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CONSTITUTIONAL LAW—WATER LAW— Constitutionality of Water Export Bans and Limitations on Interstate Water Allocation. ***Sporhase v. Nebraska ex rel. Douglas,*** **_____ U.S. _____, 102 S. Ct. 3456 (1982).**

In 1972, Joy Sporhase purchased a block of farmland that straddled the gravel road marking the border between Chase County, Nebraska and Phillips County, Colorado. A water well, drilled by previous owners of the land, was located on the Nebraska tract a few feet from the state line. The well produced ground water that was pumped through a center pivot system, irrigating crops on both the Nebraska and Colorado tracts. A former owner had indicated on his well registration form that he intended to irrigate his land on both sides of the state line, but neither he nor Sporhase applied for a permit to transport water from the Nebraska well for use in Colorado as required by Nebraska statute.[1] Section 46-613.01 of the Nebraska Revised Statutes provided:

> Any person . . . intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.[2]

In 1977 the State of Nebraska obtained an injunction prohibiting Sporhase from transporting Nebraska ground water into Colorado without a permit.[3] On appeal the Nebraska Supreme Court upheld the injunction, rejecting the defense that the suspect statute imposed an impermissible burden on

1. Sporhase v. Nebraska *ex rel.* Douglas, _____ U.S. _____, 102 S. Ct. 3456, 3458 (1982). *See also* Russakoff, *Farmer, 'Country Hick' Lawyer Upset Legal System,* The Denver Post, Sept. 19, 1982, sec. F (Region), at 1, col. 1.
2. NEB. REV. STAT. § 46-613.01 (Reissue 1978).
3. Sporhase v. Nebraska, 102 S. Ct. at 3458 (1982). Due to the last requirement of § 46-613.01, Sporhase would not have been granted a permit even had he applied for one. Since Colorado absolutely forbade the exportation of its ground water, reciprocity would have been impossible. Colorado law provided, "[I]t is unlawful for any person to divert, carry, or transport . . . any of the ground waters of this state . . . into any other state for use therein." COLO. REV. STAT. § 37-90-136 (1973).

interstate commerce.[4] The Nebraska court held that the statute did not violate the commerce clause[5] since Nebraska ground water was not "a market item freely transferable for value among private parties, and therefore not an article of commerce."[6]

On direct appeal, the United States Supreme Court reversed the Nebraska decision. In *Sporhase v. Nebraska ex rel. Douglas* the Court abandoned any distinction between ground water and other natural resources, finding water to be an article of commerce subject to traditional burden-on-commerce analysis as well as to affirmative congressional regulation.[7] Speaking through Justice Stevens, the Court further held that the reciprocity requirement did not significantly advance Nebraska's legitimate conservation and preservation concerns and that in any event the requirement was not narrowly tailored toward achieving those ends.[8] Finally, the Court declined to accept the suggestion that Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water. Neither the failure of Congress to establish uniform federal water laws, nor the willingness of Congress to allow the states to settle their own water disputes was enough to persuade the Justices that Congress had consented to the "unilateral imposition of unreasonable burdens on commerce."[9] This note will focus on the Court's commerce clause analysis and the effect of that analysis in limiting the states' authority to regulate water control on the local level, particularly in the context of interstate allocation.

I. JUDICIAL TREATMENT OF WATER EXPORT PROHIBITIONS BEFORE *Sporhase*

The framework of judicial commerce clause analysis is well established. By virtue of the commerce clause, Congress has the unquestioned constitutional power to regulate not only

4. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614, 616 (1981).
5. "Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. 1, § 8, cl. 3.
6. 305 N.W.2d at 616.
7. 102 S.Ct. at 3463.
8. *Id.* at 3465.
9. *Id.* at 3466.

actual articles of interstate commerce, but also the overall stream of commerce.[10] In the absence of conflicting or preemptive congressional legislation, however, the states are recognized to possess a limited degree of power to govern matters of significant local concern which nevertheless affect or regulate interstate commerce.[11]

Historically, the federal government has acknowledged the vastly different geographic, climatic and economic regions of the nation and has left the control and regulation of water resources to the states.[12] Congress has consistently deferred to state water law,[13] and the Supreme Court has repeatedly attested to the "superior competence" of the individual states in conserving and preserving scarce water resources.[14] Thus, water users have, by and large, come to rely on state water laws as a means of controlling the use and appropriation of that resource.[15] It is this traditional confidence in the applicability of individual state law which resulted in a split of authority prior to *Sporhase.*

Sporhase cleared the air with respect to earlier disparate decisions. In *Hudson County Water Co. v. McCarter,* the Supreme Court upheld a New Jersey statute that prohibited the transfer of surface waters for use in another state.[16] The Court noted that the state's interest in conserving its water was "obvious" and held the state's exercise of its police power to be a legitimate weapon in securing that interest.[17] Briefly disposing of any commerce clause attack upon the statute, the Court found the state to have an ownership interest in its

