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WATER LAW—Discrimination Against Interstate Commerce in Ground Water for Economic Reasons. *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

In 1980 the City of El Paso filed suit challenging New Mexico's embargo of ground water as unconstitutional under the commerce clause of the United States Constitution.¹ El Paso needed ground water from New Mexico in order to meet the water demand of its citizens. El Paso filed applications with the State Engineer of New Mexico for permits to appropriate ground water. The applications were denied because the State Engineer interpreted the state constitution to preclude the export of ground water beyond the state's borders.² El Paso brought suit challenging the constitutionality of section 72-12-19 of the New Mexico Statutes³ (embargo statute) as well as all other aspects of New Mexico law that were causing the embargo of ground water.⁴ The United States District Court for the District of New Mexico sustained the challenge and held the statute to be unconstitutional (*El Paso I*).⁵ The court interpreted *Sporhase v. Nebraska*⁶ to hold that discrimination by a state against interstate commerce in ground water in excess of the amount necessary for the protection of health and safety was unconstitutional under the commerce clause.⁷ New Mexico appealed the district court's decision.⁸ The New Mexico Legislature then repealed the embargo statute and in its place enacted section 72-12B-1 (Senate Bill 295) of the New Mexico Statutes.⁹ The new statute allows for the movement of ground water beyond the state's borders and establishes a procedure for the granting of permits for the export of water.¹⁰ After the new statute was enacted, New Mexico moved in the appellate court to have the case dismissed.¹¹ New Mexico claimed that the new statute mooted the issue between the parties.¹² The appellate court vacated the decision in *El Paso I* and remanded the case to the district court for "fresh consideration there of the respective rights and obligations of the parties in light of whatever intervening changes of law and circumstances are relevant" (*El Paso II*).¹³ This Note will deal primarily with the commerce clause aspects of the controversy.

1. U.S. CONST. art. I, § 8, cl. 3.

2. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 381 (D.N.M. 1983).

3. In pertinent part the statute reads as follows: No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act prohibits the transportation of water by tank truck from an underground source in New Mexico to any other state where the water is used for exploration and drilling for oil and gas The amount of water withdrawn from any one well for such exploration shall never exceed three acre-feet. N.M. STAT. ANN. § 72-12-19 (1978).

4. Plaintiff's First Amended and Supplemental Complaint at 1, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

5. 563 F. Supp. at 392.

6. 458 U.S. 941 (1982).

7. *Id.* at 389.

8. Appellant's Docketing Statement at 2, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

9. N.M. STAT. ANN. § 72-12B-1 (1978) (Supp. 1983).

10. N.M. STAT. ANN. § 72-12B-1(A)-(G) (Supp. 1983).

11. Motion to Dismiss and Suggestion of Mootness at 2, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

12. *Id.* at 3.

13. *City of El Paso v. Reynolds*, No. 83-1350, Order and Judgment at 3 (10th Cir., 1983).

BACKGROUND

Many states have enacted legislation to prevent or restrict the flow of goods and resources across their state lines. State quarantine and inspection laws restrict the flow of goods into a state for the purpose of protecting the health and safety of the state's citizens.¹⁴ Other laws, however, have been motivated solely by a desire to gain an economic advantage for the citizens of one state at the expense of interstate commerce and citizens of other states.¹⁵ Quarantine and inspection laws have been upheld as a valid exercise of police power. A key feature of these laws is that they discriminate against all commerce in the item sought to be controlled and not just the interstate portion. Statutes by which a state has attempted to gain an economic advantage for its citizens have generally failed to survive constitutional scrutiny.¹⁶

When state regulations involving water have been challenged on commerce clause grounds, the states have commonly relied on three general theories to defend their laws: (1) water is not an article of commerce; (2) Congress has authorized the states to impose these burdens on interstate commerce; and (3) the state is the owner of the resource and the state's decision regarding the resource is a valid exercise of its police power.

