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Interstate Use of Water— “*Sporhase v. El Paso, Pike & Vermejo*”

Frank J. Trelease*

INTRODUCTION—“*SPORHASE V. EL PASO*”

The Western states share with other political subdivisions a strong attachment to their land, streams, rivers, lakes, and even their groundwater. The waters offered them amenities and riches, environmental treasures and the means to exploit their soil and mineral resources and to supply a healthy and growing population. The miners, farmers, and ranchers who pioneered the Western territories took “their” water by the simple act of diverting and using it, and claimed that these acts gave them a “water right” to continue to take it in the future.

The earliest prior appropriator—“first taker” in Anglo-Saxon English—defended his water with Colt and Winchester,¹ but his self-created right was soon enforced by courts and legislatures. The states and territories exacted a price for this protection in the form of standardization and regulation of water rights. In their constitutions and statutes they declared that the state, or the public, *owned* the water and that this intangible, non-possessory, non-usufructuary, paper claim gave them the power to limit and regulate the rights they allowed the appropriator to obtain.²

By 1890 the appropriation was no longer a taking by individuals, but a grant from the state. It became a dispensation that the state might

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* Dean Frank J. Trelease died while this article was in preparation. Professor George A. Gould, McGeorge School of Law, assembled the article from drafts of its various parts. While some editing was required, the ideas are exclusively those of Dean Trelease.

1. See *Territory of Montana v. Drennan*, 1 Mont. 41 (1868). The court held that it was not a defense to a charge of assault with a deadly weapon that the victim had diverted the defendant's water.

2. See Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1975).

withhold unless the applicant for a water right met certain engineering standards, accepted limitations on the amount of water that might be used, and fulfilled a requirement that the use be for a beneficial purpose. Nor was this all, the permit to appropriate might be withheld unless the state officials found that the use would further the public interest.³

One public interest seen by most of the Western states was the desirability of using water to develop their other resources—land, minerals, even flora and fauna. At least seven of the thirteen Western states enacted specific laws prohibiting or restricting the export of water to other states, and in the remaining states the public interest limitations might be used to the same end.⁴ Some of these were absolute bans on export, others allowed the export if the receiving state reciprocated, some required legislative permission for each outflow.

The question of the validity of these restraints on the movement of water across state lines under the commerce clause⁵ was early put in question. In 1908, *Hudson County Water Co. v. McCarter*,⁶ seemed to establish their validity, but in the 1960's doubt was cast upon them by a lower court case which the Supreme Court affirmed without opinion.⁷ Then in 1982, the United States Supreme Court announced its holding in *Sporhase v. Nebraska*,⁸ a simple case, but one that rested on a complex of legal formulas and practical factors that upheld some state restraints on export but would strike down others.

Sporhase owned two adjoining farms, separated by the Colorado-Nebraska state line. The Nebraska farm was irrigated from a well, pumped by virtue of the common law "correlative right" of a Nebraska land owner to underlying groundwater. The well complied with local "natural resources district" conservation regulations dealing with well spacing, allowable quantities, and rates of pumping. Sporhase attempted to take the water across the line to irrigate his Colorado farm, but was enjoined for violation of a Nebraska statute that required a permit from the State Department of Water Resources to withdraw Nebraska groundwater for export. These permits were normally issued if the Department found the withdrawal to be reasonable, not contrary to the conservation and use of the resource, not detrimental to the public interest and if the receiving state granted reciprocal rights to use its water within Nebraska.⁹ Since Colorado had placed a complete ban on water exports to other states, Sporhase could not meet the last requirement and could get no permit.

3. Trelease, *Water Law, Policies and Politics, Institutions for Decision Making in Western Water Resources: Coming Problems*, Federal Reserve Bank of Kansas City (1979).

4. Examples of these laws can be found in Clyde, *State Prohibitions on the Interstate Exportation of Scarce Water Resources*, 53 U. COLO. L. REV. 529, 530 (1982), and Tarlock, *So its Not "Ours"—Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, XVIII LAND & WATER L. REV. 137, 143-44 (1983).

5. U.S. CONST. art. I, § 8, cl. 3.

6. 209 U.S. 349 (1908).

7. *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966).

8. 458 U.S. 941 (1982).

9. NEB. REV. STAT. § 46-613.01 (1984).

This absolute ban on exports, said the Supreme Court, was a violation of the commerce clause of the constitution.

Sporhase presents no surprise in its proposition that the commerce clause creates federal powers over water. Despite state claims to ownership, it has always been known the United States has many powers over water. The navigation servitude has its roots in the commerce clause.¹⁰ The federal government has the power to take water for federal purposes.¹¹ It may prevent the use of water that results in frustration of a federal purpose.¹² Congress has always had power to deal with water on a national scale because the constitution expressly grants to Congress the power to regulate commerce among the states. This does not preclude, however, state regulation of water on a local scale,¹³ and while Congress may preempt and supplant state law, it may leave room for consistent state and federal laws to work together.¹⁴

But even if Congress has not exercised its powers, the Supreme Court has developed the "negative commerce clause," under which Congress may nullify a state action that unreasonably interferes with commerce. Applying this doctrine to Nebraska groundwater, *Sporhase* held that when exercising its police power over a resource, a state may not unreasonably restrict its use to home consumption.¹⁵ The citizens and residents of other states must get a fair crack at it. Thus, the commerce clause in the constitution is more than a positive grant of power to Congress. The "negative commerce clause" that the Supreme Court has added is more than jealous protection of national power; it is the guarantee of an important freedom to the people of the United States.

Yet, the *Sporhase* Court recognized that the states do have a very real and substantial interest in local control of waters. The commerce clause does not negate all state controls over local resources destined for export, only those that place an unreasonable burden on commerce are proscribed. The applicable test for reasonableness was laid down in the 1970 case of *Pike v. Bruce Church, Inc.*:

Where the statute regulates even-handedly 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 whether it could be promoted as well with a lesser impact on interstate activities.¹⁶

10. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

11. *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899).

12. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 181 (1946).

13. *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 105, 108 (1829).

14. See *First Iowa*, 328 U.S. at 176.

15. *Sporhase v. Nebraska*, 458 U.S. 941, 957-58 (1982).

16. 397 U.S. 137, 142 (1970).

Nebraska's claim to ownership of the water was said to be a fiction—legal shorthand for the state's police power over this important resource. However, it was also said to be indicative of the water-short state's legitimate desire to preserve and protect this vital resource for its own citizens under certain circumstances: to protect the health not simply the economy, of its people; to protect its legal expectations arising out of equitable apportionment decrees and interstate compacts; to give a limited preference to its own citizens in the utilization of the resource; and to favor its own citizens in the use of water it produces and owns by virtue of its conservation efforts.¹⁷

Under the *Pike* test and in the light of these considerations, the first three requirements for the Nebraska export permit—reasonableness, conservation and the public interest—might be justified. However, the flat refusal to allow any export to Colorado was held facially discriminatory, not justifiable as a conservation measure.

Sporhase was followed shortly by *City of El Paso v. Reynolds (El Paso I)*.¹⁸ El Paso, Texas, sits just below New Mexico's southern border in the Rio Grande Valley. To support its growing population and stimulate economic growth, the city filed applications with the New Mexico state engineer to appropriate practically all of the safe yield of a large aquifer in the New Mexico section of that valley. All applications were denied on the basis of a New Mexico statute, since repealed, that expressly barred the export of New Mexico groundwater. The district court enjoined the state engineer from enforcing the statute, without attempting to test it against the requirement of reasonableness or to fit it into the *Sporhase* exceptions. The court ruled that, outside of fulfilling human survival needs, water is an economic resource, and the statute's economic protectionism is forbidden by *Sporhase*.¹⁹ In effect, the court obliterated the state line and, except for a small reserve of water for public health and safety, required the New Mexico authorities to treat the growing Texas city and its fast-growing industrial complex on an even par with New Mexico's slower, primarily agricultural growth.

The New Mexico statute was replaced with a procedure for considering permits for export in light of the public interest. After first considering the factors involved in every appropriation—protection of existing rights, conservation of water, and the public welfare—the state engineer must then consider the need to maintain adequate water supplies for the state's water requirements, balancing the state-wide and local supply of, and demand for, New Mexico water against the sources available, and the demand, at the out-of-state place of use.

In a second phase of the case, *City of El Paso v. Reynolds (El Paso II)*,²⁰ the district court modified its earlier position slightly and gave some recognition to the *Sporhase* dictum that a water-short state might give

17. *Sporhase*, 458 U.S. at 956-57.

18. 563 F. Supp. 379 (D.N.M. 1983).

19. *Id.* at 390-92.