10. Wickard v. Filburn, 317 U.S. 111, 124 (1942).
11. Southern Pac. Co. v. Arizona, 325 U.S. 761, 766-70 (1945).
12. California v. United States, 438 U.S. 645, 653 (1978).
13. *Id.*
14. Sporhase v. Nebraska, 102 S.Ct. at 3463 (1982). *See also* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163 (1935).
15. Trelease, *Government Ownership and Trusteeship of Water,* 45 CALIF. L. REV. 638 (1957). In theory water law in the arid West might logically have been federal. There are at least two constitutional bases on which the United States could assert complete control and regulation of water. First is the federal ownership of public lands as a basis for riparian water rights. Throughout its history the United States has been the predominant landowner in the West. Second, under its commerce power the federal government has the power to secure the uninterrupted navigability of all navigable streams within the jurisdiction of the United States. C. Corker, Constitutional Restraints on Protecting State Interests in Water Rights I-8—I-9 (June 8, 1982) (unpublished paper available from Natural Resources Law Center, University of Colorado School of Law).
16. 209 U.S. 349 (1908).
17. *Id.* at 356.

water resources and therefore the ability to qualify any ownership rights that it chose to recognize.[18] The state was in possession of a commodity and thus able to preclude that commodity from entering into the stream of interstate commerce.[19]

The only case presenting a realistic alternative to *Hudson County* questioned a Texas statute which sought to prohibit the exportation of Texas ground water into Oklahoma without legislative approval.[20] In *City of Altus v. Carr,* the Supreme Court, per curiam and without opinion, affirmed the decision of a federal district court striking down the Texas statute as imposing an unreasonable burden upon interstate commerce.[21] In razing the Texas statute, the district court assumed a somewhat different posture regarding the state's attempted water export ban from that assumed by the Supreme Court in its earlier *Hudson County* decision. The district court rejected Texas' contention that ground water was not an article of commerce, noting that Texas law recognized withdrawn ground water as an item of personal property subject to ordinary commercial regulation.[22] The *City of Altus* court further held that public interest in the preservation of scarce water resources, while not insignificant, was insufficient to justify such a deliberate burden upon interstate commerce.[23]

An inherent problem surfaced in attempting to reconcile the holding of *Hudson County* with that of *City of Altus.* While the district court distinguished the two cases on the basis of Texas' characterization of withdrawn water as an article of personal property, subject to sale and commerce, the Supreme Court's summary affirmation of *City of Altus* gave no indication whether the Court adopted this distinction. The question remained whether or not the *City of Altus* affirmation was indeed a sub silentio overruling of the *Hudson County* decision.[24]

18. *Id.* at 357. Justice Holmes, author of the *Hudson County* opinion, primarily addressed the "police powers" aspects of the case.
19. *Id.*
20. The Texas statute owed its existence largely to the fact that the city of Altus, Oklahoma, was out of water. The city went to nearby Texas for a solution, relying on a Texas attorney general opinion which stated no reason under Texas law to indicate that this alternative water supply was not available to Altus. The Texas legislature temporarily thwarted this plan with a statute effectively prohibiting the withdrawal of underground water in Texas for transport outside the state. 2 WATERS AND WATER RIGHTS § 132 (R. Clark ed. 1967).
21. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam,* 385 U.S. 35 (1966).
22. *Id., 255 F. Supp. at 840.*
23. *Id.* at 838-40.
24. Comment, *"It's Our Water!"— Can Wyoming Constitutionally Prohibit the Exportation of State Waters?,* 10 LAND & WATER L. REV. 119, 132-35 (1975).

II. THE *Sporhase* DECISION

A. Water as an Article of Commerce

In *Sporhase* the Supreme Court held ground water to be an article of commerce and therefore subject to congressional regulation.[25] While the Nebraska Supreme Court cited *Hudson County* as controlling precedent,[26] in reversing the Nebraska decision the United States Supreme Court in *Sporhase* found its earlier affirmation of *City of Altus* to be fundamentally inconsistent with *Hudson County*.[27] The *Sporhase* Court noted, however, that in summarily affirming the decision in *City of Altus* it did not subscribe to the district court's reasoning. Rather, its affirmation indicated only an agreement with the result reached by the lower court.[28]

The Supreme Court acknowledged that Texas law differs significantly from Nebraska as to the rights of a surface owner to underlying ground water.[29] Nevertheless, it felt Nebraska's public ownership theory to be "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[30] The *Sporhase* Court further found that ground water was fundamentally indistinguishable from other natural resources.[31] The fact that Nebraska law granted the surface owner a lesser ownership interest in ground water than he might enjoy with respect to other captured resources could not serve to absolutely remove ground water from traditional commerce clause scrutiny.[32]

Moreover, the *Sporhase* Court found the states' legitimate interests in preserving valuable water to have an interstate dimension.[33] This characteristic was most clearly evidenced by

