montana legislature serves to preclude appropriations for the interstate use of water for coal slurry pipelines.

The statute applies equally to intrastate and interstate pipelines, and so may not be subject to the "strictest scrutiny" reserved for facially discriminatory legislation.[99] The fact that interstate commerce may be affected should not threaten the statute so long as Montana can demonstrate that coal slurry pipelines do entail significant adverse environmental impacts and that the statute's purpose is not purely economic protectionism.[100] Also, the traditional power of states to declare certain water uses to be non-beneficial has never been denied by the courts.[101] The state may well be able to demonstrate that its legitimate interests are best served by prohibiting the use of water in coal slurry transport.

The burden placed upon interstate commerce by the Montana statute is mitigated somewhat by the fact that coal slurry pipelines are not totally prohibited simply because water may not be utilized as the medium of transport. One commentator has suggested the truth of this proposition, noting that the statute does not prevent slurry transport, since other liquids or gases are potentially available for use in coal slurry pipelines.[102]

Reciprocity requirements contained in the laws of other western states[103] are facially discriminatory, and must be "narrowly tailored" to the conservation and preservation rationale.[104] Justice Stevens suggested in *Sporhase* that a reciprocity requirement might stand where it could be shown

98. MONT. CODE ANN. § 85-2-104 (1981).
99. As required by Sporhase v. Nebraska, 102 S.Ct. at 3465 (1982).
100. Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, ENVTL. F., Jan. 1983, at 28, 33.
101. Comment, *Coal Slurry: All Quiet on the Western Front?* 3 PUB. LAND L. REV. 156, 169 (1982).
102. *Id.* at 170-71.
103. *See supra* note 73.
104. *See* Sporhase v. Nebraska, 102 S.Ct. at 3465 (1982).

that the entire state was arid, that the transportation of water intrastate from areas of abundance to areas of shortage was feasible despite any distance, and that the importation of water from an adjoining state would basically compensate for any exportation to that state.[105]

Sketchy statutory support for the reciprocity requirements of some states will require additional evidentiary or legislative backing in order for the provisions to pass constitutional muster. The enactment of new, carefully articulated standards according to which the state may require reciprocal rights, or otherwise control the transfer of water for use outside its boundaries may be the best approach.

The burden that a reciprocity requirement places upon interstate commerce must be, in effect, necessary to serve legitimate state conservation and preservation ideals. Legislation that specifies the means by which the state's interest in the health and safety of its citizens, and the protection of non-economic values such as wildlife and aesthetics will be promoted, may help to protect the legislation from attack as being mere "economic protectionism."[106] Evidentiary support concerning the geographic and seasonal fluctuations in water supplies must be maintained and updated. Proposed water projects which may appropriate large amounts of available water should be identified as well. Without such further support, state governments will be in a poor position to regulate diversions by those who wish to take advantage of the less-than-certain status of state laws in the wake of *Sporhase.*

To validate reciprocity requirements and other facially discriminatory statutes, the states must marshal substantial and particular evidence concerning the need for such restrictive legislation.[107] Many states may be unable at present to completely justify such restrictions, and may be compelled to initiate less burdensome controls.

In contrast, state statutes requiring legislative approval prior to the appropriation of water for use outside the state

105. *Id.*
106. *See* City of El Paso v. Reynolds, Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983).
107. Sporhase v. Nebraska, 102 S.Ct. at 3465 (1982).

may be constitutionally permissible. Wyoming prohibits any appropriation of surface water or groundwater for use outside the state without specific legislative approval.[108] An additional statutory requirement mandates legislative examination of a set of particular factors when the proposed use involves water as a medium of transportation of mineral, chemical or other products.[109]

South Dakota law requires that the legislature must approve any application to appropriate water in excess of 10,000 acre feet annually.[110] Common carriers which have failed to obtain such consent are denied the power of eminent domain under the same act.[111]

In Oregon, water located within the state may not be appropriated in any manner for use outside the state except upon the express consent of the legislature.[112] Consent may be conditioned upon whatever restrictions, reservations or terms the legislature deems appropriate to protect the interests of the state and its citizens.