20. 597 F. Supp. 694 (D.N.M. 1984).

its citizens a limited preference.²¹ The public welfare included economic overtones said the court. The court concluded that a state's efforts to protect its public welfare by conservation measures might include some protection of economic interest as long as this was "only incidental" to the general public welfare. The court also said though "simple economic protectionism" is still forbidden *some* burdens on commerce might be supported if outweighed by non-economic local benefits.²² *Sporhase* and *El Paso* deal with different problems—the first with state regulation of private trading in water and water rights and the second in state allocation of its public domain. This article argues that the *Pike* test and the stringent *El Paso* reading of the *Sporhase* rules for commercial transactions are not appropriate for testing the validity of state action in distributing its patrimony.

Professor Corker reminds us of Justice Robert's eloquent statement of the purpose of the commerce clause:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been doctrine of this Court which has given it reality.²³

Sporhase fits this pattern. It would be easier to see this as a "commerce case" if *Sporhase* had involved twin brothers, each owning one of the farms. The Colorado farmer needs water for consumption and should be able to get the cheapest water at hand. This is available from his Nebraska twin, who must charge a price that will cover the cost of giving up whatever crop he is growing on his Nebraska field. If this is cheaper than the price the Colorado farmer must pay a Colorado neighbor, he should not be driven to a higher price by a Nebraska law that favors its residents at the expense of the citizens of other states.²⁴ On the other side of the line, the Nebraska twin with the well should be able to dispose of his water or water right in any market where he can get the most for it. He should not be stopped by his state's embargo, even though it is triggered by the Colorado reverse discrimination law.

In the *El Paso* situation this market does not exist. When *El Paso* applies to the State of New Mexico for a permit to extract and put to use

21. *Id.* at 700-01.

22. *Id.*

23. Corker, *Sporhase v. Nebraska ex rel. Douglas: Does the Dormant Commerce Clause Really Limit the Power of the State to Forbid (1) the Export of Water and (2) the Creation of a Water Right for Use in Another State*, 54 U. COLO. L. REV. 393, 407 (1983) (quoting from *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949)).

24. The Colorado farmer cannot appropriate Colorado water. He [*Sporhase*] applied for a Colorado permit which was denied on the ground that the safe yield of the aquifer was fully committed. *See id.* at 423-24.

unappropriated water, Justice Robert's ideal is not served. Perhaps El Paso could have gotten its water from Texas irrigators from the nearby Rio Grande or overlying land owners who might sell their ground water to the city²⁵ at a price. But the state of New Mexico does not seek a price. If two of New Mexico's own citizens seeking in-state uses were applicants, the state could pick and choose between them "in the public interest" in order to insure the best use, or it could deny a permit to a single applicant and hold the water for a better future use.²⁶ If it grants the permit and the water right, it makes no charge to the appropriator.

When the Texas city applies for its permits, the State of New Mexico does not have "free access to every market in the nation" where, as a seller, it can find the best price. It does not sell the water, it cannot put itself on an equal footing with the Texas land owners and bid against them. Nor would the City of El Paso be the beneficiary of Justice Robert's "free competition." It would be saved from having to pay for Texas water because it could reach across the state line and take it without any charge whatever.

The differences between the two types of transactions can be seen by noting the very different decisions a state water administrator must make when approving an export permit to allow a selling appropriator to transfer his water right to an out-of-state city and when considering whether the state should grant an appropriation of water for export to an out-of-state city. In the transfer case, the seller—realistically an irrigator—has a right to a specific quantity of water (X acre-feet per year) to irrigate specific land. Whether he can sell it to anyone, in or out of state, depends on answers to a number of zoning or planning type questions, nearly all directed at the ultimate question of whether the change in type and place of use will injure other appropriators. What has been the historic quantity pumped? Will there be any increase in depletion or in the rate of depletion? Is there return flow to the aquifer that will be lost by the change in place of use, to the detriment of other appropriators? Will there be any loss in water quality or any effects from pumping year-around instead of during the irrigation season?

On the other hand, if a new appropriation is sought, the questions are: Is there water available? What is the "safe yield?" Where will the water be best used? What is the best use for it? Should it be saved and preserved for future use? Is the city appropriating more than enough for a reasonable future supply?

In both situations, questions as to the "public interest" may arise and may differ between in-state use and export proposals. But for the moment these questions are postponed, and it is enough to note that the transfer transaction and the allocation decisions are very different.

25. See *City of Altus v. Carr*, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966) (mem.).

26. *Young & Norton v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (1910).

Sporhase is right and *El Paso* is wrong. States can live with *Sporhase's* ruling that a state cannot tell its citizens that they cannot sell out of state when it permits them to sell within the state. This applies to both sales of water and sales of water rights. A state cannot expect to prevent the interstate sale of water rights to "preserve the neighborhood" any more than it could prevent a steel mill from closing in a factory town or dictate the way of life to its rural inhabitants. On the other hand, the states cannot live with *El Paso*. *El Paso* would require a state to sit by and see other states deprive its people of future opportunities for growth and development, while preserving only "noneconomic" water for the public health and safety of stagnating communities. Without overruling *Sporhase*, but with some clarifications in regard to shortages and explanations of legitimate local interests, much water might be saved within states on a territorial-opportunity cost theory, discussed later,²⁷ without freezing out neighboring cities. Neighboring cities might be put to more expense either because they have to pay the opportunity costs or because they must use available, though more expensive, sources in their own state. The remainder of this article will examine these issues.

SPORHASE AND WATER ALLOCATION: "THE SEVERAL REALITIES"

Many authors seemed to have lost sight of the fact that the *Sporhase* Court put the imprimatur of facial constitutionality on an export permit that would issue only upon a showing "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." First, the Court said that as applied, these conditions might lead to no more severe strictures than those applied to intrastate transfers. But the Court went on to say:

Moreover, 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 water-short areas.] Our reluctance stems from the "confluence of [several] realities."²⁸

The Court's realities are based upon an unreal understanding of the climatology and hydrology of the high plains and mountain states and of the operation of the law of prior appropriation. The Court conditions its permissible restrictions on export to "times of severe shortage" (the language replaced by the bracketed materials in the above quote), "times and places of shortage," and "times of severe shortage." The Court's notion of a "shortage" seems to assume a normal supply sufficient for everyone most of the time, occasionally falling below demands—in other words, an Eastern-type drought. The Court does not understand the variable nature of Western rivers, the need for seasonal storage of spring floods

27. See *infra* note 76 (subsection titled *Economic Efficiency As a Legitimate Local Interest*).

28. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

and snow-melt to provide late summer flows, and the need for "drought-design" in reservoirs to provide carry-over from the years of plenty to the years of dearth.

Even those states with unappropriated water are "water-short" because of the costs of the dams, reservoirs, canals, wells, pipelines, and pumping plants needed to store and transport the water. Even where water flows unused to the sea, there will be found plans, permits, applications, conditional decrees and legal claims upon this water so that it can hardly be called unappropriated.

The Court says "a demonstrably arid state" might get special privileges. The dividing line between the arid zone and the humid zone splits the high plains from North Dakota down through Texas. The arid zone is scientifically designated as an area²⁹ where potential evapotranspiration exceeds the average annual precipitation. Except for vagaries of storms, no water would flow off of the land. Yet every Western state has enclaves of humid climate in its mountains, where rainfall and snow-melt produce streams that flow to and through the dry plains. The Court also speaks of a well with perhaps an excessive supply, an extraordinary phenomenon. Where is the excess in a non-recharging aquifer that will be exhausted in twenty-five years at one rate of pumping, in forty years at a slower rate?

The Court shows little understanding of the law of prior appropriation, with its fixed shares separated by priority, the fences that separate the property of senior from being taken by the junior, that shifts the entitlement to water depending upon the quantity available at a particular moment. The Court seems to assume a system of water law that puts an administrator's left hand on the faucet and his right hand on a hose to direct the water to the person with the greatest need or higher claim. It seems to me that to substitute "water-short areas" for "times of shortage" detracts in no way from the Court's reasoning and eliminates all these problems.

Turning to the "several realities" the Court said: "First, a State's power to regulate the use of water . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power."³⁰ Of course, if there are municipal needs for drinking water and sanitation uses within a state, the state is not bound to deliver water for less important or even the same needs across the state line. At a minimum, a liberal reserve for the future needs of the City of Los Cruces and other communities in the Lower Rio Grande Valley could be set aside from capture by Texas. The Court says that the water is essential for human survival and speaks of

29. V. CHOW, HANDBOOK OF APPLIED HYDROLOGY, 24-8 (1964).

30. *Id.* This reading skips the distinction made between the health of the citizens and the health of the economy that the *El Paso* court seized upon as nullifying practically everything else in the opinion. In the case cited for the protection of human health, *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), a restraint on competition was justified as a phony safety measure. In fact, the remaining realities themselves speak in economic terms.

this "vital resource."³¹ The Court also notes, however, that eighty percent of the water supply is used for agriculture.³² Thus, such a reserve might be a small portion of the whole.