All three of these theories were addressed by the United States Supreme Court in *Sporhase v. Nebraska*.¹⁷ First, Nebraska argued that ground water should not be considered an article of commerce because of the severe restrictions placed on ownership by the state. The Court rejected Nebraska's argument on the ground that acceptance of that contention would exempt state water laws from scrutiny under the commerce clause and would curtail Congress' ability to act in this area.¹⁸ The Court then held that water is an article of commerce.¹⁹

Second, Nebraska argued that congressional deference to state water laws puts those regulations beyond the reach of the commerce clause. The Court in *Sporhase* held that deference by Congress did not "constitute persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce"²⁰ and that compliance with the commerce clause is a necessary element of a "valid state law to which Congress has deferred."²¹

14. *Mintz v. Baldwin*, 289 U.S. 346 (1933) (New York regulation requiring cattle to be certified free of Bang's disease); *Kimmish v. Ball*, 129 U.S. 217 (1889) (Iowa statute that held possessor of diseased cattle liable for damages caused by the spread of the disease); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (Minnesota statute banning the sale of milk in plastic containers).

15. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (Municipal ordinances regulating the sale of milk and milk products within its jurisdiction); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina statute regulating the grading of apples imported into the state); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey statute prohibiting the importation of waste into the state).

16. See *supra* note 15 and accompanying text.

17. 458 U.S. 941, 945-51 (1982).

18. *Id.* at 953.

19. *Id.* at 954.

20. *Id.* at 960.

21. *Id.*

Third, the state in *Sporhase* argued that ground water is owned by the state and regulations dealing with ground water are beyond scrutiny under the commerce clause.²² The same argument had been presented in *City of Altus v. Carr* and rejected.²³ In *Altus*, Texas argued that the surface owner could not obtain absolute ownership of the ground water he pumped from his land and the ownership rights he did not obtain remained in the state. In *Sporhase*, Nebraska argued that since it imposed greater restrictions on ground water than did Texas in *Altus*, its regulation should not be subject to the commerce clause.²⁴ The Court in *Sporhase* rejected this contention, stating that: "although appellee's greater ownership interest may not be irrelevant to commerce clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership."²⁵ By later adding that Nebraska's claim to public ownership of water "is not without significance" in a commerce clause inquiry, it appears that the state ownership argument retains some vitality.²⁶ But a state's ability to regulate the use of ground water through its police power remains viable after *Sporhase*. In fact, Mr. Justice Stevens wrote that "a state's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."²⁷

After the decision in *Sporhase*, any attempt to justify restrictions on the interstate movement of ground water on the theory ground water is not an article of commerce would be futile at best. The Court specifically stated that water is an article of commerce and that Congress has not removed commerce clause constraints from state regulation in this area.²⁸ The theory of state ownership of ground water resources appears to be weakened by the decision in *Sporhase*. It is interesting to note that the Court was careful not to completely negate the state ownership theory. Questions still remain as to when "significance" will be accorded the "legal fiction of state ownership" and the extent of the significance.²⁹ Finally, the police power theory remains a viable basis for the regulation of ground water. But, attempts by states to regulate water under police power will still be subject to scrutiny under the commerce clause.³⁰

The state's interest in providing safe and adequate supplies of water for its people cannot be questioned. Water, in addition to being crucial to the existence of life, is also a necessary ingredient for the maintenance of economic activity. A state also has an interest in promoting economic growth and well being for its citizens.³¹ The federal government has an interest in promoting interstate commerce by preventing undue restrictions from being imposed upon it. This is the juncture at which state and federal interests collide.

22. *Id.* at 949-51.

23. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

24. 458 U.S. at 951.

25. *Id.*

26. *Id.* at 953.

27. *Id.* at 956.

28. *Id.* at 954, 958-60.

29. *Id.* at 951-53.

30. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-70 (1945).

31. *Chicago, B. and Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906).

EL PASO I—THE COURT'S ANALYSIS

As mentioned earlier, the defendants in *El Paso I* argued that: (1) water is not an article of commerce and therefore the statute is not subject to commerce clause analysis; (2) Congress has permitted the states to impose burdens on interstate commerce in ground water; and (3) the state's exercise of police power over publicly owned resources is beyond the reach of the commerce clause.³² The district court disposed of the defendant's contentions in short order, relying on *Sporhase*.³³ The district court held that water is an article of commerce and that "Congress' long-standing deference to state water law did not demonstrate an intent to permit discrimination against interstate commerce in ground water."³⁴ The court also held that federal constitutional constraints are not surrendered because the state claims public ownership of the resource.³⁵ The district court added that "although such a claim may support a limited preference for its own citizens in the utilization of the resource. . . , a state's asserted ownership of public waters within the state is only a legal fiction."³⁶

