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SPORHASE V. NEBRASKA EX REL. DOUGLAS: A CALL FOR GROUND WATER LEGISLATION

I. INTRODUCTION

In *Sporhase v. Nebraska ex rel. Douglas*,[1] the Supreme Court fulfilled commentators' prophecies[2] by holding that state water anti-export statutes are contrary to the commerce clause of the federal Constitution.[3] This decision brings water regulations within the scope of the Court's previous pronouncements on state statutes regulating interstate commerce in animal, vegetable, and mineral resources.[4]

This comment will outline the development of the commerce power as it relates to state export/import restrictions, and examine the Court's rationale in *Sporhase* in the context of commerce clause precedent. The Court's characterization of water will be analyzed, and probable effects of this holding on future interstate water allocation plans will be projected. This comment takes the position that some state regulation of ground water export is possible after *Sporhase*.

II. FACTS OF *SPORHASE V. NEBRASKA EX REL. DOUGLAS*

Joy Sporhase and Delmer Moss, both Colorado residents, owned contiguous tracts of farmland in Colorado and Nebraska. The crops on these two tracts were irrigated with ground water[5] pumped from a well located on the Nebraska tract.[6] These facts in and of themselves did not spark a controversy worthy of Supreme Court attention; however, the additional element of a Nebraska statute[7] conditioning water export provoked inquiry into con-

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1. 102 S. Ct. 3456 (1982).

2. Several commentators have suggested water anti-export statutes may present constitutional problems. *E.g.*, F. Trelease, Federal-State Relations in Water Law 60-61 (Nat'l Water Comm'n Legal Study No. 5, 1971); Comment, *"It's Our Water!"—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER L. REV. 119, 120 (1975). *See* Hellerstein, Hughes v. Oklahoma: *The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 91-92.

3. U.S. CONST. art. I, § 8, cl. 3.

4. *See* Hughes v. Oklahoma, 441 U.S. 322 (1979) (state cannot restrict interstate sale of naturally seined minnows); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (intrastate fruit packaging requirements invalid); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (natural gas anti-export statute invalid).

5. The term ground water has many definitions; throughout this comment it will be used as defined by the Nebraska Legislature. "Ground water shall mean that water which occurs or moves, seeps, filters, or percolates through ground under the surface of the land." NEB. REV. STAT. § 46-657(2) (1978). For a more thorough and scientific definition of ground water, see generally D. TODD, GROUND WATER HYDROLOGY (1963).

6. Sporhase v. Nebraska *ex rel.* Douglas, 102 S. Ct. 3456, 3458 (1982).

7. The relevant Nebraska statute provides in part:

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

stitutional issues under the commerce clause.

Sporhase and Moss did not apply for a permit to the Nebraska Department of Water Resources, as required by the statute, before exporting ground water from their Nebraska well for use on their land in Colorado. This violation prompted Nebraska to seek permanently to enjoin further water exports by the landowners. Ruling that the export was not in compliance with the statute, the trial court granted the injunction[8] and rejected Sporhase's claims that the statute was contrary to the commerce, due process, and equal protection clauses of the Constitution.[9] The Nebraska Supreme Court affirmed, holding that because ground water was not an article of commerce under Nebraska law, it could not be subject to commerce clause considerations. The court also rejected Sporhase's due process and equal protection claims.[10]

The constitutional challenge was, however, ultimately successful. In a seven-to-two decision, the United States Supreme Court reversed the Nebraska decision.[11] The majority concluded that the state statute could not be upheld based on the negative power of the commerce clause.[12]

III. BACKGROUND

A. *Judicial Interpretation of the Commerce Clause*

The commerce clause of the federal Constitution provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[13] On its face, this constitutional provision does not demand exclusive congressional control of commerce. The debates of the Constitutional Convention likewise do not reflect an intent that states be powerless to institute regulatory legislation.[14]

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used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

NEB. REV. STAT. § 46-613.01 (1978).

8. Nebraska was readily able to determine that the Sporhase export did not meet the statutory criteria. Colorado has an absolute embargo on ground water export (COLO. REV. STAT. § 37-90-136 (1973)); therefore, the Nebraska reciprocity requirement could not be met.

