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Interstate Transfers of Water: Opportunities and Obstables [sic]

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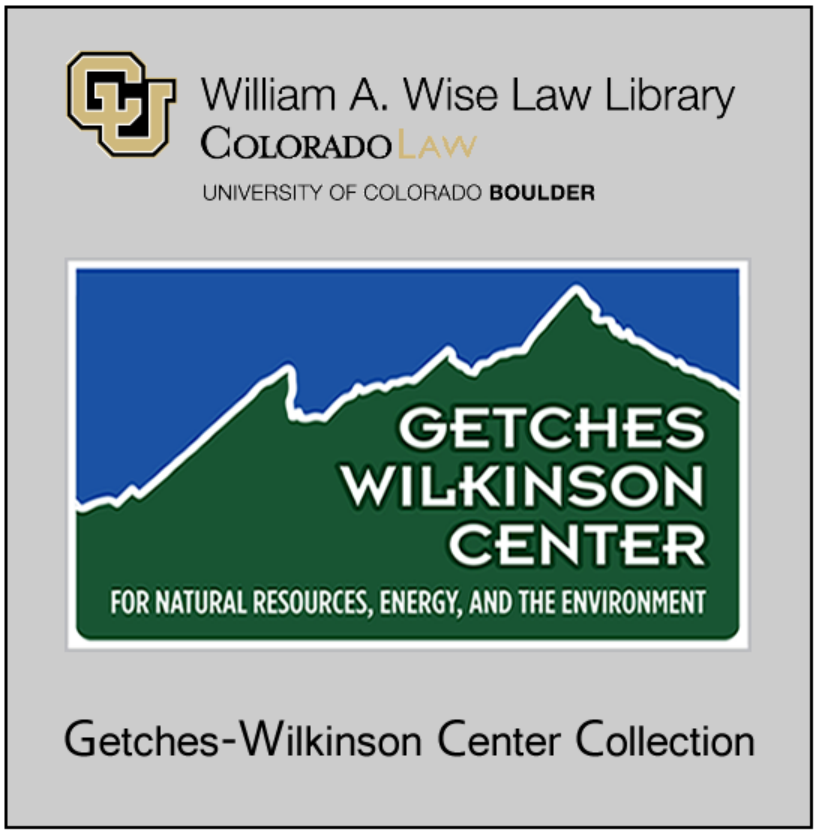

A. Dan Tarlock, *Interstate Transfers of Water: Opportunities and Obstables* [sic], *in* WESTERN WATER LAW IN TRANSITION (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1985).

INTERSTATE TRANSFERS OF WATER: OPPORTUNITIES AND OBSTABLES

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WESTERN WATER LAW IN TRANSITION

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I. WHERE ARE EXPORT PRESSURES AND WHY DO THEY EXIST?

A. East, West, North, South: Water-export projects or proposals exist in all regions of the United States, but naturally they are concentrated in the Western United States. In 26 of the 52 water resources sub-regions in the Western United States, off-stream water use exceeds 90% of the average monthly flow during at least one month of the year. These may be highly urbanized areas, southern Califronia, central Arizona or Colorado; major agricultural areas, the Snake River Plain in southern Idaho or the Ogallala aquifer in Kansas, Nebraska and Texas, or mixed urban-agricultural areas, the Great Basin and New Mexico.

B. Gleams in Engineers Eyes: Water-export schemes shift water from areas of surplus to areas of shortage. Historically, water has been exported from the area of origin intra rather than interstate. The California State Water Plan and the Colorado- Big Thompson transbasin diversions are two examples of large-scale intrastate shifts. Water users are now thinking on a larger interstate scale as percieved shortages intensify, and there are several pending proposals to shift water interstate to supply urban areas, to export energy and to support agricultural areas that have depleted their groundwater reserves. The following

are examples of relatively recent proposed or investigated interstate transfer schemes. They range from small scale transfers to large-scale schemes that cannot be cost-justified:

1. Boundary Accidents. Many interstate diversions occur because of the divergence between political boundaries and water demand. The case of Sporhase v. Nebraska arose because a Nebraska farmer wanted to use water withdrawn from a well on the Nebraska side of his farm on the Colorado side. The City of El Paso Texas' application to perfect groundwater rights to 296,000 acre feet in New Mexico for the purpose of exporting the water to El Paso is a classic example of a small-scale interstate diversion. There are many other such examples of either existing or potential diversions.