Having disposed of these defenses, the district court then proceeded to analyze the statute under traditional commerce clause analysis. First, because the statute called for almost a total ban on exports of water the court found the statute to be facially discriminatory and therefore subject to strict scrutiny.³⁷ Even though the court recognized the need for strict scrutiny, it apparently analyzed the statute according to the test used for a slightly lower level of scrutiny. For a discriminatory statute to survive commerce clause scrutiny, according to the Court in *El Paso I*, the proponent must show that the embargo is necessary to further a legitimate local purpose, is narrowly tailored to that purpose and that no other non-discriminatory alternatives exist.³⁸

The state claimed its embargo was intended to "conserve and preserve the state's internal water supply."³⁹ The district court found this purpose to be "unquestionably legitimate and highly important"⁴⁰ and that it might justify limited non-discriminatory burdens on interstate commerce but it could not "support a total ban on interstate transportation of ground water."⁴¹ The district court then distinguished between regulations intended to further public health and safety considerations and those intended to promote economic protectionism. This distinction gives a state the power⁴²

"to shelter its people from menaces to their health or safety" but not "to retard, burden or constrict the flow of . . . commerce for their economic advantage . . ." Thus the Supreme Court held that a

31. Chicago, B. and Q. Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906).

32. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 388 (D.N.M. 1983).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citations omitted from quoted material).

37. *Id.* at 388-92.

38. *Id.* at 388.

39. *Id.* at 389.

40. *Id.*

41. *Id.*

42. *Id.* (citations omitted from quoted material).

state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource. For purposes of constitutional analysis under the Commerce Clause, it is to be treated the same as other natural resources.

The defendants argued that by the year 2020 the state's water supply will be insufficient to meet "reasonable 'public welfare' needs" and that statewide shortages of 626,000 acre-feet of water per year will occur.⁴³ The district court found that in determining "public welfare needs" the defendants were including estimated needs for industry, energy production, and irrigated agriculture.⁴⁴ By restricting interstate commerce in ground water for the purpose of furthering these non-health and non-safety needs the court felt New Mexico was engaging in an activity "tantamount to economic protectionism."⁴⁵

EL PASO I—CRITIQUE AND ANALYSIS

A. General Observations

By holding the embargo statute unconstitutional, the district court's decision in *El Paso I* was correct. The statute sought to discriminate against interstate commerce under the guise of "conservation." The facts demonstrated, however, that there was no shortage of water for meeting the health and safety needs of the people. More specifically, the court found that the statewide demand for water in New Mexico for health and safety reasons was about 220,000 acre-feet per year whereas the estimated renewable supply of water was ten times that amount.⁴⁶ The State Engineer also admitted that the time when the scarcity of water would become a limitation on the growth of the state was still far away.⁴⁷ Also included in the court's analysis was a recognition that interstate commerce was bearing the brunt of the burden from this conservation effort. The Court in *Sporhase* found it significant that Nebraska's regulatory scheme imposed restrictions on intrastate as well as interstate commerce in water.⁴⁸ The Court in *Sporhase* felt 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. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation."⁴⁹ Such balanced regulation did not exist in New Mexico. Additionally, the district court found that even if the embargo statute was only for the purpose of protecting the health and safety of the state's citizens it would be unconstitutional because it was not narrowly tailored to achieve that purpose.⁵⁰ The defendants were unable to "marshall evidence to establish a

43. *Id.* at 389-90.

44. *Id.* at 390.

45. *Id.*

46. *Id.* at 389.

47. *Id.* at 390.

48. 458 U.S. at 955-56.

49. *Id.*

50. 563 F. Supp. 379, 390 (D.N.M. 1983).

close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.”⁵¹

B. Sporhase and Regulation of Ground Water for Economic Reasons

The district court in *El Paso I* interpreted *Sporhase* to preclude a state from discriminating against interstate commerce in ground water in excess of the amount necessary for the health and safety needs of its citizens.⁵² In so doing, however, the court interpreted the decision in *Sporhase* too narrowly.