These statutes do not represent the sort of facially discriminatory[113] legislation requiring application of the "strictest scrutiny"[114] under commerce clause analysis. Legislative approval statutes arguably do not discriminate *per se* against interstate commerce, since the legislature may quite conceivably enact certain conditions or restrictions on out-of-state appropriations or diversions for conservation purposes without necessarily discriminating in favor of in-state uses.[115] No automatic ban is imposed on exports by requiring legislative approval. Rather, vesting authority in the legislature to decide whether to allow the proposed use provides a means by which the states may assure that the pro-

108. WYO. STAT. § 41-3-105 (1977).
109. WYO. STAT. § 41-3-115 (1977 & Supp. 1982). The factors set forth in this section apply to a proposal by Energy Transportation Systems Inc., to appropriate water for use in a coal slurry pipeline.
110. S.D. COMP. LAWS ANN. § 46-5-20.1 (Supp. 1982). It should be noted that South Dakota does not require legislative approval for applications to appropriate water for energy industry use.
111. S.D. COMP. LAWS ANN. § 46-5-20.1 (Supp. 1982).
112. OR. REV. STAT. § 537.810 (1981).
113. *See* Hughes v. Oklahoma, 441 U.S. at 337 (1979).
114. *Id.*
115. Clyde, *supra* note 70, at 539.

posed appropriation is not in contravention to the states' basic interests in promoting the conservation and preservation of water. The state legislature may provide the best forum to assure that a proposed use does not endanger the public welfare of the state, or the health and safety of its citizens. The export of water from the state arguably requires the heightened attention provided by legislative approval, since once gone, water may never again be utilized by the state in any fashion.[116]

The state legislature may examine an application to export water in view of other pending applications, to ascertain whether or not the water desired is actually available for appropriation. The legislature may also examine the legitimacy of the proposed appropriation, and whether or not the developer is truly able to carry out the proposed diversion, in order to prevent speculation in water rights.

Similar factors are examined by the State Engineer when granting in-state appropriations.[117] The requirement of legislative approval does not destroy the evenhandedness of the statute's approach; instead it may simply provide the sort of special treatment the Supreme Court in *Sporhase* recognized as being legitimate for requests to transport water across state lines.[118] Because they are not facially discriminatory, the validity of these state statutes having an effect upon interstate commerce is determined according to the traditional balancing test evidenced in *Pike v. Bruce Church.*[119]

Sustaining the constitutionality of a statute such as Wyoming's requires 1) a clear showing of the state's purpose, through evenhanded regulation, to conserve and preserve scarce water resources; 2) a showing that the statute interferes or imposes upon interstate commerce only incidentally; and 3) evidence that the local benefits exceed the burdens the statute places upon interstate commerce.[120]

116. In Sporhase v. Nebraska, 102 S.Ct. at 3464 (1982), the Supreme Court acknowledged that the transport of water across state lines may very well deserve "special treatment."
117. WYO. STAT. § 41-4-503 (1977); WYO. STAT. § 41-3-101 (Supp. 1982).
118. *See supra* note 116.
119. 397 U.S. at 142. The test is stated in note 34, *supra.*
120. *Id.*

In Wyoming, the state purpose to conserve and preserve water is evidenced by statutory mandates that each appropriation of water be for a beneficial use,[121] that the appropriation not harm the rights of senior appropriators,[122] and that the appropriation not be contrary to the public interest.[123] These requirements are not unlike the statutory requirements sanctioned by the Court in *Sporhase*.[124]

Protection of Wyoming's water resources is also demonstrated by the statutory provision calling for the creation of groundwater control areas in regions where groundwater mining might occur.[125] The state engineer may refuse to grant permits for the drilling of any new wells within a control area.[126] Other controls which the state engineer is authorized to implement in order to effect the state policy aimed at conserving underground water include regulation of the distribution and location of wells in critical areas, establishing standards for non-wasteful construction of wells, and sealing or capping wells when waste or pollution is occurring.[127]

Preservation of water is also promoted by Wyoming's "change in use" statute.[128] Owners of water rights who wish to transfer those rights to new uses or different locations may only transfer the amount of water historically diverted and consumed, and the proposed transfer may not in any manner injure other existing appropriators.[129]

The legitimacy of the state purpose to conserve and protect water is easily ascertained by an examination of the factual realities concerning the availability of water in Wyoming. Although limited supplies of water are available for appropriation in Wyoming, many problems arise in connection with the