It is also important to note that Sporhase was using water from his Nebraska well because he had been denied a permit for a Colorado well. Colorado denied the permit application because of excessive demands on ground water in the area. Brief of the National Agricultural Lands Center and Kansas City Southern Industries as *Amicus Curiae* at 11-12, Sporhase v. Nebraska *ex rel.* Douglas, 102 S. Ct. 3456 (1982).

9. Jurisdictional Statement of Appellants at 4, Sporhase v. Nebraska *ex rel.* Douglas, 102 S. Ct. 3456 (1982).

10. Nebraska *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd*, 102 S. Ct. 3456 (1982).

11. 102 S. Ct. at 3467. Justice Stevens wrote the majority opinion, joined by Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, and Powell. Justice Rehnquist filed a dissenting opinion in which Justice O'Connor joined.

12. *Id.* at 3463-67. The Court, by virtue of its commerce clause holding, did not reach the questions of due process and equal protection. Although due process and equal protection considerations are relevant, they are beyond the scope of both the decision and this comment.

13. U.S. CONST. art. I, § 8, cls. 1 and 3.

14. *E.g.*, Phillips, *The Growth and Development of the Federal Commerce Power*, 11 TEMP. L.Q. 517, 521 (1937); *see generally* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

The scope of state regulatory power, however, may be clarified by examining Supreme Court commerce clause decisions.

The Supreme Court first interpreted the commerce clause in *Gibbons v. Ogden*.[15] This case involved a New York statute prohibiting steamships, not licensed by the state from navigating in New York waters. The sole question to be decided was whether a state could regulate commerce in contravention of a federal statute. In finding the New York law repugnant to the Constitution, the Court reasoned that supremacy of congressional action demands that a state law yield when it is in conflict with a valid act of Congress.[16]

Gibbons dealt with the positive commerce power—the situation where Congress has acted by legislating on a subject. The negative implications of the commerce clause, where congressional power is dormant, present more difficult questions regarding state regulatory power.

Willson v. Black Bird Creek Marsh Co.[17] marked the beginning of Supreme Court pronouncements on the dormant commerce power. In *Willson*, the Delaware Legislature authorized construction of a dam across navigable water in the absence of congressional action forbidding such construction. The Delaware Act clearly did not violate the positive force of the commerce clause; moreover, the Court found no reason to consider it repugnant to the dormant commerce power.[18] In upholding the Act, the Court nevertheless indicated there might be a limit to a state's commerce power even when Congress had not acted.[19]

The case most often credited[20] with delineating the negative implications of the commerce clause is *Cooley v. Board of Wardens*.[21] A Pennsylvania pilot regulation, which did not conflict with any federal regulation, was upheld in *Cooley*. The Court reasoned that although state regulation of commerce was not expressly excluded by the commerce clause, it would not be allowed where the subject was national in nature and required uniform treatment.[22] Finding that regulation of ship pilots was not a subject of national concern, the Court allowed the Pennsylvania law to stand.[23]

The first case to use the negative implication of the commerce clause to invalidate a state regulation was *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*.[24] The issue in *Wabash* was whether Illinois could regulate interstate railroad rates by requiring lower rates for short distance intrastate hauls than for long distance interstate hauls.[25] The Court found interstate rate

15. 22 U.S. (9 Wheat.) 1 (1824).

16. *Id.* at 210. For a more comprehensive discussion of this case, see P. BENSON, THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, at 9-25 (1970).

17. 27 U.S. (2 Pet.) 245 (1829).

18. *Id.* at 252. Construction of the dam was calculated to enhance property values and protect the public health. *Id.* at 250.

19. *Id.* at 252.

20. *See, e.g.*, B. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION 7 n.13 (1932); Phillips, *supra* note 14, at 522.

21. 53 U.S. (12 How.) 299 (1851).

22. *Id.* at 319.

23. *Id.* at 318-21. For a later case further developing the extent of the state power to regulate commerce, see Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

24. 118 U.S. 557 (1886).

25. *Id.* at 561.

regulation to be a subject of national concern that could only be addressed by Congress.[26] Following *Wabash* a line of cases invalidated state commerce regulation in areas where no federal legislation existed.[27]

Decisions based on the negative power of the commerce clause present a problem because they do not follow a clearly predictable pattern.[28] In 1946, Justice Rutledge aptly described the nature and scope of the negative function of the commerce clause:

> It is not the simple, clean-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For clearly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. . . . [T]he business of negative implication is slippery.[29]

The varying results in dormant commerce clause cases may be attributed to the Court's use of several different standards. Over the years, the Court has tested indirect versus direct burdens on commerce,[30] balanced state police power needs against the need for free commerce among the states,[31] evaluated the reasonableness of restrictions,[32] and determined whether nondiscriminatory alternatives were available.[33] The variety of analyses makes early decisions less useful precedent than more recent commerce clause pronouncements.