25. 102 S.Ct. at 3463.
26. 305 N.W.2d at 618.
27. 102 S.Ct. at 3461.
28. *Id.*
29. *Id.* Texas law maintains that the owner of the land surface owns all the water he can pump from beneath his land. Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 26 (Tex. 1978). Nebraska ground water law is a version of the "reasonable use" doctrine, providing essentially for public ownership of ground water subject to the narrowly circumscribed right of reasonable use only on the overlying land. Nebraska v. Sporhase, 305 N.W.2d at 618 (1981).
30. 102 S.Ct. at 3461 (1982) (quoting Hughes v. Oklahoma, 441 U.S. 322, 334 (1979) and Toomer v. Witsell, 334 U.S. 385, 402 (1948)).
31. 102 S.Ct. at 3462.
32. *Id.*
33. *Id.*

the role of ground water in the economic cycle. Noting that the bulk of water supplies were employed in the generation of worldwide agricultural markets, the Court proffered these markets as the "archtypical example of commerce" for which federal regulation was authorized.[34] Additionally, the Court found a significant federal interest to exist by virtue of the multistate character of the Ogallala aquifer, which lay beneath Sporhase's tract of farmland and extended throughout portions of several other Western states.[35]

That the Supreme Court held ground water to be an article of commerce is not surprising. The Nebraska Supreme Court's holding, on the other hand, was fundamentally untenable. Although the Nebraska court may have been justified in assuming that *City of Altus* did not overrule the seventy year old *Hudson County* decision,[36] a closer look reveals that any reliance on *Hudson County* was in error.

Hudson County had held *Geer v. Connecticut*[37] to be controlling on the commerce clause issue.[38] *Geer,* which upheld a prohibition against the interstate transportation of captured game birds, was in turn predicated on the theory of public ownership of wild animals. The ill-considered holding of *Geer,* however, was expressly overruled in *Hughes v. Oklahoma.*[39] Borrowing the analysis of the earlier *Geer* dissent, the *Hughes* Court dispelled Oklahoma's assertion of state ownership of free-swimming minnows:

> A State does not stand in the same position as the owner of a private game reserve and it is pure fantasy

34. *Id.* at 3462-63.
35. *Id.* at 3463.
36. 305 N.W.2d at 618.
37. 161 U.S. 519 (1896).
38. 209 U.S. at 356.
39. 441 U.S. 322, 329 (1979). The *Geer* decision was something of an anomaly almost from the start. Its erosion began only 15 years later when the Court handed down West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). *West* held that natural gas, when reduced to possession, was a commodity belonging to the owner of the overlying land and as such was a proper subject of interstate commerce. The decision condemned the obvious protectionist motive of an Oklahoma statute which sought to prohibit the interstate transportation of natural gas. In now classic language the Court said:

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the fields be brought within the principle? Thus enlarged, or without that enlargement, its influence in interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

221 U.S. at 255.

> to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.[40]

Thus it is clear with respect to the *Sporhase* saga that the philosophical and analytical underpinnings of the *Hudson County* decision had been previously dismantled. Disregarding any perceived inconsistencies between *City of Altus* and *Hudson County,* the latter was invalid precedent as it held the discredited premise of *Geer* controlling on the public ownership and commerce clause issues. Therefore, as noted above, the Nebraska court's confidence in *Hudson County* was misplaced.

Having found ground water to be an article of commerce and therefore controlled by traditional discrimination and burden-on-commerce analysis,[41] the Supreme Court further held that the affirmative power of Congress to implement its own policies concerning ground water legislation could not be circumvented by the nuances of state water law.[42] While the Court felt state claims to public ownership significant and, in fact, appeared quite willing to allow the states to indulge in these fantasies of legal fiction, it clearly found that state law could not exempt ground water from congressional power to deal with overdraft problems on a national scale: "If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar . . . [water] laws."[43]

40. 441 U.S. at 334 (quoting Geer v. Connecticut, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting)).
41. The Court apparently felt that the *Sporhase* dispute provided an appropriate forum to address the serious nature of public ownership claims to ground water. Clearly it is not necessary for a particular commodity to be recognized as an actual article of commerce in itself to trigger a commerce clause analysis. It is enough that the commodity relate even tenuously to an activity which has an economic effect on interstate commerce. Wickard v. Filburn, 317 U.S. 111, 120 (1942). The *Sporhase* Court's recognition of ground water as an essential element in the creation of interstate agricultural markets certainly indicates that the characterization of ground water as an article of commerce was not essential to the ultimate result. Sporhase v. Nebraska, 102 S.Ct. at 3467 (1982) (Rehnquist, J., dissenting).
42. Sporhase v. Nebraska, 102 S.Ct. at 3463 (1982).
43. *Id.*

B. The Extension of Pike v. Bruce Church, Inc. to Ground Water

In *Pike v. Bruce Church, Inc.*,[44] the Supreme Court outlined the principles of commerce clause analysis employed in *Sporhase,* unanimously holding:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted with a lesser impact on interstate activities.[45]