Next, the Court said:

[T]he legal exception that under certain circumstances each State may restrict water within its borders has been fostered over the years, not only by our equitable apportionment decrees but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources.³³

Some seem to have read this as requiring the legal expectation to have reached the magnitude of a title arising out of a decree of equitable apportionment, or a compact approved by Congress.³⁴ I think it means just what it says—that states with access to a common resource must share it, that the resource is to be rationed among them, that each owns, controls, and has power over the share allotted it. The Court does not say that only already apportioned shares will be protected; rather, it says that the notion that state boundaries have relevance has been fostered by equitable apportionment decrees and compacts. It is therefore error to read *Sporhase* as saying that the commerce clause would allow the unapportioned shares of unappropriated water to be grabbed by an exporter or that *Sporhase* prevents the state of origin from protecting its unapportioned share.³⁵

In the third reality supporting the ruling that the Nebraska statute, sans reciprocity, is facially constitutional, the Court says that Nebraska's claim to public ownership of its ground water is logically more substantial than claims to public ownership of other natural resources (such as fish and game?), and while this cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the use of the resource. This ownership-that-is-not-ownership can only be territorial sovereignty over the land, water, and minerals within its borders. While the right "to take, hold and dispose of property" was on the first list of privileges and immunities that a state may not deny to noncitizens,³⁶ in its initial disposition, a state is free to dispose of property for the benefit of its own citizens.

31. *Sporhase*, 458 U.S. at 953.

32. *Id.*

33. *Id.* at 956.

34. Including myself; see Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 349 (1985). See also Rodgers, *The Limits of State Activity in the Interstate Water Market*, XXI LAND & WATER L. REV. 357, 372-76 (1986); Uton, *In Search of An Integrating Principle for Interstate Water Law: Regulation Versus the Market Place*, 25 NAT. RESOURCES J. 985, 996 (1985).

35. A discussion of the relationship between *Sporhase* and equitable apportionment is found *infra* text accompanying notes 101-136 (section titled "*SPORHASE & EL PASO V. VERMEJO*").

36. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

"Territorial sovereignty" gave Colorado authority to step into a priority suit and turn it into an equitable apportionment controversy: "In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the state."³⁷ This is the foundation of the doctrine of *parens patriae*; Kansas was said to have an interest as a state, not as a simple proprietor, when the prosperity of a large tract of land bordering the Arkansas River affected the general welfare of the State.³⁸ Closest to the point is *McCready v. Virginia*,³⁹ in which the Court allowed Virginia to bar a Maryland resident from farming oysters on state lands underlying navigable waters. Restricting the use of these lands to Virginia citizens was held within its powers:

If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purpose of agriculture, could the citizens of other States avail themselves of such a privilege. . . .

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. . . .⁴⁰

When Alaska found its treasures overflowing with oil revenues and distributed the money to its citizens, the Court said a state clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place to live. In addition, a state may make residence within its boundaries more attractive by offering benefits to its citizens in the form of public services, lower taxes or direct distribution of munificence.⁴¹

This treatment of water resources as part of the territorial base of the state does not give the state immunity from federal action. All of the *Sporhase* "realities" are prefaced with, "in the absence of a contrary view expressed by Congress."⁴² The Court says that the multi-state character of the Ogallalah Aquifer—underlying tracks of land in Colorado and, Nebraska, as well as parts of Texas, New Mexico, Oklahoma and Kansas—affirms the view that there is a significant federal interest in conservation and allocation of diminishing resources.

37. *Colorado v. New Mexico* (Vermejo I), 459 U.S. 176, 182 n.9 (1982).

38. *Kansas v. Colorado*, 206 U.S. 46 (1907).

39. 94 U.S. 391 (1877).

40. *Id.* at 395-96.

41. *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982).

42. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

In a previous article,⁴³ I instanced several scenarios for a possible congressional intervention: one state's ruinous overdraft of interstate aquifer, state failure to control overdrafts that threaten the nation's food supply, municipal shortages in the Northeast caused by very large cities in very small states, and harms to the environment from state rules (or lack thereof) for withdrawals that allow or fail to control the spread of contaminants in drinking water supplies. In *Hodel v. Virginia Surface Mining Reclamation Association*,⁴⁴ the Court found state law was even preempted when the laws controlled an individual's exercise of property rights to mine coal and a state's plan for land use.

Territorial sovereignty over water has been proposed by others. Professor Utton finds these cases "may threaten the territorial integrity of the individual states and, therefore, the balance of those states within the federal union, thus weakening one of the foundation stones of federalism."⁴⁵ Professor Corker finds a constitutional basis for territorial sovereignty. Speaking of legislation designed to give states more or less absolute control over exports of water by slurry pipeline, he concluded that the law was unconstitutional,

not under the commerce clause, which the bills alone address, but under other parts of the Constitution. Section 3 of the Constitution's federalism Article protects the state without its consent from having Congress give its territory to another state. The Constitution makers of 1787 clearly had in mind that Congress could not turn a state's territory into uninhabitable desert. The equal footing of states is a structural principle not found in constitutional text, but it has vitality.⁴⁶

Today I suggest that its vitality lies in the restraint of the Court, that is, the restraint the Court places upon itself. It is too late to argue on constitutional grounds that the commerce clause does not apply to a state's allocation of its resources. *Sporhase* was specific: The water in the ground was an article of commerce, subject to the power of Congress to regulate and to the negative power of the Court to strike down unreasonable restrictions on interstate movements. The Court clearly intends that the negative commerce clause shall be coextensive with the power of Congress. In the recent *Garcia* case⁴⁷ that overruled *National League of Cities v. Usery*⁴⁸ and the last vestige of Tenth Amendment protection for state legislation, the Court said that it has no license to employ free-standing conceptions of state sovereignty when measuring congressional authority under the commerce clause.

The possibilities of congressional take-over of ground water management in a particular spot or nationally seems mercifully remote, and it

43. Trelease, *supra* note 34.

44. 452 U.S. 264 (1981).

45. Utton, *supra* note 34, at 989.

46. Corker, *supra* note 23, at 443 (footnote omitted).

47. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

48. 426 U.S. 833 (1976).

is to be hoped that the take-over by the courts under the negative commerce clause is even more remote. Professor Corker reminds us that when Congress preempts a state regulatory law, it will enact substantive rules to replace those enactments struck down and provisions to administer and enforce the new rules. On the other hand, he notes that a statute or procedure struck down by the courts under the negative commerce clause leaves a vacuum that can only be filled with cumbersome litigation. Further, Corker suggests that water management by a court is likely to prove impossible.⁴⁹ But more important than these procedural problems, the case for abstention comes down to this: The Supreme Court could, but should not, allow people of other states to strip the slower-growing states of their assets and resources that give them the promise and hope of future development.

Most of the authors who have struggled with this problem have been primarily concerned with interstate sources, shared waters to which each state has access. The Ogallala Aquifer underlies both of Sporhase's farms. *El Paso* deals with a ground water tributary to the interstate Rio Grande. The only attempt to appropriate a non-shared source for export involved a Montana farmer who sought an appropriation from an Idaho stream which did not flow into Montana. The Idaho court refused the appropriation.⁵⁰

There are only a few "lost rivers" in the West. But, there are quite a few non-recharging aquifers wholly within one state or aquifers technically tributary to an interstate stream in which lateral transmissibility of water is so slow that, for all practical purposes, the flow in the lower state will be unaffected for many, many years. Professor Utton thinks such aquifers are probably not an important category of water,⁵¹ but today engineers tunnel through mountains, siphon waters across valleys, and pump it over hills for any use that can pay the costs.⁵²

Previously, I have urged that wholly intrastate waters are wholly under the control of the state in which they are found and are waters to which no other state has a legitimate claim.⁵³ Utton would agree.⁵⁴ If wholly intrastate aquifers are not solely under the control the state in which they are found, he would make them so, urging a congressional statute with this as one feature.⁵⁵

Professor Tarlock's "duty to share" water resources in general, would probably make intrastate aquifers subject to the commerce clause.⁵⁶ Certainly, however, no other state could claim that a share or allocation of an intrastate aquifer be set aside for it. Shares might be a solution in a

49. Corker, *supra* note 23, at 434.

50. *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812, 816 (1912).

51. Utton, *supra* note 34, at 998 n.52.

52. A second law of hydraulics is "water flows towards money."

53. Trelease, *supra* note 34.

54. Utton, *supra* note 34, at 998 n.52.

55. *Id.* at 1001 n.60.