The modern test for determining the validity of a state statute affecting interstate commerce was enunciated in *Pike v. Bruce Church, Inc.* [34] The plaintiffs in *Pike* challenged the constitutionality of an Arizona statute requiring all Arizona cantaloupes to be packaged in the state prior to export.[35] Writing for a unanimous Court, Justice Stewart stated that unless the burden on commerce was clearly excessive, a statute regulating evenhandedly to further a legitimate local public interest, with only incidental effects on interstate commerce, would be upheld.[36] A close inspection of what has become the

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26. *Id.* at 577.

27. *See generally* B. GAVIT, *supra* note 20, at 250-52 (a collection of pre-1932 cases invalidating state regulation under the dormant commerce clause).

28. An attempt to categorize and reconcile all the dormant commerce clause cases would be an immense, if not impossible, task and is beyond the scope of this paper.

29. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 418 (1946).

30. *E.g.*, Di Santo v. Pennsylvania, 273 U.S. 34 (1927) (state licensing statute directly interfered with interstate commerce and was therefore invalid).

31. *E.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) (safety benefit of train length law did not outweigh federal interest in unburdened interstate commerce).

32. *E.g.*, South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (regulation of truck weight and size was reasonable based on evidence; therefore, legislature's wisdom was not to be questioned by Court).

33. *E.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (discriminatory milk regulation invalid since reasonable nondiscriminatory alternatives were available).

34. 397 U.S. 137 (1970).

35. *Id.* at 138.

36. *Id.* at 142. The following explanation by Justice Stewart has become known as the *Pike* test:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course de-

general rule for determining the validity of state commerce regulation, reveals that it is a combination of tests previously used by the Court.

Most of the negative commerce clause decisions since *Pike* have been based on this test. Two cases held the state's interest was sufficient to uphold the regulation.[37] Four cases invalidated state requirements for failing to further legitimate local interests.[38] Two other cases struck down statutes using the *Pike* test in addition to invoking the strict scrutiny test reserved for *prima facie* discriminatory statutes.[39] The only exceptions to analysis under the *Pike* test have been three special cases where the state was a market participant rather than a market regulator.[40] In the absence of a congressional mandate, the state acting as a market participant is not prohibited from favoring its own citizens.[41]

In summary, a state has a residuum of power to regulate matters of local concern that affect interstate commerce. The scope of state regulation allowed depends on the particular state concern and whether the local benefit outweighs the federal interest in unrestricted interstate commerce.

B. *Natural Resource Export/Import Restrictions Under the Dormant Commerce Clause*

In the specific area of natural resource export/import restrictions, most state regulation has been held invalid.[42] Both facially discriminatory export/import restrictions[43] and regulations invalid as applied[44] have been

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pend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

37. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (state's waste management interest sufficient to support plastic container ban); Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978) (state's game preservation interest sufficient to support hunting license fee differential).

38. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (Iowa's truck length statute invalid as a burden on interstate commerce considering the state's questionable safety interest); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (state's interest in less than 55 foot trucks had only speculative relationship to safety); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (apple grading regulation invalid burden on interstate commerce); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (reciprocity barrier to milk imports furthered no legitimate interest).

39. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (absolute barrier to minnow export facially discriminatory) (*see infra* notes 47-54 and accompanying text); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (prohibition on imported waste facially discriminatory).

40. White v. Massachusetts Council of Constr. Employers, 103 S. Ct. 1042 (1983) (city could limit employment to city residents for a city funded construction project). Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state owned cement plant and therefore could sell its product free of commerce clause considerations); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state recycling bounty favoring citizens valid because state entered market as a participant).

41. Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)).

42. An exception is Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). The Court in *Hudson* upheld a water anti-export statute, designed to protect the health of the citizens, as a legitimate exercise of state police power. *Id.* at 356-57.

43. Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Altus v. Carr, 385 U.S. 35 (per curiam), *aff'g* 255 F. Supp. 828 (W.D. Tex. 1966); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (West Virginia not allowed to retain all natural gas for local use); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (Oklahoma cannot prevent export of natural gas).

44. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (waste anti-import statute

struck down. Writers have suggested that state ownership of resources validates otherwise questionable regulation of commerce.[45] While possibly valid at one time, the state ownership theory has been discredited repeatedly.[46]

In *Hughes v. Oklahoma*,[47] a recent example of an absolute restriction on export, Oklahoma attempted to prevent the export of minnows procured from the natural waters of the state.[48] Oklahoma relied on an earlier Supreme Court case, *Geer v. Connecticut*,[49] which had validated a statute prohibiting the export of lawfully killed game birds. The theory in *Geer* was that the birds were owned by the state and the state, therefore, could make any regulations concerning the birds free of negative commerce clause implications.[50] The Court in *Hughes* rejected the outmoded legal fiction of state ownership, overruled *Geer*,[51] and analyzed the minnow export restrictions using the *Pike* criteria.[52] In addition, the Court announced that facially discriminatory legislation would be strictly scrutinized.[53] The Oklahoma regulation was held to be invalid as unjustified discrimination against interstate commerce.[54]

Pike v. Bruce Church, Inc. [55] is an illustration of an export restriction found invalid as applied. Arizona, by requiring all cantaloupes grown in-state to be packaged in Arizona, was enhancing the reputation of local cantaloupe growers and providing jobs for local citizens at the expense of an interstate packaging corporation.[56] Although the state's interest may have been legitimate, the regulation as applied imposed an unjustifiable burden on interstate commerce and therefore was held unconstitutional.[57]

Theoretically, the negative implications of the commerce clause do not preclude state regulation. It is conceivable under *Pike* that a state may restrict the export or import of natural resources so long as the statute is tailored narrowly and designed to effect a legitimate local interest. In practice, however, no case since *Hudson*[58] has upheld a state commerce regulation in

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invalid as simple economic protectionism); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (apple grading regulation invalid since purpose was economic protection); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (intrastate packaging requirements for shrimp invalid because designed to favor Louisiana manufacturers).

45. *E.g.*, Hellerstein, *supra* note 2, at 71-92.

46. *See generally* Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249, 1259-67 (1981) (recites general history of the common ownership theory).

47. 441 U.S. 322 (1979).

48. *Id.* at 323. For a thorough discussion of this case, see Hellerstein, *supra* note 2, at 119.

49. 161 U.S. 519 (1896), *overruled*, Hughes v. Oklahoma, 441 U.S. 322 (1979).

50. 161 U.S. at 529-32.

51. 441 U.S. at 322-35.

52. *Id.* at 336-38. The Court found the restriction facially discriminatory. A legitimate local interest existed in conservation and protection of wild animals but could have been fulfilled more effectively by nondiscriminatory alternatives. *Id.*

53. *Id.* at 337. "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose . . . ." *Id.*

54. *Id.* at 338.

55. 397 U.S. 137 (1970). The Court set forth the modern test of validity under the commerce clause in this case. *See supra* note 36 and accompanying text.

56. 397 U.S. at 142-43.

57. *Id.* at 143-46. *See supra* note 36.

58. 209 U.S. 349 (1908). *See supra* note 42.

natural resources. Although the Court articulated a standard in *Pike* for permissible state regulation, it is possible that state natural resource import/export restrictions will not be tolerated.

C. *Congressional Permission*

State restrictions on commerce may be validated by explicit congressional permission because the Constitution vests the commerce power in Congress.[59] An early illustration of the effect of explicit congressional permission is *Pennsylvania v. Wheeling & Belmont Bridge Co. (II)*.[60] When the case was first before the Court, Pennsylvania asked for an order requiring that a bridge authorized by Virginia be raised because it obstructed free passage of ships on the Ohio River.[61] The Supreme Court agreed that the bridge obstructed commerce and ordered that it be elevated.[62] Congress, however, passed a statute authorizing the bridge in its original position.[63] On a second hearing, the Court held the federal statute valid based on Congress plenary power over commerce.[64]

A more recent example of express authorization of state regulation affecting interstate commerce exists in the insurance industry. Under the McCarran-Ferguson Act,[65] Congress removed all commerce clause limitations on state authority to regulate and tax the insurance industry. Cases interpreting this statute have ruled that express congressional permission of state regulation admits of no exceptions.[66]

Congressional deference is not to be confused with congressional permission. The fallacy of the assumption that congressional deference validates state commerce regulations is apparent in two recent cases. *Lewis v. BT Investment Managers*[67] involved the Bank Holding Company Act,[68] and *New England Power Co. v. New Hampshire*[69] addressed the Federal Power Act.[70] Both cases held that for local legislation to be immune from a commerce clause attack, Congress must expressly state its intention that the local legislation be sustained.[71]

Although there has been no explicit congressional permission for state export/import water regulation, local control is a reasonable possibility.