121. WYO. STAT. § 41-4-503 (1977); WYO. STAT. § 41-3-101 (Supp. 1982).
122. WYO. STAT. § 41-4-503 (1977).
123. WYO. STAT. § 41-4-503 (1977).
124. The requirements of NEB. REV. STAT. § 46-613.01 (Reissue 1978) that the withdrawal of groundwater requested is reasonable, not contrary to the conservation and use of groundwater, and is not otherwise detrimental to the public welfare, were held to pose no impermissible burden on interstate commerce. 102 S.Ct. at 3464-65.
125. WYO. STAT. § 41-3-912 (1977 & Supp. 1982).
126. WYO. STAT. § 41-3-912(q) (Supp. 1982).
127. WYO. STAT. § 41-3-909 (1977).
128. WYO. STAT. § 41-3-104 (1977). For an insightful analysis of the Wyoming statute, see Comment, *Changing Manner and Place of Use of Water Rights in Wyoming*, 10 LAND & WATER L. REV. 455 (1975).
129. WYO. STAT. § 41-3-104 (1977).

distribution of these supplies.[130] The consumptive demands for water occur in the lowlands of mountain valleys and in and around the towns and cities on the open plains.[131] Most of the state's precipitation falls in the form of snow in the mountainous areas; nearly 70% of the river flows in the state result from snowmelt runoff.[132] Moving water from areas of availability to areas where it is needed is at the core of the Wyoming water problem. Clearly, restrictions and conditions on the use and transfer of water rights are vital to the effective management of the resource.

To sustain a constitutional challenge, the Wyoming approval statute must also be shown to place no more than an incidental burden on interstate commerce.[133] The Wyoming legislature has not used its approval power to deny all applications for out-of-state use; rather, the legislature has approved at least four major appropriations for the use of water outside the boundaries of the state.[134] The approval provisions arguably seek no more than to protect the "uncontrolled transfer" of water out of the state. A state like Wyoming that imposes often severe withdrawal and use restrictions upon its own citizens does not discriminate against interstate commerce when exercising management over interstate transfers.[135] Indeed, noted the *Sporhase* Court, "[A]n exemp-

130. WYOMING WATER RESOURCES RESEARCH INSTITUTE, FIVE-YEAR WATER RESOURCES RESEARCH AND DEVELOPMENT GOALS AND OBJECTIVES FOR WYOMING 44 (1981).
131. *Id.*
132. *Id.* at 45.
133. Sporhase v. Nebraska, 102 S.Ct. at 3463 (1982) (quoting Pike v. Bruce Church, 397 U.S. 137, 142 (1970)).
134. WYO. STAT. § 41-3-115 (1977 & Supp. 1982), grants approval to Energy Transportation Systems, Inc. to appropriate up to 20,000 acre-feet annually for use in a coal slurry pipeline from Wyoming to Arkansas. Legislative approval allows the state engineer to issue permits to appropriate the necessary water, so long as certain requirements are met. The general requirements of the statute are geared to protect and conserve water, and the rights of other water users. WYO. STAT. § 41-2-601 (Supp. 1982) grants approval to Chevron Chemical Company to export up to 3,000 acre-feet annually for a phosphate rock concentrate slurry pipeline transportation system. WYO. STAT. § 41-2-301 (Supp. 1982) provides legislative consent to Texas Eastern Wyoming, Inc. to export up to 20,000 acre-feet annually from the Little Big Horn River and its tributaries for a coal slurry transportation pipeline. Finally, 1973 WYO. SESS. LAWS Ch. 94 authorizes the state engineer to approve the application of the Blake Ranch to divert water for use in Colorado, so long as Colorado grants reciprocal authority for similar diversions of surface water to be used in Wyoming.
135. In Sporhase v. Nebraska, 102 S.Ct. at 3464 (1982), the Court, acknowledging the "legitimate reasons for the special treatment accorded requests to transport groundwater across state lines," declared that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."

tion for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation."[136]

It has been argued that the flexibility of the approval process makes it susceptible to abuse, by making applicants vulnerable to the shifting whims of local political constituencies.[137] Discriminatory effects and applications of the statute could, of course, render it invalid under a constitutional challenge. It should not be overlooked that laws which are inherently discriminatory are more subject to invalidation under a constitutional challenge than are the laws which have a suspected discriminatory effect. It is much more difficult to prove the discriminatory application of a statute than to find discrimination on its face.