The Court later extended the *Pike* test to provide commerce clause protection to all activities of interstate commerce, including items not previously considered to be legitimate articles of trade.[46] In *Hughes v. Oklahoma* the Court applied the *Pike* test to state regulation of natural resources in which the state asserted public ownership.[47] Finally, the *Sporhase* Court employed *Pike* to control interstate trade in ground water, rejecting the defense that ground water was distinguishable from other natural resources.[48]

The *Pike* rule outlines a number of primary factors inherent in the Court's modern commerce clause analysis. The first and most critical factor considers whether a state law, on its face or in its effect, regulates "evenhandedly." The evolution of *Pike* dictates that when a state law operates to slam the door on the free movement of commerce across state boundaries there is a virtual presumption of per se invalidity.[49]

44. 397 U.S. 137 (1970).
45. *Id.* at 142 (citations omitted).
46. Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (invalidating a New Jersey law prohibiting the importation of solid or liquid waste).
47. 441 U.S. at 336-38.
48. 102 S.Ct. at 3463-65.
49. Philadelphia v. New Jersey, 437 U.S. at 624 (1978).

Sporhase held the reciprocity provision of the Nebraska statute unable to pass constitutional muster as it failed to regulate in a non-discriminatory manner.[50] Because the State of Colorado absolutely prohibited the exportation of its ground water,[51] the *Sporhase* Court easily determined that the Nebraska reciprocity requirement operated as an out-and-out barrier to commerce between the two states.[52] On balance, Nebraska's reciprocity statute was discriminatory, and in any event not narrowly tailored to the state's conservation and preservation rationale. The provision was therefore unable to survive the "strictest scrutiny" reserved for facially discriminatory legislation.[53]

Looking beyond the discriminatory nature of the reciprocity requirement, the Court addressed the remaining conditions in the Nebraska statute for the withdrawal of water for interstate transfer. Those conditions were that the withdrawal of ground water requested be (1) reasonable, (2) not contrary to the conservation and use of ground water, and (3) not otherwise detrimental to the public welfare. Because the burden-on-commerce analysis involves a lesser degree of scrutiny than the discrimination-against-commerce analysis, the *Sporhase* Court, in convincing dicta, found that the additional conditions did not necessarily place an undue *burden* upon interstate commerce.[54] The Court again applied the *Pike* test in assessing the legitimacy of the local public interest which the Nebraska legislation was designed to advance. This second aspect of *Pike* applies only when no overt discrimination is uncovered, thus shifting the emphasis from discrimination to burden. Under *Pike* a state-imposed burden on commerce may be tolerated when the level of local interests clearly outweigh any incidental effects on interstate commerce.[55]

50. 102 S.Ct. at 3465.
51. COLO. REV. STAT. § 37-90-136 (1973). It is uncertain whether or not Sporhase would have been granted a Nebraska permit for water use *within* the state even had he applied for one since his tract was located within a so-called "critical township." Sporhase v. Nebraska, 102 S.Ct. at 3463-64 (1982).
52. 102 S.Ct. at 3465. The Court also noted that a reciprocity requirement could not be justified as a response to another state's unreasonable burden upon commerce. *Id.* at 3465 n.18. This typifies the Court's traditional hostility toward unilaterally imposed reciprocity provisions. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 375 (1976).
53. 102 S.Ct. at 3465.
54. *Id.*
55. *Id.* at 3463. *Accord* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

Though couched primarily in terms of a burden analysis, the *Sporhase* Court clearly and correctly found the Nebraska reciprocity clause to be an insurmountable barrier to interstate commerce and therefore discriminatory. However, in noting the implications of the "negative commerce clause," the Court recognized that the states may, in the absence of preemptive congressional legislation, impose certain burdens on interstate commerce. The Court indicated that in some rather peculiar cases a burden upon interstate commerce may, in fact, be necessary for a state regulatory scheme to meet the general "evenhandedness" requirement of *Pike.*[56] In *Sporhase,* for example, Nebraska law served to strictly limit the intrastate transfer of ground water.[57] It was, therefore, essential that the State of Nebraska also impose withdrawal and use restriction on interstate transfer. Any exemption for interstate transfer would be inconsistent with the mandated objective of evenhandedness in regulation.[58]

Notwithstanding the discriminatory nature of the Nebraska statute, the *Sporhase* Court found the state's interest in the conservation of its scarce water resources to be "unquestionably legitimate and highly important."[59] It is in this regard that *Sporhase,* although circumscribing the power of the states to regulate ground water, found an avenue by which to accommodate state interests. The *Pike* formulation allows for an evaluation of the relative weight of various state interests and objectives when balancing those interests against any burden imposed on interstate commerce.