In *Sporhase*, the appellants were challenging the constitutionality of a Nebraska statute which required them to obtain a permit from the Director of Water Resources before removing ground water from the state.⁵³ Appellants owned adjoining tracts of land situated in Nebraska and Colorado.⁵⁴ They wanted to use water from a well located on tracts in Nebraska for irrigation of land in Colorado.⁵⁵

The Court in *Sporhase* focused its attention on four aspects of the Nebraska statute under attack.⁵⁶ The first three specified the conditions upon which the Director of Water Resources would grant a permit to export ground water. In order to grant a permit the Director had to find that: (a) the proposed withdrawal of ground water was reasonable; (b) the withdrawal of ground water was not contrary to conservation efforts and the use of ground water; and, (c) the requested withdrawal was not otherwise detrimental to the public welfare.⁵⁷ The Court found that these aspects of the statute did not “impermissibly burden interstate commerce.”⁵⁸ The fourth aspect of the statute was a reciprocity requirement. Under the reciprocity requirement the state that was to receive Nebraska groundwater had to grant reciprocal rights for the export of ground water to Nebraska.⁵⁹ The Court in *Sporhase* found there was no relationship, under the facts of the case, between the reciprocity requirement and the state’s “unquestionably legitimate and highly important” purpose of conservation and preservation of diminishing sources of ground water.⁶⁰

The issue which concerned New Mexico in *El Paso I*, however, was whether or not, through state regulation, the flow of groundwater out of

51. *Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982).

52. 563 F. Supp. at 390.

53. 458 U.S. at 944. (The statute attacked in *Sporhase* provided that: Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well as 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 the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska. (Emphasis added).

54. *Id.*

55. *Id.*

56. *Id.* at 955-57.

57. *Id.*

58. *Id.* at 957.

59. *Id.*

60. *Id.* at 957-58.

state could be restricted solely for economic reasons. The district court in *El Paso I* answered this question in the negative. *Sporhase*, however, appears to allow such discrimination.

In *Sporhase*, Mr. Justice Stevens expressed the Court's reluctance to interfere with a state's regulatory scheme absent a mandate from Congress.⁶¹ He stated that "in the absence of a contrary view expressed by Congress, 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. Our reluctance stems from the "confluence of [several] realities."⁶² The "realities" identified by the Court were:

- a) A state may regulate the use of water in times of shortage for the purpose of protecting the health and safety of its citizens;
- b) From equitable apportionment cases and interstate compacts there has risen an expectation that states may restrict water within their borders;
- c) A states claim to public ownership of water may support a limited preference in its own citizens in the utilization of the water; and,
- d) Water which is the result of a state's conservation efforts is similar to a good that is publicly produced and a state may favor its citizens in the utilization of this water in times of shortage.⁶³

Of the four "realities" or, more appropriately, considerations, listed by the Court, the third affords a state the best opportunity to protect the economic interests of its citizens through regulation. Under this "limited preference," a state should be able to restrict the export of ground water for economic reasons.

Sporhase supports such a conclusion. After mentioning the "limited preference," the Court cited the case of *Hicklin v. Orbeck*.⁶⁴ *Hicklin* involved an Alaskan program which required that jobs relating to the exploitation of oil and gas resources on state owned land be first offered to Alaska residents. Even though the validity of this hiring program was attacked under the privileges and immunities clause, Mr. Justice Brennan referred to commerce precedents.⁶⁵ The cases he referred to in deciding *Hicklin* were *West v. Kansas Natural Gas*,⁶⁶ *Pennsylvania v. West Virginia*,⁶⁷ and *Foster Packing Co. v. Haydel*.⁶⁸ Each of these cases involved attempts by the states to regulate the use of natural resources for the economic benefit of the state's citizens. Even though these cases found the state regulations unconstitutional under the commerce clause, Mr. Justice Brennan felt these three cases established the proposition that the "commerce clause circumscribes a state's ability to prefer its own citizens in the utilization of

61. *Id.* at 956.

62. *Id.*

63. *Id.* at 956-57.

64. 437 U.S. 518 (1978).

65. *Id.* at 531-34.

66. 221 U.S. 229 (1911).

67. 262 U.S. 553 (1923).

68. 278 U.S. 1 (1928).

natural resources found within its borders"⁶⁹ Additionally in the *Hicklin* case, Mr. Justice Brennan spoke of *Foster Packing* as limiting "the extent to which a state's purported ownership of certain resources could serve as a justification for the state's economic discrimination in favor of residents."⁷⁰ Mr. Justice Brennan's comments in *Hicklin* thus indicate that a state can prefer its citizens in the use of a natural resource and that this preference can be motivated by economic reasons. The commerce clause does not prohibit economic preferences, it only limits the extent of the preference. Under *Hicklin* a state may, for economic reasons alone, prefer its own citizens in the utilization of a natural resource as long as this preference does not impose an impermissible burden on interstate commerce. Additionally, the conclusion can be drawn from the *Hicklin* opinion that under certain circumstances, a state's "purported" ownership of a natural resource can permit the state to favor its own citizens. It is for this reason that the "fiction" of state ownership of resources is "not without significance" and relevant to a commerce clause inquiry.⁷¹ By citing *Hicklin* as authority for the "limited preference" in *Sporhase*, the Supreme Court has indicated that a state can favor its own citizens in the use of a resource for economic purposes. The court in *El Paso I* erred when it indicated that a state can only restrict the export of ground water in an amount necessary to protect the health and safety of its citizens.