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59. U.S. CONST. art. I, § 8, cls. 1 and 3.

60. 59 U.S. (18 How.) 421 (1856).

61. Pennsylvania v. Wheeling & Belmont Bridge Co. (I), 54 U.S. (13 How.) 518 (1852).

62. *Id.* at 626-27.

63. Act of Aug. 31, 1852, ch. III, §§ 6-7, 10 Stat. 112.

64. Pennsylvania v. Wheeling & Belmont Bridge Co. (II), 59 U.S. (18 How.) 421, 435-36 (1855).

65. 15 U.S.C. §§ 1011-1015 (1976).

66. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

67. 447 U.S. 27 (1980).

68. 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-1850 (1976 & Supp. V 1981)).

69. 455 U.S. 331 (1982).

70. 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 791-821c (1976 & Supp. V 1981)).

71. *BT Inv. Managers*, 447 U.S. at 49; *New England Power*, 455 U.S. at 331.

Currently, two coal slurry pipeline bills are pending before Congress.[72] If enacted, these bills will enable states to restrict commerce in water used for coal slurry purposes.

IV. *SPORHASE V. NEBRASKA EX REL. DOUGLAS*

The Nebraska Supreme Court reasoned in *Sporhase* that a product must be an article of commerce to be governed by the commerce clause.[73] The court defined an article of commerce as a commodity capable of being reduced to private possession and exchanged for value.[74] Nebraska ground water, according to the court, had never been considered a freely transferable market item and therefore could not be subject to the Constitution's commerce clause restrictions.[75]

In a two-step analysis, the United States Supreme Court reversed the Nebraska court's decision. First, the Court rejected the contention that ground water is not an article of commerce and therefore not subject to the negative impact of the commerce clause.[76] Next, using the *Pike* test, the Court examined the water-export statute for validity under the commerce clause.[77]

The Court ruled that ground water is an article of commerce, but cited no direct precedent. Instead, the Court seemed to reach its conclusion by deductive reasoning. Ground water shortages are a national problem; Congress has power to deal with national problems under the commerce power; therefore, ground water must be an article of commerce.[78] The Court further reasoned that the affirmative commerce power of Congress could never be utilized to correct the problem of ground water overdraft unless such water was considered an article of commerce.[79]

Using the *Pike* test, the Court examined the constitutionality of the Nebraska statute.[80] The Nebraska law[81] required that four conditions be met prior to granting approval to export ground water. The export had to be: reasonable, consistent with conservation, not detrimental to public welfare,

72. Coal Pipeline Act of 1983, H.R. 1010, 98th Cong., 1st Sess. Coal Distribution and Utilization Act of 1983, S. 267, 90th Cong., 1st Sess. The explicit language authorizing state authority, § 206(b) of the Coal Pipeline Act of 1983, H.R. 1010, 98th Cong., 1st Sess., is:

> Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions (including terms or conditions terminating use on permits or authorizations) for the reservation, appropriation, use, or diversion of water for a coal pipeline for which a certification has been made under section 208 shall be determined pursuant to State law notwithstanding any transport, use or disposal of such water in interstate commerce.

Section 5(b) of the Coal Distribution and Utilization Act of 1983, S. 267, 98th Cong., 1st Sess. contains nearly identical provisions.

73. 208 Neb. at 705, 305 N.W.2d at 616.

74. *Id.* at 705, 305 N.W.2d at 616.

75. *Id.* at 705-09, 305 N.W.2d at 616-19.

76. 102 S. Ct. at 3458-63.

77. *Id.* at 3463-65. *See supra* note 36 and accompanying text.

78. 102 S. Ct. at 3462-63.

79. *Id.* at 3463.

80. *Id.* at 3463-65.