56. See Tarlock, *supra* note 4, at 145-49.

shared resource, but all that is required in a non-shared resource is non-discrimination. That could be achieved by taking each application for appropriation as it comes along under the *Pike* test or the "leave something behind" public interest test,⁵⁷ as may be required. This might be the place to apply the Court's statement that a "demonstrably arid State conceivably might be able to marshal 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."⁵⁸

The final reality seems most unreal. The *Sporhase* Court stated that "given [the state's] conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."⁵⁹ This suggests that the state is a market participant, free of the restrictions of the negative commerce clause, as to that part of groundwater "publicly produced and owned" by conservation efforts imposed upon the state's own citizens. Identifying and quantifying this particular water would raise difficult, if not impossible, problems of administration.⁶⁰ In any situation in which the limits of appropriation approach, the only solution that seems just is to treat all of the remaining water as if so produced and owned. Over the years, state water officials have limited appropriations to beneficial use, to common law duties of water, and to statutory limits on use and quantity. For whose benefit? Certainly not to make the water available in some other state where all of its benefits would better the neighboring state, increase its revenues, and increase the prosperity of its citizens.

"EL PASO V. PIKE"—COMPLIANCE WITH THE PIKE TEST

If it cannot be accepted that *Sporhase* is completely inappropriate in allocation cases, allocation cases can be fitted into *Pike* and *Sporhase* and still leave the state a sufficient measure of control over allocation to protect its interests. *El Paso* misreads *Sporhase* and *Pike* and takes an overly restricted view of their holdings.

A state's different treatment of outsiders, and a preference for its citizens, is still possible if the restrictions on the issuance of permits for export meet the *Pike* test—if the regulation is even handed, if it serves their legitimate local interests, and if the effects on interstate commerce are incidental. If it meets all of these tests, it still must also pass a balancing test; the local benefits must exceed the burdens on commerce. The question is one of degree. Some local interest may be more important than others. There is some question of whether the local interests are promoted by some other means with lesser impact on commerce.

57. See *infra* text accompanying notes 137-144 (section titled CONCLUSION—A SUBSTITUTE TEST FOR ALLOCATIONS).

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

59. *Id.*

60. See Barnett, *Mixing Water and the Commerce Clause: The Problem of Product, Precedent, and Policy in Sporhase v. Nebraska*, 24 NAT. RESOURCES J. 161, 168-70 (1984).

This is hardly a precise formula, all it does is indicate the direction of the inquiry and gives little in the way of answers. While many effects on commerce might be incidental to local regulations, much of what we are talking about, and what the Court has talked about in the past, has been directed at furthering interstate commerce as the principal objective. Questions of balance and degree are matters of process and judgment.

In its analysis of the Nebraska statute, *Sporhase* provides some indication of the results of applying the balancing test to the problem at hand. Using the *Pike* standards, the Court said:

The only purpose that [Nebraska] advances for [the statute] is to conserve and preserve diminishing supplies of ground water. The purpose is unquestionably legitimate and highly important, and the other aspects of Nebraska's ground water regulation demonstrate that it is genuine.⁶¹

The Court notes an administrative determination that there is an inadequate ground water supply to meet present and reasonably foreseeable needs in the area where the well is located.⁶² The Court also notes that the natural resources district has promulgated special rules which define as "critical" those townships in which the annual decline of the ground water table exceeds a fixed percentage and that *Sporhase's* well is located in such a township. The regulations for critical townships require the installation of a flow meter on every well, specify the amount of water per acre that may be used for irrigation, and set the spacing required between wells. The Court goes on:

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in [the statute] for the withdrawal of water for an interstate transfer. Those requirements are 'that 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'. . . . Obviously, 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 even-handedness in regulation.⁶³

On its face, therefore, the statute received the Court's approval, but on the assumption, "that the first three standards of [the statute] may well be no more strict in application than the limitations upon intrastate transfers imposed by the . . . District."⁶⁴

While the Court does not limit the legitimate local purposes of conservation and preservation, much of the rest of the language of the opin-

61. *Sporhase*, 458 U.S. at 954-55 (footnote omitted).

62. *Id.*

63. *Id.* at 955-56.

64. *Id.*

ion, upon which the validity of future cases may turn, is colored by this phrase. There are other indications; the Court speaks of the "vital resource," meaning presumably life-preserving; yet, of course, ninety percent of water in the Western states is used in agriculture. The Court's definition of conservation and preservation is not easy to identify. In some contexts it seems to mean "nonwasteful" in the sense that the job is done with the least water needed (no mention is made of the economic side of waste).⁶⁵ In other places, the Court suggests that the purpose of conservation is "to conserve and preserve diminishing sources of ground water," and to promote "the continuing availability of groundwater in Nebraska."⁶⁶ Here, there may be the connotation of a groundwater reserve for the future.

But lengthening the life of an aquifer, or spreading the water on more land, is not the only "local public interest" served by Western water laws. Nebraska leaves to local districts the control of physical waste by well spacing and pumping limits, and allows overlying land owners to pump water within those limits by virtue of common law rights. State permits deal only with export. "Conservation" of resources in Nebraska means little more than official supervision of water use by the private sector.

Most Western states implement protection and public interest measures through permits to appropriate, which may be denied when some notion of the "duty of water" or "safe yield" is reached. Historically, the "local public interest," was focused on the promotion and encouragement of the best *local* use of water. This was accomplished by doling out permits for remaining unappropriated water to those who would use the water. Before permits were required, appropriations were initiated by taking the water and applying it to beneficial use, under the loose supervision of the courts.

Ditches that tapped the stream and carried the water across a state line for use in another state were recognized and enforced.⁶⁷ Eventually, this was seen as a possible threat to the public interest in obtaining the maximum local benefit from the water, and statutes were added to allow such appropriations only if the importing states allowed reciprocal privileges to the exporter's citizens, or if the permit were approved by the exporter's legislature as well as by water officials.⁶⁸ Many such cooperative arrangements were made.

65. The need for legal controls to promote conservation is less pressing in groundwater than in surface water. Lifting water hundreds of feet consumes much energy, and few farmers are going to pay for electric power or diesel fuel in order to slather the water over their fields without regard to physical efficiency. The same economic controls hold for manufacturers with cost-conscious managers. Municipal users may not be governed by these money considerations. The city has access to many water users who would not balk at a small charge. In this situation, the control on waste, however, is better placed on the ultimate users—the householders who irrigate their lawns or wash their cars—who may not pay full value if the municipal works are subsidized by other taxes, as is true in many places.

66. *Sporhase*, 458 U.S. at 954, 957.

67. *Willey v. Decker*, 11 Wyo. 496, 544, 73 P. 210, 225 (1903).

68. See Clyde, *supra* note 4; Tarlock, *supra* note 4.

Public Interest

The first permit statute was Wyoming's 1890 water code that gave the State Engineer the power to reject an application if, in his opinion, its approval would be contrary to the public interest.⁶⁹ Even before New Mexico was a state, the territory copied the Wyoming statute. In 1910, the New Mexico Territorial Supreme Court said, in a case where two proponents applied for the same water for essentially the same project, "The declaration in the first section . . . that the waters are 'public waters,' and the fact that the entire statute is designed to secure the greatest possible benefit from them for the public should be borne in mind."⁷⁰ The court ruled that where competing applicants sought the same water for different projects for the irrigation of New Mexico lands, the better project should receive the water.⁷¹ The court said consideration should be given to stability and feasibility of the projects and the costs and returns of each. Even before statehood, a little administrative chauvinism raised its head; but the court discounted it:

The territorial engineer apparently bases his approval of the latter project as against the former on the fact that Young & Norton and their associates are actual settlers on the land, while Hinderlider is not a resident of the territory. We do not say this circumstance should have no weight in the determining the question of the public interest, but we think it should not outweigh the other considerations to which we have referred.⁷²

More recently environmental limitations have been added to the grounds for denial or conditioning permits in the public interest.⁷³

One gets the impression from the Supreme Court's preoccupation with "conservation and preservation" that it is the only "legitimate local purpose." But the purpose of most state's water laws has historically been, and is now, to promote the use of water to advance the prosperity of its inhabitants. A glance at most state water codes shows their agricultural bias; they are irrigation oriented with minor accommodations to make them suitable for municipal and industrial users and with recent overlays or amendments to avoid waste and to preserve environmental values.

Planning

Every Western state now has an elaborate water plan or planning process. These are designated not to produce a blue print for total use, but to continue the growth of the state's farms, cities, and industries with the unappropriated remainder of water still found in the state. Professor

69. 1890-91 Wyo. Sess. Laws ch. 8, § 34 (codified at WYO. STAT. ANN. § 41-4-503 (1977)).

70. *Young & Norton v. Hinderlider*, 15 N.M. 666, 110 P. 1045, 1050 (1910).

71. *Id.*; see also *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957, 964 (1943); WASH. REV. CODE ANN. § 90.54.020(2) (Supp. 1987).

72. *Young & Norton*, 15 N.M. 666, 110 P. at 1050.