A question related to this "limited preference" has to do with the extent of the preference. In other words, how great is the area "circumscribed" by the commerce clause? The cases Mr. Justice Brennan mentioned in *Hicklin* dealt with natural gas and shrimp, both of which are natural resources. In addition, in *Foster Packing* the state was claiming an ownership interest in the shrimp caught in Louisiana's coastal waters.⁷² In *Sporhase*, the resource in question was ground water. Nebraska's claim to public ownership of ground water, in the Court's opinion, "[was] logically more substantial than claims to public ownership of other natural resources."⁷³ This statement by Mr. Justice Stevens in *Sporhase* reduces the weight that is to be attached to the commerce clause limitations in *West, Pennsylvania v. West Virginia*, and *Foster Packing*. The limited preference a state can exercise in favor of its own citizens is therefore greater when ground water is involved. In addition, it appears quite unreasonable to argue that this limited preference is only for health and safety purposes since that need is adequately addressed in the first "reality" mentioned in *Sporhase*. The limited preference is intended to provide a state's citizens with an economic benefit. For the reasons mentioned above it is clear that a state can regulate the export of ground water so as to favor its own citizens, even if for purely economic reasons. Under *Sporhase* and the commerce clause, a state can restrict the export of ground water for economic reasons. The extent of this preference has yet to be addressed by the Court.

69. 437 U.S. 518, 533 (1978). (Emphasis added).

70. *Id.*

71. *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982).

72. 278 U.S. at 11.

73. 458 U.S. at 956-57.

Should the Doctrine of Equitable Apportionment Apply to Ground Water?

The district court's decision in *El Paso I* has created an unusual situation in the allocation of water among states. If the district court's decision is correct, underground water can be removed by other states while the state from which the water is being removed is unable to protect any economic interest it may have in the water. But if the water involved flows across the surface of the land, the state is able to protect its economic interests through an equitable apportionment proceeding.⁷⁴ Under the facts of the principal case the disparity is especially striking because the ground water is hydrologically related to the surface waters of the Rio Grande.⁷⁵ There is a physical "link" between the river and the aquifer. Additionally, the aquifer underlies portions of several states.⁷⁶ From a practical standpoint there is no reason to treat ground water any differently from surface waters of interstate streams. According to the district court's interpretation of *Sporhase*, the state could not protect its economic interests if the water is to be pumped from underground, but could if the water happened to be in an interstate stream.

EL PASO I—THE CASE ON APPEAL

New Mexico appealed the district court's decision in *El Paso I*. While the case was on appeal the New Mexico Legislature repealed the embargo statute. In place of the embargo statute the Legislature enacted section 72-12B-1 (Senate Bill 295) of the New Mexico Statutes⁷⁷ which provides for the movement of ground water out of the state.⁷⁸ The statute establishes a procedure for applying for permits to remove water from the state. In order for an application to be approved, the State Engineer must find that "the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico."⁷⁹ The statute also lists criteria that the State Engineer shall consider (but is not limited to) in reaching his decision as to grant or deny permission to appropriate water.⁸⁰ After the new statute was enacted, New Mexico moved in the appellate court to have the case remanded to the district court with instructions to dismiss the case as moot.⁸¹ New Mexico contended that the new statute mooted any controversy that existed between the parties.⁸² El Paso opposed the motion to dismiss on the grounds that, first, Senate Bill 295 did not

74. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1931). (In apportioning the waters of interstate streams the United States Supreme Court applies the doctrine of equitable apportionment. *Colorado v. New Mexico*, ___ U.S. ___, 103 S.Ct. 539, 545 (1982). Equitable apportionment is a doctrine of federal common law and it is a "flexible doctrine which calls for the exercise of informed judgment on consideration of many factors to secure a just and equitable allocation." *Id.*.)

75. 563 F. Supp. at 384.

76. *Id.* at 380.