One commentator has argued that the Wyoming legislative approval statute has been applied discriminatorily in the past.[138] The discrimination alleged was not between residents and nonresidents, but rather between two successful applicants, on the grounds that one company was required to fulfill different conditions than the other.[139] Such "conditioning" may be necessary to assure that the state's health, environmental, and other interests connected with water resources development are met. Some uses may logically incur greater obligations in order to serve these state interests.

The evidence does not show that the Wyoming statute discriminates against interstate commerce by forbidding or placing an undue burden on out-of-state transfers. Rather, the Wyoming approval statute appears to show a demonstrable, legitimate state interest which only incidentally interferes with interstate commerce. If challenged, the statute has a substantial chance of being upheld.

Federal Authority Over Water

Although water resource management in the West has always been primarily a state responsibility, the federal

136. 102 S.Ct. at 3464.
137. Comment, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?* 53 U. COLO. L. REV. 655, 671 (1982).
138. McDaniel, *Commerce Clause and Water Availability Issues Concerning Coal Slurry Pipelines*, 12 NAT. RESOURCES LAW. 533, 542 (1979).
139. *Id.*

government also has legitimate interests in the allocation of the region's water. The federal government acts as proprietary owner of large tracts of western lands and may dispose of its property, both land and the water arising thereon, just as any other proprietor may.[140] The government has an additional role as a soverign entity exercising specific powers granted to it under the United States Constitution. While Congress may release its proprietary interest in land and water and allow the states to control appropriation and use thereof, it may not delegate its sovereign powers to any state.[141] Congressional power to regulate commerce is one such inherent power.[142]

The holding in *Sporhase* that water is an article of commerce is not one which Congress may subsequently overrule. It is well established that Congress may authorize activities which would otherwise place an impermissible burden upon interstate commerce,[143] but it is equally clear that Congress may not use its power to restrict its own affirmative authority under the commerce clause.[144]

The Supreme Court has not declared that the United States has any ownership interests in water that is presently subject to state control. The focus of the *Sporhase* ruling was, instead, that Congress has discretion to regulate water uses which touch upon interstate commerce, and that Congress may not eliminate that discretion.

Water issues are critical to questions of future development and growth in the West, so it is understandable that the states resist attempts by the federal government to upset the nature of the federal-state relationship. In the face of growing energy problems, state prohibitions upon the interstate use of water for energy development could invite the federal intervention that state and local politicians and populations seek to avoid.[145]

140. U.S. CONST. art. IV, § 3, cl. 2.
141. Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851).
142. *See* U.S. CONST. art. I, § 8, cl. 3.
143. 102 S.Ct. at 3466 (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982)).
144. United States v. Twin City Power Co., 350 U.S. 222 (1956). It should be pointed out that the failure of Congress to exercise its full powers under the commerce clause will not preclude it from doing so at some future time. *Id.*
145. Clyde, *supra* note 70, at 557.

As previously noted, Congress has generally been quite willing to defer to state authority and control of water sources.[146] However, examples of past congressional deference to the applications of state water law may have a somewhat weakened value in determining the future of federal-state relationships in the wake of the *Sporhase* decision. The system of "cooperative federalism" delineated by the Court in the reclamation project area may become a thing of the past. This threat to the security of state water law systems has left important water rights vulnerable to changes in congressional policy.[147]

Congress may change the existing federal-state balance by explicit legislation which serves to preempt the otherwise valid exercise of state police power.[148] The *Sporhase* ruling on the commerce question opens the door for federal preemption, since it provided the necessary relationship between an enumerated power and federal control over interstate water development.[149]

If Congress decided to modify the portion of the Court's *Sporhase* decision susceptible to legislative oversight, there are several avenues Congress could follow. Acting pursuant to its authority under the commerce clause, Congress could preempt state legislation and attempt to regulate the interstate transfers of water through the exercise of new federal law. Or, Congress could pass legislation that established guidelines concerning what types of state legislation would be permissible, or it could pass a law that listed all current state statutory export (or burdensome) restrictions and authorize them pursuant to its commerce clause power. Congress might even enact legislation encouraging the establishment of interstate compacts on the theory that such compacts are the best legal avenue for the resolution of interstate water disputes.[150]