In applying a balancing test to the non-discriminatory provisions of the Nebraska statute, the Court noted its continued reluctance to interfere with legitimate state measures undertaken to provide for the health and safety of local citizens.[60] The Court has historically recognized a distinction between the power of states to protect health and safety concerns and the states' lack of power to promote economic protectionism.[61]

56. 102 S.Ct. at 3464.
57. *Id.*
58. *Id.*
59. *Id.* at 3463.
60. *Id.* at 3464.
61. H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) (state may not use its power to protect health and safety as a basis for suppressing interstate competition in dairy products).

Interestingly, *Sporhase* characterized the state regulation of water supplies as relating most directly to the health of local citizens rather than to their economic welfare. Having previously noted the pervasive commercial nature of ground water in an agricultural context, this second characterization by the Court would apparently allow the states meaningful latitude in formulating water control schemes. When health and safety concerns have been recognized as paramount, substantial state interference with interstate commerce has been permitted.[62] There is nothing to suggest that this would not be the case with ground water regulation.

While the *Sporhase* Court established state claims to public ownership of natural resources to be mere legal fictions, the Court found, somewhat incongruously, that such claims were not wholly irrelevant to commerce clause analysis.[63] The Court noted that state claims to public ownership of ground water were "logically more substantial than claims to public ownership of other natural resources"[64] and that in any event a state's reliance on that theory was expressive of the importance of that resource to the people of the state.[65] Thus, when balancing local interests against incidental burdens upon interstate commerce, the fact that state water law is founded upon the legal fiction of state ownership may tend to support a limited preference for state citizens in the utilization of water resources.[66]

The *Sporhase* Court also recognized Nebraska ground water to possess "some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage."[67] Noting its holding in *Reeves v. Stake,*[68] the Court apparently likened a state's conservation efforts to a state's actual production, ownership and participation in the marketplace. States engaged in a systematic scheme of water

62. Bradley v. Public Utilities Comm'n, 289 U.S. 92 (1933) (regulation to insure highway safety not violative of commerce clause).
63. 102 S.Ct. at 3463.
64. *Id.* at 3464.
65. *Id.* at 3461.
66. *Id.* at 3464.
67. *Id.* at 3464-65.
68. 447 U.S. 429 (1980) (state as market participant in cement industry permitted to discriminate against non-citizens).

resource management directed toward the ultimate goal of conservation may therefore be permitted to impose substantial burdens on commerce without necessarily running afoul of the commerce clause.

Clearly the Court's reliance on the commerce clause analysis prescribed by *Pike* does not preclude the states from instituting legislative programs which effect and, to some degree, regulate interstate commerce. Any fear that *Sporhase* somehow undercuts state authority to control ground water overdraft or to rely on long-standing prior appropriation decrees is unfounded. There is little doubt, however, that state legislation which is perceived as facially discriminatory, will be subject to the "strictest scrutiny." State water legislation which falls short of actual discrimination would appear to stand a reasonable chance of passing constitutional muster.[69] In fact, given the importance of the public's interest in ground water conservation, it is plausible that the *Sporhase* Court would have upheld the questioned Nebraska statute were it not for the blatantly discriminatory aspect of the reciprocity provision.[70]

C. Congressional Authorization of Discriminatory Power

The commerce clause expressly authorizes Congress to enact laws which preserve and promote free trade among the states.[71] Additionally, the "dormant commerce clause" theory holds that the commerce clause stands alone, without the support of any particular congressional legislation, as its own limitation on the regulatory power of the states.[72] Unless Congress divests itself of its power to regulate some specific arena or article of commerce, any state legislation which infringes on that particular facet of commerce runs the risk of intruding into the sphere of reserved federal powers.[73]

69. *Sporhase* disregarded the aspect of the *Pike* test which questions the availability of non-discriminatory alternatives, suggesting that the Court would be reluctant to engage in this heightened level of scrutiny. Future adjudications involving the commerce clause implications of ground water exportation bans would tend toward upholding such restrictions if the states were required merely to substantiate narrowly tailored legislation rather than to demonstrate the total non-existence of non-discriminatory alternatives.
70. The Court intimated that the discriminatory reciprocity provision may be severable. 102 S.Ct. at 3467. Furthermore, in *Sporhase* Justice Stevens indicated in dicta that overt discrimination might be tolerated: "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 and preserve water." *Id.* at 3465.
71. U.S. CONST., art. 1, § 8, cl. 3.
72. Freeman v. Hewit, 329 U.S. 249, 252 (1946).
73. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976).