81. NEB. REV. STAT. § 46-613.01 (1978). *See supra* note 7.

and to a state granting reciprocal rights to export ground water. Under *Pike*, the Court held the first three requirements were facially valid restrictions on interstate commerce; the state interest in conserving a vital resource is legitimate under the police power.[82] Although the public ownership theory does not prevent the application of commerce clause restrictions, the public ownership nature of western water played a part in the Court's examination of the local interest and in the Court's justification of the first three export restrictions.[83]

The fourth statutory element, reciprocity, was found to be an explicit barrier to interstate commerce[84] and therefore triggered the strict scrutiny test of *Hughes v. Oklahoma*.[85] The Supreme Court found no evidence establishing a close means-end relationship between the reciprocity requirement and conservation of ground water.[86] Nebraska's requirement did not meet the minimum *Pike* standard of effecting a legitimate local public purpose and therefore was held to be an impermissible burden on interstate commerce.[87]

Nebraska asserted that the history of congressional deference to state water law protected its statute from commerce clause restrictions.[88] Specifically, Nebraska referred to thirty-seven federal statutes[89] containing language deferential to state water laws.[90] The Court ruled this language was not evidence Congress intended to remove commerce clause restrictions on state water law, but was only indicative of the specific federal legislation's preemptive power.[91] Moreover, under *New England Power Co. v. New Hampshire*,[92] congressional permission must be expressly stated to protect local legislation from a commerce clause attack. With ground water anti-export statutes there has been no explicit congressional permission to burden interstate commerce.[93]

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82. 102 S. Ct. at 3464-65. *See generally* Brief of the National Agricultural Lands Center and Kansas City Southern Industries as *Amicus Curiae, Sporhase* (in-depth discussion of the vital nature of the ground water resource).

83. 102 S. Ct. at 3463. *See supra* notes 45-46 and accompanying text.

84. 102 S. Ct. at 3465.

85. 441 U.S. 322 (1979). Strict scrutiny is applicable when legislation is facially discriminatory. *See supra* notes 51-54 and accompanying text.

86. 102 S. Ct. at 3465.

87. *Id.*

88. Appellee's Brief at 22-27, *Sporhase*.

89. *See Federal-State Water Rights: Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 302-10 (1964) (contains abstracts of the relevant sections of the 37 statutes).

90. The Reclamation Act of 1902, § 8, 32 Stat. 388, 390 (codified at 43 U.S.C. § 383 (1976)), is one example of the language referred to by the state. "[N]othing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation."

91. 102 S. Ct. at 3465-66. The Court also may have been influenced by the fact that all 37 statutes involved surface water.

92. 455 U.S. 331 (1982). *See supra* notes 69-71 and accompanying text.

93. Nebraska devoted a considerable portion of its brief to the argument of congressional permission for all state regulations of water allocation. Appellee's Brief at 22-27, *Sporhase*. *Amicus curiae* briefs of New Mexico, California, Colorado, Wyoming, Kansas, South Dakota, Missouri, Nevada, North Dakota, and Utah were in accord. The Court did not find this argument convincing. 102 S. Ct. at 3465-66. This portion of the decision appears to be correct consider-

Justice Rehnquist, in a dissent joined by Justice O'Connor, questioned the basis of the majority decision.[94] The majority tested the statute's validity by considering whether Congress has authority to regulate interstate commerce in ground water.[95] The dissent emphasized that congressional authority and state authority require distinct analyses because the affirmative implications of the commerce clause extend further than the negative implications.[96] The article of commerce analysis, according to Justice Rehnquist, was wholly unnecessary to a decision on the validity of the Nebraska law.[97] Arguably, Congress could regulate ground water overdraft even if ground water was not an article of commerce by showing that overdraft substantially affected interstate commerce.[98]

The dissent's approval of the Nebraska statute was based on the traditional authority of the states in matters of water regulation.[99] Although the dissent criticized the majority's article of commerce analysis, Justice Rehnquist summarized his objections by stating that Nebraska ground water cannot be an article of commerce for purposes of the negative impact of the commerce clause. He reasoned that because Nebraska only recognizes a limited usufructory interest in ground water, there can be no commerce in water.[100] Justice Rehnquist categorized the Nebraska regulation in question as merely another of the many western water use regulations.[101]

V. ANALYSIS

The Supreme Court decision in *Sporhase* is generally consistent with the majority of commerce clause cases.[102] Under strict commerce clause analysis, the *Sporhase* result was predictable.