146. *See supra* note 46.
147. Backman, *Public Land Law Reform—Reflections from Western Water Law*, 1982 B.Y.U. L. REV. 1, 45-46.
148. *See generally* TRIBE, AMERICAN CONSTITUTIONAL LAW 376-91 (1978).
149. *See* Kansas v. Colorado, 206 U.S. 46, 92 (1907).
150. Statement of Carol Dinkins, *supra* note 53. *See also* Sporhase v. Nebraska, 102 S.Ct. at 3466 n.20 (1982) (recognizing the historical preference given to the enactment of interstate compacts as means for solving interstate resources disputes).

Attempts by Congress to define what types of state restrictions are permissible may actually lead to a result which would be more troublesome to the states than the *Sporhase* decision itself. One reason the Court will infer deference to state water law—the fact that Congress hasn't acted—vanishes once Congress asserts its authority over groundwater pursuant to its power under the commerce clause. From the states' point of view, it may thus be desirable for Congress to avoid enacting any immediate remedial legislation. This is particularly true in light of the fact that the Court in *Sporhase* left open the possibility that the western states may be able to satisfy the commerce clause by enacting new restrictions or recasting their existing regulations.[151]

Specific conflicts in determining whether federal preemption applies are usually resolved in accordance with congressional intent, national policies, and the degree to which the state laws are inconsistent with federal law.[152] In order for Congress to actively and effectively defer to state water law, its intent must be "expressly stated."[153]

Coal slurry pipeline legislation presently pending before Congress may be indicative of the continuing Congressional intent to defer to state water law. The Senate Committee on Environment and Public Works has attempted to provide an express statement of Congressional intent to preserve the primacy of state water laws, presumably even those which could impede the development of the pipelines, despite the fact that coal slurry pipelines are deemed to be in the "national interest."[154]

Recognition of congressional deference to state water law is also illustrated by a recent Justice Department opinion which analyzes and reaffirms the notion that deference to state water law is the rule, and preemption the exception, when resolving federal-state conflicts over water.[155] The

151. *See supra* text accompanying notes 89-91.
152. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).
153. Sporhase v. Nebraska, 102 S.Ct. at 3466 (1982) (quoting New England Power Co. v. New Hampshire, 455 U.S. at 343 (1982)).
154. S. 1844, 97th Cong., 2d Sess. (1982) ("Coal Distribution and Utilization Act of 1982").
155. WATER LAW NEWSLETTER, No. 2, 1982, at 15.

opinion further suggests that the proper focus in resolving state-federal conflicts centers upon congressional intent.[156]

It appears that congressional intent will continue to be the deciding factor in determining which level of government has authority to regulate water. Though *Sporhase* substantially expands the federal government's ability to control water located within the states, it is unlikely that Congress will vigorously assert that power in the immediate future.

CONCLUSION

The Court's decision in *Sporhase v. Nebraska ex rel. Douglas,* has created much anxiety in the western states, prompting state legislatures to consider new or amended water laws which will constitutionally justify restrictions on the use of water for interstate commerce. The states' anxiety comes in part from what David Aiken, a water law specialist at the University of Nebraska, calls the "specter of a full social and political transformation."[157]

Yet, certain realities of the states' "ownership interest" remain. The longstanding congressional role of deference to the application of state water law, and the states' "highly legitimate and unquestionably important" purpose to conserve and preserve a rare and special resource, may serve to validate those state laws which are demonstrably necessary to achieve the desired results.

Congress is not likely to invoke the ruling to intervene in state water regulation where the states can marshall substantial support for their conservation programs. Without specific congressional consent to state regulation, however, the federal government's ability to intervene is undeniable.

Sporhase fits into the pattern of changes which are reshaping the West. The Court, Congress, and the states will all play a role in determining just how profoundly these changes will affect the distribution and control of water.

ANNE B. TALLMADGE

156. *Id.* at 16.
157. Russakoff, *supra* note 52, at A9, col.3.