73. See *Bank of Am. Nat'l Trust & Sav. Ass'n v. State Water Resources Control Bd.*, 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

Tarlock says that New Mexico won its fight with Colorado over the Vermejo River:⁷⁴

Both to preserve supplies for internal uses and to assert fair share claims against another state, states must demonstrate that they have an adequate process to attempt to maximize the use of available waters. Through legislation and the judicial imposition of public trust duties, states are moving toward planning and evaluation processes that ask harder questions about the need to develop new or reallocate existing supplies than have been asked in the past.⁷⁵

If the *El Paso II* court gutted this process when it struck down as a stalling tactic the moratorium proposed by the New Mexico legislature for a study of the need for water in New Mexico, we are practically back to the old fashioned prior appropriation with only possibilities of ad hoc quickie studies of alternatives as applications for permits are made.

I pump the organ for "prior appropriation" as a system of water law— but always "modern prior appropriation," not the pioneer doctrine that gave full play to individual action uncontrolled by the state. Individual action worked well for a pioneering economy. It probably led to a good deal of maximization, since the best projects are most likely to attract the capital and enthusiasm to put them into action. The doctrine of prior appropriation created a system of private rights that were transferable and that allowed the market to correct early mistakes and facilitate improvements. It lent itself to state control and, especially in the initiation of projects, to the protection of the public interest, translated by crude cost benefit analysis into maximization of net benefits. More recently, it laid a foundation for environmental protection.

Economic Efficiency as a Legitimate Local Interest

Is it legitimate under *Pike* to allocate the waters found in a state so as to extract from them the greatest possible benefit for the development of the state? *Sporhase* mentioned economic protection as an aside in a later aspect of the case.

First, 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. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation on the other. [See *H.P. Hood & Sons v. Dumond*, . . .].⁷⁶

74. See *Colorado v. New Mexico (Vermejo I)*, 459 U.S. 176 (1982); 467 U.S. 310 (1984) (*Vermejo II*).

75. Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 409 (1985) (footnotes omitted).

76. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

A state's allocation of public resources and state regulation of the commercial transactions of citizens are very different things. The state distributing its own public resources, writing a law to guide its administrators who will dole out the resource and create the rights, is in a very different position from the state regulation in *DuMond*.⁷⁷ There, the state regulation denied a license for facilities that would enable an out-of-state milk dealer to buy milk for export. The Court found that the purpose of the regulation was not to protect the purity of milk, but to protect state dealers from competition for the supply. A state regulating the economy of local businessmen by shielding their commercial operations from higher prices is not the same as state protection of its own economy by saving a dwindling resource to provide for the further development of its other resources.

The *El Paso I* court completely misunderstood and misapplied the *Sporhase* Court's citation in *DuMond*. The lower court ruled that outside of fulfilling human survival needs, water is an economic resource, and economic protectionism is forbidden by the negative commerce clause. When the case returned to the district court in *El Paso II*, the New Mexico legislature had eliminated the embargo and substituted a number of factors to be considered. The amended statute would allow some water to be exported if it was not "detrimental to the public welfare of the citizens of New Mexico."⁷⁸ The district court retreated and said that this requirement was proper since it constituted one aspect of the balancing process required by *Pike*. But it said that the burden on interstate commerce must be weighed against putative non-economic local benefits and again warned against "simple economic protectionism." The court ended up with an almost circular argument to the effect that the public welfare of state citizens includes health, safety, recreational, ascetic, environmental and economic interests, and that the state may prefer its citizens to an extent that includes protecting economic interest so long as this is "only incidental" to the protection of the "general public welfare."⁷⁹

This, I submit, is errant nonsense. The picture of the state engineer considering an export application, wondering how much water he can save for the economic future of his state, and pussyfooting around with factors that he hopes will justify holding back a little water, is ridiculous. The entire purpose of the process is to exercise sovereignty over the state's resources for the benefit of the state—the very purpose for which it is a state. Water is territory as much as land; it is part of the resource base of the state. And, indeed a state's natural resources—land, water, and minerals—are more than territory; they are the patrimony of the state. To argue that it has a duty to share this patrimony with other states who may take it away for their own benefit is to diminish and distort the very basis upon which the state was founded. It is fatuous to say that it is not "legitimate" for a state to choose the beneficiaries of grants of resources under its control.

77. *H.P. Hood & Son v. DuMond*, 336 U.S. 525, 529 (1949).

78. N.M. STAT. ANN. § 72-12B-1 (Supp. 1984).

79. *See City of El Paso v. Reynolds (El Paso II)*, 597 F. Supp. 694, 700-01 (D.N.M. 1984).

The *Pike* test requires the state to regulate "even-handedly."⁸⁰ This does not mean, cannot mean, a simple erasure of the state line. Certainly it does not require that a saintly state engineer treat El Paso as if it were the most important city within New Mexico. In *El Paso I*, the court notes that El Paso is the marketing and commercial center for the lower Rio Grande Valley in New Mexico. To the extent that El Paso's prosperity spills over into Los Cruces and communities and farmers north of the state line, this is a factor in determining New Mexico's public interest. If none of the benefits return back from Texas, this factor can be ignored. So far as the New Mexico state engineer is concerned, it does not exist.

When a Western state grants a permit for use within the state, no charge is made for the water as such. This does not mean that the state receives nothing in return. We have seen that when applicants for appropriations are mutually incompatible the state may choose the one which will produce the maximum net benefits to the prosperity of the state, without regard to priority of filing. In a previous article I demonstrated, I hope, that it is only the *primary* benefits of gas wells, mining processes, and cantaloupes that the state of origin can claim.⁸¹ Similarly, the state's interests cease with the first allocation of water. It is the benefits to the state from the allocation that are to be considered, not the *secondary* effects of trading in the private sector with the goods produced by the water's use. At a minimum, the *primary* benefits are the real estate and severance taxes produced by the farms, factories, and homes that directly use the water and any income or transaction taxes arising from the initial transactions of the appropriator. The *secondary* or multiplier effects of the income and taxes resulting from trading in the water are the kind of citizen prosperity that the state cannot, and must not, control under the commerce clause.

If the competitors are a person proposing an instate use and a person seeking water for export, one use promises prosperity for the state and revenue for its treasury while the other use will generate prosperity and revenue in another state. Is the state where the water is found and the state that has sufficient jurisdiction over the water to determine who may use it acting evenhandedly if it says to the applicant for export, "you may have the water if you will contribute the same or equivalent benefits which we would receive from instate use?"

South Dakota, in the same circumstance, required a payment in cash.⁸² It also required the exporter to drop off water to small communities along the route of the pipeline. Wyoming, under similar circumstances, asked that exporters add features to their projects that would allow local farms and communities to share proposed storage.⁸³ Would a procedure that allowed a study of such factors and comparisons of benefits be "evenhand-

80. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

81. Trelease, *supra* note 34.

82. Trelease, *supra* note 43, at 371.

83. WYO. STAT. ANN. § 41-2-301 (Supp. 1986).

ed," even though the search is for conditions and extra contributions extracted from the exporter that would not be imposed from the local user?

It is not entirely clear that the cash, extra facilities, and supplies to local irrigators and communities were extra conditions imposed on exporters. These were, more likely, attempts to capitalize on the "coal rush," which developed when the huge beds of coal found under the northern plains offered tremendous wealth (as long as oil was at \$32.00 per barrel). Some conditions imposed on the slurry pipelines (adding local features) might have been imposed upon instate coal users as well. The premature collapse of the energy boom prevented history from being played out.

There was talk in Wyoming that an energy company's application for a low dam at the last good site on a stream with a flow greater than needed for the coal might be denied unless the dam were heightened and the reservoir enlarged to take care of local projects. The total project was said to be physically and economically feasible, although the incremental features individually were not. This is a time-honored practice in Bureau of Reclamation projects where one feature subsidizes another in the name of full development. Similarly, dam builders and diverters are commonly required to incorporate structures into their projects or to release minimum flows, that add to costs or subtracts from benefits, in order to preserve and even enhance environmental and recreational values for the public.⁸⁴

Aside from this, even if the exporter clearly has to make a contribution or bear costs not imposed upon the local user, this is even-handed treatment, as long as he is making some contribution to the state of origin's economy equivalent to what would have been made by a use within the state. If there is a "duty to share," as Professor Tarlock says,⁸⁵ it means at least to share on equal terms with the local appropriator. Some attempt, however rough, to equate the "extra" burden imposed on the exporter with the opportunity costs to the state, or to require a cash contribution to replace lost taxes, is certainly not unequal treatment.

The state may be willing to take considerably less. Economic maximization is not the only goal. It goes without saying that a state may deny an appropriation to anybody, local and foreigners alike, on environmental grounds, such as the preservation of a lake or water fall. That kind of conservation is certainly permissible even where the burden is on out-of-staters and the benefit is to the local people. Suppose, for example, there is a stream feeding a lake or falls near a state border. Water from the stream might be physically available to the exporter only from the lake or above the falls. The request by the exporter to take the water might be denied to preserve the lake or falls even though local appropriators could take the water from the stream below the falls or after it leaves the lake.