The Court's reasoning, however, was flawed. As suggested by the dissent, the holding that water is an article of commerce was unnecessary[103] and unfortunate because the transfer of water was not the issue. Sporhase attempted to transfer a water *right*, and that should have been the focus of the analysis.

A water right is a limited property interest defined by state law,[104] which allows the owner to use a certain amount of water in a particular

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ing that deference must be expressly stated to be valid. For an exhaustive treatment of the complex topic of federal-state water relations, see generally F. Trelease, *supra* note 2.

94. 102 S. Ct. at 3467-68 (Rehnquist, J., dissenting).

95. *Id.* at 3467.

96. *Id.*

97. *Id.* at 3467-68.

98. *See* United States v. Darby, 312 U.S. 100, 118 (1941). "The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end. . . ." *Id.*

99. 102 S. Ct. at 3467-68 (Rehnquist, J., dissenting).

100. *Id.* at 3469.

101. *Id.* at 3468-69.

102. *See supra* note 4, and accompanying text.

103. 102 S. Ct. at 3467-68.

104. States have traditionally been responsible for defining property rights. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (affirmation of state's right to choose system for defining property rights).

manner on specified lands. Under Nebraska law, the owner of a water right owns only the right to use a limited quantity of ground water on the land from which it is drawn.[105] There is no property interest that allows him unilaterally to transfer the right.[106]

The Court's focus on water rather than on a water right oversimplified the issue. By referring to water as an article of commerce, the Court implied that specified water molecules could somehow be owned. The concept of water as a tangible item of commerce, similar to other natural resources, is inaccurate.

Natural gas is appropriately considered an article of commerce; it is a commodity that can be wholly owned, transferred, and destroyed.[107] The owner's property interest is not defined in terms of the rights of other owners of natural gas, and the natural gas can be used without redefining the other owners' property interests.[108]

In contrast, water is not owned.[109] The property interest in water is an intangible right, described as an incorporeal hereditament, which is attached to the tangible substance—water.[110] The right is owned, but specific identifiable water is not.[111] Each individual water right is defined in terms of the rights of all other water users in the state system.[112] The interrelated nature of the right prevents an appropriator from unrestricted transfer or change; such actions would affect the rights of all other water right holders.[113] Only by redefining his water right can an appropriator transfer the right or change the place or manner of use of the water. Some states, such as Nebraska, do not recognize the right of a general appropriator to sever water from the land.[114] The distinction between the tangible substance, water,

105. *See generally* Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917 (1980) (overview of Nebraska ground water law); Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721 (1963) (general hydrologic and legal overview of Nebraska's ground water system).

106. *Sporhase*, 208 Neb. at 707, 305 N.W.2d at 617.

107. *See generally* 1 H. WILLIAMS and C. MEYERS, OIL AND GAS LAW § 201, at 17-18 (1981).

108. Another distinction between water and natural gas, which helps explain their different treatment under the law, is that water is a renewable resource and natural gas is not. The specified water molecules are not destroyed by use, but instead become the object of the next appropriator's water right. This physical fact makes it imperative that any definition of a property right in water consider every other appropriator's rights in that same water.

109. For a discussion of the nature of property rights in water see generally S. CIRIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, A. STONE, 1 WATERS AND WATER RIGHTS § 53.1, at 344-49 (1967).

110. The tangible/intangible distinction was probably best articulated in Hammond v. Johnson, 94 Utah 35, 40, 75 P.2d 164, 170 (1937). Justice Wolfe, in his dissent, pointed out that a water right does not have all the attributes of real property and therefore cannot automatically be subject to legal doctrines that apply to tangible items capable of being possessed. The majority in *Sporhase* automatically identified water as a commodity without noting its different characteristics.

111. 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 137-38, 442-43 (1971).

112. The appropriative right is measured by beneficial use and absence of harm to other appropriators. *Id.* at 491-516, 569-83; S. CIRIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, A. STORE, *supra* note 109, § 51.7 at 296-98.

113. S. CIRIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, A. STONE, *supra* note 109, § 53.4 at 357. *See generally* 1 W. HUTCHINS, *supra* note 111, at 623-44.

114. *See Sporhase*, 208 Neb. at 709, 305 N.W.2d at 617-18.

and the intangible property interest in water must be made to appreciate the consequences of *Sporhase*.