77. N.M. STAT. ANN. § 72-12B-1 (Supp. 1983).

78. N.M. STAT. ANN. § 72-12B-1(B)(G) (Supp. 1983).

79. N.M. STAT. ANN. § 72-12B-1(C) (Supp. 1983).

80. N.M. STAT. ANN. § 72-12B-1(D) (Supp. 1983).

81. Motion to Dismiss and Suggestion of Mootness, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

82. *Id.* at 2-3.

moot the issue of the State Engineer's interpretation of the state constitution as calling for an embargo; second, the bill merely restated the existing embargo policy; third, New Mexico had not abandoned its embargo policy; and fourth, the bill did not moot the issue of whether the Rio Grande Compact allocated ground water hydrologically related to the Rio Grande.⁸³ The appellate court, in an unpublished order and judgment, vacated the district court's decision in *El Paso I* and remanded the case for such "further proceedings as are deemed necessary and appropriate" (*El Paso II*).⁸⁴

EL PASO II—CONSTITUTIONALITY OF SENATE BILL 295

The district court in *El Paso II* will have to determine the constitutionality of Senate Bill 295. After the new law was enacted, El Paso moved in the district court to have the decision in *El Paso I* amended to declare Senate Bill 295 unconstitutional.⁸⁵ It appears the district court agreed with El Paso because the record on appeal contains an unsigned order declaring sections 1(C), 1(D) and 5 unconstitutional.⁸⁶ If this unsigned order is indicative of the district court's view of the constitutionality of Senate Bill 295, the district court will err again in its interpretation of *Sporhase*, because the New Mexico statute is very similar to those portions of the Nebraska statute in *Sporhase* which the Court found not to impermissibly burden interstate commerce.⁸⁷ Both statutes vest discretionary authority in a state official to decide whether permits for the export of groundwater should be granted.⁸⁸ Both statutes establish conditions upon which the state official must base his decision. Both require that the amount of water

83. Brief Opposing Appellant's Motion to Dismiss the Case as Moot at 2, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

84. Order and Judgment at 3, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

85. Motion to Modify Final Judgment at 4, *City of El Paso v. Reynolds*, No. 83-1350 (10th Cir., 1983).

86. Section 1(C) reads:

In order to approve an application under this act, the State Engineer must find that the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico. See N.M. STAT. ANN. § 72-12B-1(C) (Supp. 1983).

Section 1(D) reads:

In acting upon an application under this act, the State Engineer shall consider, but not be limited to, the following factors:

- (1) the supply of water available to the state of New Mexico;
- (2) water demands of the state of New Mexico;
- (3) whether there are water shortages within the state of New Mexico;
- (4) whether the water that is the subject of application could feasibly be transported to alleviate water shortages in the state of New Mexico;
- (5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- (6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

See N.M. STAT. ANN. § 72-12B-1(D) (Supp. 1983).

Section 5 of Senate Bill 295 amended New Mexico Stat. Ann. § 72-12-20 (1978) to read "WHEN APPROPRIATION WITHOUT PERMIT ALLOWED. No permit and license to appropriate underground waters for in-state use shall be required except in basins declared by the State Engineer to have reasonably ascertainable boundaries." See N.M. STAT. ANN. § 72-12-20 (Supp. 1983).

87. See *supra* notes 3, 55-58 and accompanying text.

88. *Id.*

withdrawn be reasonable, that the withdrawal not be contrary to the purpose of conservation of ground water, and that the withdrawal not be otherwise detrimental to the public.⁸⁹ In *Sporhase*, the Court found that these conditions did not impermissibly burden interstate commerce.⁹⁰

The constitutional problem with the statute in *Sporhase* was its reciprocity requirement.⁹¹ No such requirement exists in Senate Bill 295. Since Senate Bill 295 Section 1(C) parallels the valid portions of the statute in *Sporhase*, the district court will be committing error if it declares that section unconstitutional. Section 1(D) merely establishes a list of factors for the State Engineer to consider in reaching his decision.⁹² If it is constitutionally permissible to allow the State Engineer to consider the public welfare in his determining whether to grant an export permit it should not be constitutionally impermissible to require him to consider certain factors.⁹³

As part of its police power the state has a duty to protect the health and safety of its citizens.⁹⁴ The state's police power also requires it to take steps to protect and promote the health of its economy.⁹⁵ In *Chicago, Burlington and Quincy Railway Co. v. People of the State of Illinois*, the Supreme Court held that "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety."⁹⁶ The availability of water in adequate supplies is crucial not only to the health and safety of a state's inhabitants but also to the viability of its economy. The California Supreme Court eloquently summarized the importance of water to a state in *Gin S. Chow v. City of Santa Barbara*:⁹⁷

The conservation of other natural resources are of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order, and well being of society.