84. See *Bank of Am. Nat'l Trust & Sav. Ass'n v. State Water Resources Control Bd.*, 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

85. See Tarlock, *supra* note 4, at 145-49.

Finally, a state might, in granting permits, consider many things relating to the public interest in addition to economic maximization. It might be as simple as simply saving water for future local use. The City of El Paso, apparently, asked for practically the entire predictable safe yield of the New Mexico aquifers. A requirement to "leave some water for us" to satisfy predictable future local needs might be a sufficient "public interest" to satisfy *Pike*, even though the balance of costs and benefits might not come out very favorably when the municipal and industrial uses in Texas are compared to small increases in agriculture in New Mexico. In *United Plainsmen*,⁸⁶ equating the public interest with the public trust, the North Dakota Supreme Court indicated that before all of the unappropriated water in North Dakota was unthinkingly allocated for boom and bust coal development, some should be saved for future farmers and preservation of a stable agriculture industry.

A simple loss of water for future development is not the most likely problem. Few states have appropriated or planned the ultimate diversion of the last possible drop. The real problem imposed by progressive use of more and more water is increase in the costs of obtaining the water. The problem may be that if easily available cheap water is now used, the extra costs of storage required for the use of spring floods and above average annual flows will be considerable. Here again, while not common, there are precedents for imposing costs on large local projects to keep water within the economic reach of less favored future uses. Intrastate parallels can be found in the "compensatory storage" laws⁸⁷ spawned by the inter-regional rivalry between Colorado's east and west slopes and California's statutes protecting the "area of origin,"⁸⁸ resulting from its internal north-south rivalry.

Even reciprocity may play a part here and turn out to be even-handed regulation. In many situations, the Western states have permitted use of local waters in another state if the other state allows reciprocal privileges to the citizens of the first. A prime example is the Little Snake River (aptly named) which, with its major tributary, crosses and recrosses the Colorado-Wyoming line twenty-two times. Many ditches head in Wyoming, have a Wyoming water right, and take the water to a Colorado field, while many Colorado ditches feed Wyoming hay meadows. These states have said to each other, "you scratch my back and I'll scratch yours. You can have my water if I can have some of yours." An even trade may not be required; the possibilities could be enough.

86. *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976).

87. *COLO. REV. STAT.* § 37-45-118(1)(b)(iv) (1973).

88. *CAL. WATER CODE* §§ 10505, 11460-11463 (West 1971). While these statutes are a political promise of the legislature that can be changed at any session, Professor Ralph Johnson's legal study for the National Water Commission concludes that it is a pledge by the state that the needs of Northern California will be taken care of in future water plans primarily for the benefit of Southern California. Johnson, *Major Interbasin Transfers Legal Aspects*, Legal Study No. 7, at 81 (National Water Comm'n. 1971).

Pike Balancing

If a statute meets the *Pike* test, *Pike* says it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. This obviously calls for a procedure in which the balance can be determined. The *Pike* Court went on to say: "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"⁸⁹

There are, of course, several different kinds of balancing. The *Pike* test says that the burden on commerce should be compared to the local benefits and may even outweigh them, as long as the burden is not "excessive." A city, industry, or district is always going to look for the cheapest water, and a free appropriation in another state will often be cheaper than buying out a local user. It may even be cheaper than obtaining a new in-state appropriation. The burden in *El Paso* is the cost of purchasing Texas water and constructing facilities for its use against the cost of wells and a pipeline to New Mexico. In other words, the burden is measured by how much *El Paso* saves by using New Mexico water. This figure, which might not be as large as first thought, must be compared to the opportunity costs in New Mexico.

The public interest factor applied to local projects⁹⁰ allows the exporting state to balance the benefits of use for *El Paso's* municipal and industrial water against future New Mexico agricultural water, and one might expect this to favor the city. Yet this balance is not made in *El Paso*. Neither *Pike* nor *Sporhase* required the *El Paso* court to simply erase the state lines. The balance might go the other way when the burden on the receiving state is balanced against different benefits in the originating state.

The availability to the exporter of local supplies is also very important in answering the question of whether the lower state is hoarding its own resources for its own future uses instead of using water available to it. While *El Paso* is not the State of Texas, its actions can be considered state actions, as was the case in *Kansas v. Colorado*⁹¹ and *Wyoming v. Colorado*.⁹² Here too, the Court seeks equity between states when their citizens by the use of water threaten to disturb the balance of power between the states.

Incidental Effects on Commerce

The *Pike* formula seems to contemplate a regulation of general application to all commerce in which "the effects on interstate commerce are only incidental." Since the laws currently enforced or recently adopted that might survive the *Pike* test are directed specifically at procedures

89. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

90. See *Young & Norton v. Hinderlider*, 115 N.M. 666, 110 P. 1045 (1910).

91. 206 U.S. 46 (1907).

92. 259 U.S. 419 (1922).

for handling water exports, it may be difficult to say that their effects are only incidental. Yet, the main objective here is to require the exporter to leave something behind to avoid loss to the state of future benefits, to make some equivalent substitution of facilities for local use, or to avoid the imposition of extra costs upon future local users. Thus, the direct objective is to equalize the benefits to the state of appropriations for in-state and out-of-state uses. The contribution of the exporter is a side-effect that meets the dictionary definition of "incidental" as an event happening "in connection with something more important."⁹³

Another possible result is that commerce would not occur; the water would not be exported because the permit is denied or the conditions imposed make the appropriation unattractive. But that effect—nonuse by the unsuccessful applicant—will occur in any "public interest" choice of this project or that, of this use or a better future use. If the applicant for export is unsuccessful because he lost to a legitimate local interest, the location of the lost use is merged in the decision and is only an incident to the determination.

Facial Discrimination

The Nebraska statute prevented Mr. Sporhase from exporting his water because the reciprocity requirement called into play the Colorado embargo on exports. On its face, an embargo is presumptively unconstitutional. The *Pike* formula provides a basis for sustaining a statute which, on its face, only reasonably restrains commerce, leaving the validity of its applications to individual cases. But even if the regulations are found not fair on their face, and even if they openly discriminate, they still might be sustained.

The *Sporhase* Court's invalidation of the reciprocal embargo was based on *Hughes v. Oklahoma*,⁹⁴ which struck down a ban on the export of bait minnows. The *Hughes* Court decided that such a blocking of the flow of a commercial product at the state borders could not pass the *Pike* test and added new tests for facially discriminatory legislation. It must survive the "strictest scrutiny of any purported legitimate local purpose," it must "significantly advance" that interest, and there must be "the absence of nondiscriminatory alternatives."⁹⁵ In still another case, *Dean Milk*,⁹⁶ the Court added another twist by requiring "a close fit between the requirement and its asserted local purpose,"⁹⁷ and the *Sporhase* Court piled on still another: that the statute be "narrowly tailored" to achieve that fit.⁹⁸

In *Maine v. Taylor*⁹⁹ the *Hughes* tests were applied in the latest commerce clause case. Here the golden shiner joined the Oklahoma Minnow,

93. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1968).

94. 441 U.S. 322 (1979).

95. *Id.* at 337.

96. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

97. *Id.* at 354.

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

99. 106 S. Ct. 2440 (1986).

the Tennessee Snail Darter and the Devil's Hole Pup Fish in the Supreme Court's aquarium. Maine forbade the *import* of Golden Shiners from other states, ostensibly to protect its local population from parasitic infestation, but incidentally protecting the local bait fish industry from competition. The Court sustained the embargo once the difficulty of inspection and other preventative methods was explained. The Court's concluding sentences will be heard in future litigation over water exports:

The Commerce Clause significantly limits the ability of states and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.¹⁰⁰

Different treatment is not necessarily discrimination. It is possible for states to impose *reasonable* regulations that further a *state's interest* in its natural resources by statutes fair on their face according to *Pike* and even by statutes that clearly encumber and even bar movement across state lines.

"SPORHASE & EL PASO V. VERMEJO"

Almost contemporaneously with *Sporhase*, the Supreme Court decided two aspects of an interstate law suit for equitable apportionment of the water of Vermejo River, a small stream that rises in Colorado and enters New Mexico where it is entirely consumed.¹⁰¹ The doctrine of equitable apportionment, it is said,¹⁰² is incompatible with the *Sporhase* application of the commerce clause. Equitable apportionment magnifies the state line, splits the river basin, and splits the river with it. It has been said that *Sporhase* does quite the opposite, it erases the state line, treats the basin as a single economic unit, and the water resource as a management whole.¹⁰³

This is certainly not true, at least regarding the *Sporhase* holding. As the Court noted, the two farms and the state line both overlie the vast Ogallala Aquifer.¹⁰⁴ Nevertheless, the Court treated the water as if it lay wholly in Nebraska, like an oil field in the middle of the state, the product of which the state wanted for its own citizens' consumption.