The *Sporhase* Court rejected the defense that the State of Nebraska had been authorized to burden interstate commerce in ground water and thus to trespass on this "dormant" range of exclusive, though unexercised federal power. Neither the failure of Congress to forge federal ground water legislation nor Congress' willingness to let the states settle their differences through mutual agreement was found sufficient to command the conclusion that it had consented to the states' unilateral imposition of discriminatory legislation.[74]

The *Sporhase* Court instead relied in its recent holding in *New England Power C. v. New Hampshire,*[75] finding that congressional intent to insulate state legislation from commerce clause attacks could not be judicially inferred. To the contrary, such congressional intent and policy must be "expressly stated."[76] The courts have no authority to engage in mere speculation as to what Congress had in mind.[77]

Sporhase clearly endorsed the "consistent thread of purposeful and continued deference to state water law by Congress."[78] The Court refused, however, to equate congressional deference with congressional authorization of otherwise discriminatory legislation. Thus, the Court indicated that the states could continue to control ground water withdrawal and usage at the local level only so long as those state regulations were valid, i.e., so long as the state regulations did not unconstitutionally invade the provinces of reserved federal powers.[79] On the other hand, the *Sporhase* Court emphasized its duty to sustain state legislation whenever it found persuasive evidence that Congress had adhered to the dictates of *New England Power.*[80]

III. THE IMPACT OF *Sporhase* ON INTERSTATE WATER ALLOCATION

Not surprisingly the *Sporhase* decision raises at least as many questions as it answers. Although the Court checked

74. 102 S.Ct. at 3466.
75. _____ U.S. _____, 102 S.Ct. 1096 (1982).
76. Sporhase v. Nebraska, 102 S.Ct. at 3466 (1982).
77. New England Power Co. v. New Hampshire, 102 S.Ct. at 1102-03 (1982).
78. 102 S.Ct. at 3466 n.19 (quoting California v. United States, 438 U.S. 645, 653 (1978)).
79. 102 S.Ct. at 3466.
80. *Id.*

state authority to govern interstate commerce in ground water by tracing a line across which state legislatures must not tread, the Court left some question as to exactly where that line is drawn. One aspect of that question concerns to what extent, if any, *Sporhase* limited the scope of interstate water allocation schemes.

The law acknowledges three primary techniques in allocating waters between states—judicial equitable apportionment decrees, direct congressional allocation and interstate compacts. Traditionally, these allocation techniques have addressed the problems of surface water allocation, yet there is little to suggest that similar methods could not be employed to resolve ground water controversies.[81] The *Sporhase* Court observed that, over the years, judicial recognition of interstate allocation had fostered the legal expectation that each state could restrict water within its borders. In the same breath the Court pointed to the "relevance of state boundaries in the allocation of scarce water resources."[82]

The general framework of interstate allocation is relatively simple. In the absence of either a direct act of Congress or an approved interstate compact, the Court has turned to the doctrine of equitable apportionment when settling water rights disputes between states.[83] In entertaining such suits, however, the Court has not regarded equitable apportionment as a systematic method of analysis. "Equitable apportionment" is merely a generalized term which encompasses the "federal interstate common law" as it may apply to disputes over interstate water rights.[84] As a species of the common law, equitable apportionment is not codified by statute; instead it considers "all the factors which create equities in favor of one State or the other. . . ."[85] The object always is "to secure an equitable apportionment without quibbling over formulas."[86] Thus, the Court is not concerned that

81. Ground water use has occasionally been considered as a factor in interstate allocation, primarily as it relates to the depletion of surface flow. *See, e.g.*, Upper Niobrara River Compact, WYO. STAT. § 41-12-701 (1977).
82. 102 S.Ct. at 3464.
83. The Supreme Court has original jurisdiction over suits between states regarding the division and use of interstate waters. Kansas v. Colorado, 206 U.S. 46, 80-84 (1906).
84. *Id.* at 98.
85. Colorado v. Kansas, 320 U.S. 383, 394 (1943).
86. New Jersey v. New York, 283 U.S. 336, 343 (1931).

there be an equal division of water between the two states that share a common water source, but simply that principles of equity be applied in apportioning the benefits of the water source.[87]

Unfortunately, one overriding consideration limits the availability of a suit for equitable apportionment in a given dispute. The Supreme Court has been extraordinarily hesitant to invoke its original jurisdiction in this arena, preferring the "grass roots" negotiation of interstate compacts to its own apportionment decrees.[88] This judicial reluctance to enter into interstate water controversies evolves from the realization that such cases involve quasi-sovereigns, present delicate political questions and by nature require expert administration rather than judicial imposition of a hard and fast rule.[89] As a result, the Court has steadfastly refused to control the conduct of one state at the petition of another unless it can be shown that the threatened invasion of water rights is of a "serious magnitude."[90] In practical effect, the Court's stance has meant that equitable apportionment is an available remedy only when the controverted waters are fully utilized in either one or both of the party states and when that continued use is substantially threatened.[91]

An alternative and virtually untapped means of interstate water allocation has been direct congressional allocation. In *Arizona v. California*[92]—to date the only dispute involving congressional allocation—the Court held that Congress has the power to allocate interstate waters and that it had done so in that case with the Boulder Canyon Project Act. Moreover, the Court found that where Congress has provided its own method

87. *See* Nebrasks v. Wyoming, 325 U.S. 589 (1945). In *Nebraska,* the Court implicitly recognized that equity did not necessarily mean equality. The Court also noted that just and equitable apportionment did not always allow for strict adherence to the rule of prior appropriation even where both adverse parties were prior appropriation states. *Id.* at 618.