By exercising its police power for economic reasons, the state can take advantage of the "limited preference" approved in *Sporhase*. State police power includes efforts to promote the "general prosperity," and to meet this end, states must be able to regulate the exploitation of ground water. It is through the application of legislative enactments such as Senate Bill 295 that a state could carry out these duties.

Also, under Senate Bill 295 it is not the constitutionality of the statute which should be questioned but rather the constitutionality of the State Engineer's actions. If any burden is imposed on interstate commerce it will

89. *Id.*

90. 458 U.S. at 957.

91. *Id.*

92. N.M. STAT. ANN. § 72-12B-1(D) (Supp. 1983).

93. See *supra* note 86.

94. *Chicago, B. and Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1905).

95. *Id.*

96. *Id.*

97. 217 Cal. 673, 22 P.2d 5, 16 (1933).

be the result of the State Engineer's decision and not the statute. The statute does not preclude the export of water out of the state. In fact, Senate Bill 295 expressly recognize that under appropriate conditions export should be allowed.⁹⁸ Any New Mexico ground water that is kept out of interstate commerce will be the result of the State Engineer's decision.

In determining the validity of the State Engineer's decision the courts will apply the test from *Pike v. Bruce Church*.⁹⁹ The United States Supreme Court in *Sporhase* applied the same test in analyzing an almost identical statute.¹⁰⁰ In *Sporhase* Mr. Justice Stevens quoted the *Pike* test as:¹⁰¹

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 as well with a lesser impact on interstate activities.

Hicklin recognized that discrimination against interstate commerce in a natural resource for economic reasons can, under certain circumstances, constitute a "legitimate local purpose." Also, under *Chicago, Burlington and Quincy Railway Co.*, promoting the "general prosperity" can constitute a legitimate purpose.¹⁰² Once a legitimate purpose is found, the court will then weigh the extent of the burden imposed on interstate commerce against the local benefits to be derived. The State Engineer, under this test, will be able to adequately represent the state's interests in the water. If the court finds the amount of groundwater that is held back from interstate commerce for the "limited preference" results in an impermissible burden on interstate commerce, it will declare the State Engineer's decision to be unconstitutional.

Senate Bill 295, as it is written, does not constitute an impermissible burden on interstate commerce.

CONCLUSION

The New Mexico embargo statute was clearly an unconstitutional imposition on interstate commerce. The district court in *El Paso I* was correct in declaring the embargo statute unconstitutional but it interpreted *Sporhase* too narrowly when it held that a state could not favor its citizens in the use of water in excess of the amount necessary for health and safety purposes. The Court in *Sporhase* permitted the states to show a limited preference for its citizens in the use of water for economic purposes.

98. N.M. STAT. ANN. § 72-12B-1(A) and (B) (Supp. 1983).

99. 397 U.S. 137, 142 (1970).

100. *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982).

101. *Id.*

102. *Chicago, B. and Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1905).

The Court in *Sporhase* also found portions of a statute similar to Senate Bill 295 valid under the commerce clause. A reciprocity requirement was the problem with the statute in *Sporhase* but no such requirement is present in Senate Bill 295. By combining the *Pike v. Bruce Church* commerce clause test with a statute similar to the one in *Sporhase* or Senate Bill 295 and the limited preference for economic interests, the Supreme Court has helped create a means for allocating ground water among states which is closely related in substance to the doctrine of equitable apportionment. This development is needed because there is little reason to treat ground water differently from surface water, especially when they both possess "multistate character[s]."¹⁰³

Senate Bill 295 and *Sporhase* provide, at best, only temporary relief for a problem which will continue to fester and grow as the region continues to develop and the resource grows even scarcer. What is needed is a Rio Grande Compact of 1984. The new compact should allocate both surface and ground water and should be renegotiated periodically. The new compact should be the product of the several states in the region working together to reach a mutually beneficial solution and not the result of needless interference or meddling on the part of Congress or some federal administrative agency.

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103. *SPORHASE V. NEBRASKA*, 458 U.S. 941, 953 (1982).