The *Sporhase* case has nothing to do with equitable apportionment, any more than that oil field does. The water right for the Nebraska farm existed. There is no evidence that the change of place of use would increase the draw down of the aquifer. If at some later time the water was

100. *Id.* at 2455.

101. *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982).

102. See Utton, *supra* note 34; Simms & Davis, *Water Transfers Across State Systems*, 31 ROCKY MTN. MIN. L. INST. 22-1, 22-7 (1985).

103. *Id.*

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

divided between the two states, it might be found that Nebraska exceeded its share when the well was first drilled and placed on the Nebraska farm, not when the water was removed to Colorado. Mr. Sporhase's rights rise no higher than those of Nebraska; he and his neighbors, entitled to reasonable shares of Nebraska's share of the whole, might find themselves subject to a percentage reduction of pumping to eliminate the overdraft.¹⁰⁵ If Colorado appropriators have added to the overdraft, the junior Colorado pumpers may be cut off entirely by priority.¹⁰⁶

No such claims were made. There was no indication that Colorado wished to apportion the aquifer. It had its own rules—favorable to Nebraska—for preventing overdrafts at the state line.¹⁰⁷ An off-the-record fact showed Sporhase was denied a Colorado permit for his Colorado farm because the Colorado limit would have been exceeded.¹⁰⁸ If additional withdrawals in Nebraska drain Colorado, the Colorado Ground Water Commission might urge the State of Colorado to seek apportionment of the affected part of the aquifer. In the alternative, Nebraska might seek protection from a change in Colorado's rules that would allow more drilling in Colorado and prevent the movement of Nebraska's share of water to the Nebraska wells. Joint administration of the aquifer to manage well placement, well depth, well spacing, total pumping, and rate of pumping, all with reference to the optimal, physical management of the resource, may be desirable. But there is nothing to prevent a compact being negotiated, an executive agreement reached, or a multi-state district formed to accomplish these things, and there is nothing in *Sporhase* that would make it impossible or more difficult.

“*El Paso v. Vermejo*”

A major question that has often been asked is whether commerce clause considerations apply to fixed shares of unappropriated water in a common source to which two or more states have access. In my previous article, I instanced the split by compact of the Powder River, forty-two percent of the unappropriated water to Wyoming, forty-eight percent to Montana.¹⁰⁹ If Montana uses all of its water, is it now free to go up-stream into Wyoming, a state developing water at a slower pace, and take a part of Wyoming's share? If the shares of unappropriated water have been allocated by compact, a very strong case can be made that a state's share is beyond the reach of the negative commerce clause. It has been held that a compact adopted by the states and ratified by Congress is an act of Congress.¹¹⁰ In this light, it is *positive* exercise of the commerce clause that leaves no room for judicial modification or the operation of the negative commerce clause.

105. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

106. See *Nebraska v. Wyoming*, 325 U.S. 589, 622 (1945).

107. See *Thompson v. Colorado Ground Water Comm'n*, 194 Colo. 489, 575 P.2d 372, 376 (1978).

108. *Corker*, *supra* note 23, at 423.

109. Trelise, *supra* note 43, at 348.

110. *Texas v. New Mexico*, 462 U.S. 554 (1983); *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568 (9th Cir. 1985).

It is unlikely that shares will ever be assigned directly by congressional allocation. *Arizona v. California*¹¹¹ is the only example of this method of adjusting interstate conflicts. But, that case twisted existing legislative action preliminary to a project into a division of water. The prospect of one state introducing a bill in Congress that will settle its claims to unappropriated water against other states by assigning a percentage or quantity to it is almost unthinkable. Likewise, the probability of the other forty-eight or so unaffected states taking sides on such a bill seems remote. It is conceivable that the authorization of a multi-state project could be called a partial allocation to the states which receive a portion of the project water. This reduces the size of the problem but does not solve the question of whether a state has or controls a share of the remaining water.

A case in which the water in a shared interstate resource is already over-appropriated, and in which it is necessary to find the dividing line between the states, does not present this problem. This is exactly the *Nebraska v. Wyoming*¹¹² situation on the North Platte River, the archetype of the equitable apportionment cases. Neither *Sporhase* nor *El Paso* has any effect in these cases.

Even the judge in *El Paso I* seemed convinced that if he were dealing with compacted or equitable apportioned water, New Mexico could do as it pleased with its share.¹¹³ A great deal of space in *El Paso I* was devoted to proving that the Rio Grande Compact did not divide the river and its tributary groundwater below Elephant Butte Dam.¹¹⁴ If it had, New Mexico could apparently keep its share.

While the Supreme Court has never divided unappropriated water among the parties to an interstate law suit, it has equated its decrees with compacts. *Sporhase* says that these divisions create legal expectations. Were the Court to decree such a split, it is clear that the shares so allocated to a state are exclusively that state's to manage. It should also be clear that it would be reasonable under the commerce clause for the state to withhold its entire share for its own cities and landowners.

There are those who believe to the contrary. It has been suggested that, in the absence of explicit territorial limitations, the Court will tend to be unfavorably disposed toward state restrictions that interfere with providing water to expanding population centers. It has also been suggested that a compact must be specific in providing a state with the exclusive use of a quantity of water for the Court to conclude that the commerce clause doesn't apply.¹¹⁵ There are some compacts which are specific as to where the water may be used. Others, which are vague and make no reference to the potential place of use of the water, may be vulnerable to commerce clause reallocation under this view.¹¹⁶ Professor Tarlock

111. 373 U.S. 546 (1963).

112. 325 U.S. 589, 622 (1945).

113. *City of El Paso v. Reynolds* (El Paso I), 563 F. Supp. 379, 387 (D.N.M. 1983).

114. *Id.*

115. *See Rodgers, supra* note 34, at 374-75.

116. *Id.*

thinks that in general a state has, under the commerce clause, a "duty to share its resources with the rest of the nation," but does not address the problem directly.¹¹⁷ Professor Corker argues that the basis of interstate compacts is dismantled if the Supreme Court somehow intended that the interstate character of the source is irrelevant.¹¹⁸

El Paso's ruling reduces any state incentives to compact to shambles. The more slowly developing state will seek negotiations but will have no bargaining power. The faster developing state will have no reason for trying to bargain if it can force the assignment of water to it under the commerce clause.¹¹⁹

If compact negotiations prove impossible, a state with an inchoate claim to a common resource may consider the possibility of firming up its claim into the "legal expectation . . . fostered by [an] . . . equitable apportionment."¹²⁰ While the Supreme Court has never yet declared the equitable share of two or more states in unappropriated water to which each has access, there seems little doubt that it could do so. Equitable apportionment has been a flexible, developing remedy. It started as a tort action. The first case, *Kansas v. Colorado*,¹²¹ was a suit to enjoin present harms to Kansas from Colorado's use of the Arkansas River. Relief was denied in an opinion jammed with facts but short on law, either upon a *de minimis* or *damnum absque injuria* rationale, after a balance of the great benefits to Colorado compared to "some detriment" to Kansas. The next cases were similar, but brought to prevent future harms. In the "Eastern apportionment" case, *New Jersey v. New York*,¹²² the Supreme Court limited a transbasin diversion of the Delaware River by New York City to an amount that would avoid pollution and other environmental damage in New Jersey and Pennsylvania. Out West, in *Wyoming v. Colorado*,¹²³ and *Nebraska v. Wyoming*¹²⁴ injunctions were sought against future harm to downstream users from the operation of new projects on the Laramie and North Platte Rivers. These cases, however, involved over-appropriated rivers.

Equitable apportionment came to be a sort of quiet title action, fixing the boundary line in the waters, as it were. The next stage must be the evolution into a declaratory judgment of rights to take future actions. The old precedents are against it. In two cases, *New York v. Illinois*¹²⁵ and *Connecticut v. Massachusetts*,¹²⁶ out-of-basin diversions in upstream states caused the lower states to complain that future production of electric power would be hampered or prevented. In both, relief on this ground was denied.

117. Tarlock, *supra* note 4, at 145-49.

118. Corker, *supra* note 23, at 426-27.

119. *Id.* at 430; Utton, *supra* note 34, at 996-97.

120. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

121. 206 U.S. 46 (1907).

122. 283 U.S. 336 (1931).

123. 259 U.S. 419 (1922).

124. 325 U.S. 589 (1945).

125. *New York v. Illinois*, 274 U.S. 488, 489 (1927).

126. 282 U.S. 660 (1931).