88. Sporhase v. Nebraska, 102 S.Ct. at 3466, n.20; New York v. New Jersey, 256 U.S. 296, 313 (1921). In *New York* the Court suggested that an interstate dispute was "more likely to be wisely solved by coöperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." 256 U.S. at 313.

89. Colorado v. Kansas, 320 U.S. at 392 (1943).

90. New York v. New Jersey, 256 U.S. at 309 (1921).

91. Nebraska v. Wyoming, 325 u.s. 589, 607-11 (1945); Arizona v. California, 283 U.S. 423, 463-64 (1931).

92. 373 U.S. 546 (1963).

for allocating interstate waters, courts have no power to substitute their own notions of equitable apportionment for those of Congress.[93] *Sporhase,* of course, indicated that the Court would extend its earlier decision in *Arizona* to include ground water legislation, holding that "[g]round water overdraft is a national problem and Congress has the power to deal with it on that scale."[94]

Some may argue that direct congressional allocation is the definitive solution to water shortages in the arid states. Long range and broad based planning appear essential to the assurance of plentiful and uninterrupted water supplies. Arguably, federal financial and legal assistance is imperative. Nevertheless, some of the arguments favoring congressional allocation also tend to weigh against it. Any benefits which may flow from federal involvement in water allocation could be discounted by the political unacceptability of federal interference.

The final and ultimately most satisfactory means of interstate allocation is the interstate compact. At its best the interstate compact embodies the advantages of direct congressional allocation without assuming the perceived disadvantages of taking on the federal government as an intimate and potentially troublesome partner. The interstate compact has been continually and expressly recommended by the Supreme Court as a means of settlement preferable to litigation. Yet, bound by the prohibitions of the Constitution,[95] "a complaining State can neither treat, agree, nor [sic] fight with its adversary, without the consent of Congress. . . ."[96] Typically, though not always, negotiotion of an interstate compact takes place in three stages: (1) an act of Congress authorizing negotiation; (2) negotiation of the compact, often by a group including a federal representative; and (3) approval by Congress.[97] Follow-

93. *Id.* at 565.
94. 102 S.Ct. at 3463.
95. U.S. CONST. art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."
96. Kansas v. Colorado, 185 U.S. 125, 144 (1902) (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726 (1838)).
97. WATERS AND WATER RIGHTS, *supra* note 20, at § 133.2. The Supreme Court has held that consent may come in the form of some action by Congress, which expressly or impliedly signifies consent. Congressional acquiescence in a compact is taken to be the equivalent of congressional consent. Virginia v. Tennessee, 148 U.S. 503 (1893).

ing congressional approval the compact and any apportionment therein is binding upon the citizens of each signatory state.[98] Thus, every interstate compact presents a federal question in its construction; however, no interstate compact is a statute of the United States.[99]

Aside from its political attractiveness, the single greatest virtue of the interstate compact lies in its usefulness in terms of long range planning.[100] While equitable apportionment necessarily involves the concept of "ripeness" or justiciability requiring that present claims exceed the available water supply, interstate compact negotiations involve no similar restrictions. Thus, by agreement, interested states can effectively make a present appropriation for future use. Given the high stakes involved in the planning and financing of any large scale water project, some device for assuring the continued availability of water supplies is essential.

Whatever course is taken, the end result of any interstate water allocation is that the total available water supply—the "bundle of sticks"—is divided more or less equitably between the states which share the source of that supply. Thus, *Sporhase* inevitably raises the question of whether states may prohibit the exportation of their respective shares of allocated water without running afoul of the commerce clause.

The *Sporhase* Court lucidly observed that congressional deference to state water law via the passage of certain federal statutes and approval of interstate compacts did not indicate that Congress intended to forfeit commerce clause constraints on state water regulation in general.[101] The Court, however, appreciated that Congress has deferred to particular valid state laws through its various statutes and interstate compact endorsements.[102] In the Court's view, the validity of a given state law rests primarily on the challenged statute being

98. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938).
99. People v. Central R.R., 79 U.S. (12 Wall.) 455, 456 (1870). *See also* WATERS AND WATER RIGHTS, *supra* note 20, at § 133.3.
100. The vision of the interstate compact as a tool for long range regional planning was espoused and influenced in a historic article co-authored by Felix Frankfurter, while he was a Harvard Law Professor. Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).
101. 102 S.Ct. at 3466.
102. *Id.*

established either as non-discriminatory or as exempted from commerce clause attack by an express act of Congress.[103]

Clearly, as evidenced by *Sporhase,* a state law seeking to absolutely prohibit the issuance of water use permits to parties intending to transport water beyond state boundaries cannot pass the non-discrimination test. On the other hand, if the source involved is subject to an interstate allocation it may be argued that such discrimination has been congressionally authorized. Armed with some means of interstate allocation, the Western states may thus sweep an end run around *Sporhase* under certain circumstances.