Each state plays an important role in defining, administering, and protecting its system of water rights. By interstate compacts[115] and by equitable apportionment decrees[116] a state is allocated an equitable share of water which it must further allocate by a system of rights to users in the state. Had the Court identified the interest being transferred as a water right rather than water, a more convincing connection between the reciprocity requirement and the state's interest in conservation might have been found. The reciprocity requirement could be a legitimate means of ensuring that a state receives its equitable share of the limited interstate water allocation. The burden on interstate commerce would not be excessive because each state would retain its equitable, allocated share of water; individuals would not be allowed to reapportion and thereby redefine the right to use this valuable, life giving resource.

Although the dissent appeared to appreciate the meaning of a water right and the theory of equitable apportionment, Justice Rehnquist did not link the two ideas to justify the reciprocity requirement. Recognition of the two theories led Justice Rehnquist to conclude that a state may regulate a natural resource so as to protect it from the negative impact of the commerce clause.[117] This assertion is not valid under prior commerce clause decisions.[118] Justice Rehnquist would have had more success upholding the Nebraska statute by arguing within the confines of the accepted *Pike* analysis.[119]

The premise that water itself was the commodity being transferred, and that water is an article of commerce, triggered a commerce clause analysis of the Nebraska statute. The statute, however, would not necessarily have been invalid under the *Pike* test if the connection between a reciprocity requirement and the true nature of the interest being transferred had been considered.

VI. CONCLUSION

The *Sporhase* decision leaves questions unanswered and emphasizes the need for a federal ground water policy. The extent to which state water policies will be affected is unclear, and whether Congress will define bounds for permissible state regulation remains to be seen.

115. For an in-depth discussion of interstate water compacts, see generally J. Muys, Interstate Water Compacts (Nat'l Water Comm'n Legal Study No. 14, 1971).

116. Equitable apportionment is the basis for allocating interstate benefits among affected states. *See generally* Kansas v. Colorado, 206 U.S. 46 (1907). Although no court has considered apportionment of an interstate ground water aquifer, it is reasonable to assume that such an allocation would follow the equitable apportionment doctrine of *Kansas v. Colorado*.

117. 102 S. Ct. at 3468 (Rehnquist, J., dissenting).

118. The accepted *Pike* analysis does not provide for absolute state authority over natural resources unless its criteria are met. *See supra* notes 34-36 and accompanying text.

119. *See supra* note 36 and accompanying text. This assertion assumes *Pike* is the standard for measuring state export/import restrictions. If in practice courts will not tolerate state restrictions on import or export of natural resources, the state interest in a system of water right allocation and conservation is irrelevant.

Congressional response, however, is imperative. States must have specific information regarding their regulatory power so that the long-range planning necessary to effective water allocation procedures can be implemented.[120] Theoretically, if narrowly drawn and sufficiently supported, state anti-export statutes could be valid after *Sporhase*.[121] The opinion, however, does not indicate how narrowly regulations must be drawn nor how much evidence must be presented to ensure that such regulations will be upheld.[122] The complex and vital nature of state water resource policies requires extensive planning; case-by-case legal determinations will not suffice. Congress must either expressly recognize state authority or formulate a federally administered conservation program.

In the proposed Coal Pipeline Act of 1983[123] or the Coal Distribution and Utilization Act of 1983,[124] Congress may affirm exclusive state authority over the control of water for slurry export purposes. These bills would not totally resolve the issue of state versus federal control of ground water, and, rather than permitting state control of water only in the context of coal slurry uses, it would clearly be preferable for Congress to formulate a comprehensive ground water policy.

Whether state control is affirmed or a federal plan established, it is critical that a policy be formulated. Ground water is vital to social and economic development and without predictable conservation guidelines this slowly renewable resource will be lost.

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120. Fourteen states have statutes regulating water export, *see* Brief of National Agricultural Lands Center and Kansas City Southern Industries as *Amicus Curiae* at 16, *Sporhase*.

121. Overcoming commerce clause objections, however, will not necessarily ensure a statute's validity. Due process and equal protection issues may also have to be addressed.

122. An appeal from the trial court of a commerce clause case involving a New Mexico anti-export statute may provide additional guidance for permissible state regulation. City of El Paso v. Reynolds, 563 F. Supp. 379 (1983) (although New Mexico had a legitimate interest in its attempts to conserve ground water, the interest was not sufficient to support a total ban on interstate ground water transportation).

123. H.R. 1010, 98th Cong., 1st Sess. (1983).

124. S. 267, 98th Cong., 1st Sess. (1983).