Despite these older cases, the Court has entertained one case involving rights to unappropriated water in which no present harm was shown. *Arizona v. California*¹²⁷ was brought before the Central Arizona Project was authorized. The Project's intake was upstream from California's diversions, and Arizona could suffer no physical injury from them. Arizona's main claim was for 2,800,000 acre-feet of unappropriated water as a future supply for the C.A.P. if that project should ever be built. As it turned out, the case was not decided on equitable apportionment grounds, but the Court's treatment of the jurisdictional question is nevertheless on point. In taking up the suit, the Court said:

The basic controversy in the case is over how much water each State has a legal right to use out of the water of the Colorado River and tributaries . . . [T]his Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States . . . Unless many of the issues presented here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State's right to appropriate water from the Colorado River System for existing or new uses. In this situation we should and do exercise our jurisdiction.¹²⁸

In *Arizona v. California*, the Court was asked to allot a specific quantity for a single project which had long been studied and planned. This is different from the situation where no project is planned. In the latter scenario, the Supreme Court may be reluctant to place itself in the position of parceling out resources in a fashion that will mean placing limits on future growth of a state. The Court may be hesitant to charge a Master to study state plans and decide on the most worthy, the most likely, or the most desirable before all ramifications of such plans unfold. The prospect of reviewing the Master's decision on the evidence may seem similarly unpalatable. The Court may prefer to wait and decide on projects as they arise. However, this may put it in the position of case-by-case review of state administrative decisions, a situation which it has sought to avoid in the past.

If it is accepted that a decree of the Supreme Court, or a compact with a neighboring state, gives a state a share in an interstate resource, which the states may withhold from other states and allocate for locally preferred purposes, the question arises whether a state has such a share before the "legal expectation" has been fixed by decree or compact. Legal title does not seem necessary. When Idaho sought a division of salmon fishing in the Columbia-Snake River System between it and the states of Oregon and Washington the Supreme Court said:

The fact that no State has pre-existing right of ownership in the fish, *Hughes v. Oklahoma*, does not prevent an equitable appor-

127. 373 U.S. 546 (1963).

128. *Id.* at 551, 564.

tionment Even though Idaho has no legal right to the anadromous fish hatched in its waters, it has an equitable right to a fair distribution of this important resource.¹²⁹

It had been argued that no state can fix its own share in the resource,¹³⁰ and ultimately this is true as limits of the resource are reached. Before the limits of the resource are reached, however, the states have done exactly that. This has been the law since *Bean v. Morris*¹³¹ back in 1911, where Justice Holmes applied priority between appropriators taking water from a single stream that flowed out of one state into the other. Because a junior appropriator in one state had to respect senior's rights in the other state, each appropriation became a part of the apportionment of the state where used until the limit of the stream was reached. Certainly a state may say, "At least this much is mine," and allow applicants to acquire rights to water not used by those in the other state.

There have been some so-called exceptions to this "priority is equity" rule. In 1945, in regards to the North Platte River, Justice Douglas stated his oft-quoted modification:

That does not mean that there must be a literal application of the priority rule But if an allocation between appropriation states is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the application of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several portions of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas as compared to the benefits to downstream areas if limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the apportionment and the delicate adjustment of interests which must be made.¹³²

Although junior appropriations in Colorado were allowed to continue, Justice Douglas did not actually analyze or apply his "laundry list," and no court has ever done so. The junior Colorado appropriations were four hundred miles from the stateline Nebraska appropriations. It would take two to three weeks for water released in Colorado to reach Nebraska. The harm to Colorado would exceed the benefit to Nebraska. The case is an application of the well known priority rule of the "futile call." Stored

129. *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) (citation omitted).

130. See *Corker*, *supra* note 23, at 441.

131. 221 U.S. 485 (1911).

132. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

waters, return flow, etc. bear on the fact that little if any harm was done in the Nebraska reaches by the Colorado diversions.

Nevertheless, this is a doctrine that seems to have appeal. In *Vermejo I*¹³³ the Court called it "the flexible doctrine"¹³⁴ and indicated that the water allocated by one state to its users might be reallocated for the benefit of the other state if the former allocation were excessively wasteful. Also, *Vermejo I* struck down the key position of priority when it reversed the *Wyoming v. Colorado* rule¹³⁵ that Colorado farmers could not take water from Wyoming ranchers simply because they might make more money growing row crops than the ranchers could make growing hay. This nineteenth century type "balancing"—the idea of uncompensated transfers of wealth-producing resources on some theory that society is benefited by impoverishing a property owner because his neighbor might make better use of the property—has never been the law.¹³⁶ This is the antithesis of prior appropriation.

CONCLUSION—A SUBSTITUTE TEST FOR ALLOCATIONS

The real test of a valid or permissible state restriction on interstate commerce is that it must be reasonable. The *Sporhase* Court looked for factors that "informed the determination whether the burden on commerce imposed by state ground water regulations are reasonable or unreasonable"¹³⁷ The *Pike* test is an attempt to give the concept of reasonableness a little more content, if not clarity or certainty. But the *Pike* test was evolved for a particular case—one in which state legislation imposed an extra burden on a commercial grower of agricultural products and put the exporter at a disadvantage on the interstate market. The *Pike* test has since been applied in practically every case in which the Court has considered the negative implications of the commerce clause.¹³⁸ These cases involved state requirements placed on possessing, packaging, and transporting goods, embargoes against the export-import of minnows or golden shiners, requirements for instate processing of lumber destined for out-of-state shipment, and an embargo against the import of garbage to commercial land fills. *Pike* is consistent with older cases holding that a state may not restrict the use of natural gas produced within the state to the benefit of its citizens.¹³⁹ All these cases involve state restrictions on the commercial transactions of producers, traders, and transporters of products and goods that were once natural resources but are now in the hands of those who have exploited and captured them.

133. *Colorado v. New Mexico* (Vermejo I), 457 U.S. 176, 183 (1982).

134. *Id.*

135. 259 U.S. 419 (1922).

136. Although the Court in Vermejo II (*Colorado v. New Mexico*), 467 U.S. 310, 321-23 (1984), repeated the view expressed in Vermejo I, that one state might claim water already appropriated in another, it dismissed the case, holding that Colorado had not shown by clear and convincing evidence that better use could be made of the water in Colorado.

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

138. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 63-65.

139. *Oklahoma v. Kansas Nat. Gas Co.*, 221 U.S. 229, 260 (1911).

But the *El Paso*-type situation is outside this pattern. The water would move across the state line, as in the *Sporhase* case, but not in a market transaction, as we have seen the *Sporhase* water did. The statute in the *El Paso* case does not regulate traders or transporters, but state officials in the performance of their duty to allocate natural resources in the public domain to use in the private sector.

Not even the Supreme Court regards the *Pike* test as a universal solvent. The Court has added the rule that statutes that on their face discriminate against interstate commerce can be validated on a showing that the restriction serves a legitimate local purpose that cannot be served as well by any available nondiscriminatory means.¹⁴⁰ Two other categories of cases are treated differently from those involving the regulations of trading: Commerce clause limitations on state taxation and the question of whether state regulation has been preempted by congressional action.¹⁴¹

The test of reasonableness that might properly replace the *Pike* test is that the exporter and the domestic user of water make the same or equivalent contributions to the state of origin. The water is a resource of the state, a source of wealth, present and future. When a resource within a state is exploited, the state, as a sovereign, receives some benefits from the activity. This is an important state interest; it is a part of "sovereignty." Sovereignty is not ownership and does not insulate resources from the rest of the nation or the national government. But it does give the state the power to regulate its citizens and others who obtain interests in its land, waters and other resources. It is the source of the police power; it enables regulation in the general welfare; it gives the power of taxation. It has been used to justify Montana's heavy tax on the exported product of coal resources: "The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity."¹⁴²

In the field of water, the Supreme Court said in *Kansas v. Colorado*¹⁴³ that the doctrine of *parens patriae*, permits a state to protect its citizens and their property from the inroads of the citizens of other states. In a very recent case the Court said of the use of water by a large industrial company: "In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion of the general prosperity of the State."¹⁴⁴ This does not mean that a state may hoard its resources for its citizens alone. State *A* does not care if a citizen from state *B* buys land, grows cantaloupes, drills an oil well, or otherwise enjoys the resources of the host

140. See *Maine v. Taylor*, 106 S. Ct. 2440, 2448 (1986); *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979).

141. *Hellerstein*, *supra* note 138, at 65-66 n.80.

142. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1931) (footnote omitted).

143. 206 U.S. 46, 99 (1907).

144. *Colorado v. New Mexico (Vermejo I)*, 459 U.S. 176, 182 n.9 (1982).

state. The nonresident still makes his contribution, produces wealth, and increases the tax base as much as would a citizen-owner.

The exporter of previously unallocated water will make no such contribution if the *Pike* test is used and the *El Paso* gloss on *Sporhase* is followed. The "economic protectionism" they forbid is exactly what the state is due. The exporter should leave behind some equivalent of, or capitalization of, or replacement for, the contributions that would be made to the state of origin if the water was used at home instead of abroad. The substitute test merely permits the state to claim its due.