Borrowing language from its decisions in *New England Power Co. v. New Hampshire*[104] and *Prudential Insurance Co. v. Benjamin,*[105] the *Sporhase* Court noted that congressional intent to insulate state legislation from commerce clause attack must be "expressly stated."[106] Though congressional approval of a given interstate compact does not authorize states to impose unreasonable or discriminatory burdens on commerce at their caprice, it seems apparent that such an action is an *express* removal of obstacles to state regulation in that specific instance. It must be assumed that Congress, in its enabling action, has thrown the whole weight of its power behind the state-negotiated compact.[107] Otherwise, such congressional action would be rendered virtually meaningless. Still, congressional delegation of authority to discriminate against commerce may not be absolute even in the context of valid interstate compacts. Authorization to discriminate as a general proposition does not necessarily inform a state as to against whom and under what particular circumstances it may discriminate against the citizens of another state.

Resorting to the tried-and-true analogy of the entire water supply as a "bundle of sticks," assume that Congress has approved a compact allocating one-half of the sticks to one state

103. *Id.*
104. 102 S.Ct. at 1102.
105. 328 U.S. 408, 427 (1946).
106. 102 S.Ct. at 3466.
107. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946) (South Carolina expressly authorized by Congress to impose otherwise impermissible burdens on foreign insurance carriers).

(*S1*) and one-half of the sticks to another (*S2*). Apparently Congress has then consented to *S1*'s discrimination against *S2* in the event that *S2* attempts to claim more than one-half the sticks. *S1* should then be able to deny a permit to *S2* or anyone who expresses an intent to import *S1* water into *S2*.

But suppose that neither state is fully utilizing its share of the sticks. It seems clear under such circumstances that *S2* should not be prohibited from "borrowing" a few sticks from *S1* so long as those sticks are "chargeable" to *S2*'s allocation. Should *S1* attempt to thwart this plan by denying a water use permit it seems that this would be an unconstitutional discrimination even though both states are parties to a valid interstate compact. Carried to an extreme, it appears that neither state could constitutionally prohibit the transfer of its water so long as neither state "netted" more than its allocated share of the sticks. Only in the event that one state attempted to exceed its share should the other state be permitted to discriminate against interstate commerce in water.

To take the concept a step further, assume that a third state (*S3*), which is not a party to the compact, wishes to withdraw water from *S1* and transport it for use in *S3*. Assuming that *S3* is otherwise rightfully entitled to appropriate a few sticks from *S1*, whether through direct appropriation of unused waters or through the purchase of water rights on the open market, it appears that any denial of such a permit would result in a blatant discrimination against interstate commerce. The discrimination authorized by Congress and allowed by *Sporhase* must be narrowly construed to be specific as between the compacting states and even then permitted only when one compacting state seeks to exceed its allocated share. In the absence of specific authorization, any discrimination against *S3* would fail the "evenhandedness" test of *Pike*.

Many of the same issues arise when the interstate allocation is by means of equitable apportionment or congressional allocation. Of course, a situation involving interstate transfer is less likely to occur in cases involving equitable apportionment, since the water concerned was presumably fully

appropriated or used at the time of the decree. However, it is entirely possible that a landowner in *S2* could acquire the water rights of a landowner in *S1,* intending to transfer the water interstate, citing the transfer as a mere change in use. Again, the question of "chargeability" surfaces. Additional questions would undoubtedly arise should an individual's land straddle the state border as was the case in the *Sporhase* dispute. This would be particularly troublesome in a state following the "reasonable use" doctrine, which essentially requires that water be used only on the overlying land. Should the landowner's tract in *S2* be considered as "on the land" for purposes of *S1* water law? Should the use of *S1*'s water on the *S2* tract be charged to *S1* or *S2*?

The possible permutations are considerable and well beyond the scope of this note. Much would depend on the particular state water law in question and on the specific provisions of any compact or other form of interstate allocation. Let it suffice to say that *Sporhase* was hardly the death knell to the practice of water law in the Western states.

IV. CONCLUSION

At first blush the *Sporhase* decision may appear to cripple the states in their efforts to preserve and conserve scarce water resources. The Court's definitive characterization of ground water as an article of commerce clearly limits the states' power to regulate in this critical area, and at the same time, opens the floodgates to ground water regulation by Congress.

A closer look, however, reveals that state power to regulate ground water has not been severely curtailed. In fact, the *Sporhase* Court recognized that the states should be afforded considerable latitude when drafting ground water legislation. As long as the states either refrain from implementing overtly discriminatory legislation or are granted congressional authorization to do so, the Court indicated that it would continue to place substantial weight on state conservation interests.

The day may well arrive when the arid Western states become net water importers in their battle to insure plentiful water supplies. From this perspective, the Court's emphasis on state interests and non-discriminatory legislation, as evidenced in *Sporhase,* is a victory for those Western states.

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