2. Keeping Houston Cool. The Clean Air Act and the now defunct energy crisis of the 1970s stimulated interest in transporting low sulfur western coal to centers of high demand for electricity in the midwest, southeast and Texas. Slurry pipelines, through which coal is pumped suspended in water, could reduce the major barrier to the increase use of western coal, transportation costs. For example, the

proposed ETSI pipeline would carry coal as far as 1,400 miles from Wyoming to Texas and Louisiana. Wyoming water user objections to the acquisition of Wyoming water rights for the project forced ETSI to attempt a double trans-watershed diversion for the pipeline. Legislation was passed in South Dakota which would allow the South Dakota Conservancy District to apply to the Water Management Board for a permit to appropriate Missouri River water stored behind the Oahe Reservoir and in turn to transfer the permit to ETSI. 1982 South Dakota Session Laws, ch. 1, pp. 4-10.

3. Ogallala Bailout. The Six-State High Plains-Ogallala Six-State Regional Resources Study investigated four plans to import water from the Missouri or rivers in eastern Arkansas and Texas. The cost, exclusive of costs beyond the terminal reservoir, would be between $226 to $434 per acre foot, and the environmental impact of these interbasin transfers would be substantial. Office of Technology Assessment, Water-Related Technologies for Sustainable Agriculture in U.S. Arid/Semiarid Lands 188-191 (1983).

4. California Lifestyle Threatened. San Diego purchases most of its water from the Metropolitan Water District of Los Angeles. This water is imported from the Colorado River, and much of the water that MET has been selling to San Diego and others is water allocated to Arizona by the decree in Arizona v. California. San Diego County will be the biggest loser when the Central Arizona Project is fully operational. The County estimates that by 2000 in dry years its 1.5 million acre foot system could be short by one-half. A consortium of Colorado developers is proposing to purchase Colorado senior irrigation water rights, to store the water behind dams in nothern Colorado and to ship it down the mainstem of the Colorado to purchasers in California and Arizona. The New York Times, February 24, 1985, p. 4E, col. 3 and Western States Water News, Issue No. 568, April 5, 1985.

5. The Slide Rule's The Limit. The arid west has always thought big when it comes to water, and consideration has been given to the tapping the Columbia basin and even the Great Lakes. A proposed plan to pipe water from Lake Superior to Gilette, Wyoming and to pipe it

back to the Midwest as coal slurry was abandoned when Congress failed to pass legislation granting slurry pipelines the power of eminent domain. See Final Report and Recommendations: Great Lakes Governors Task Force on Water Diversion and Great Lakes Institutions 4 (1985).

C. Is Water Just Another Resource? States seldom try and restrict the place of use of coal, oil and gas and other natural resources extracted in the state. Early Supreme Court decisions holding that export prohibitions violated the negative commerce clause, e.g. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) and Pennsylvania v. West Virginia, 262 U.S. 553 (1923), because oil and gas were commodities in interstate commerce, shifted state efforts to confine the benefits of geological accident within the state to severance taxes. Historically, water resources have not been viewed by western states as mere commodities to be developed and sold to the highest bidder. Water resources have been seen as a special class of natural resources dedicated to the preservation of historic economies and thus exempt from normal economic laws:

> Whatever the development of water supply is estimated to cost, Westerners tend to think it is worth the price. The believe that if

> water becomes too expensive, everything else will become yet more dear, and were they to lack a sufficient supply of this basic ingredient (water), they would be unable to reap the profits that come with enterprise and development. In short, water is conceived by Westerners as a coveted commodity, a worthy prize for which they are willing to engage in demanding political games, where pay-offs may come only far into the future. [Martin, Ingram & Laney, A willingness to Play, An Analysis of Water Resources Development, 7 Western Economics Journal 137 (1982).]

This attitude is now being challenged by a coalition of neo-conservative resource economists and environmentalists who argue that water should be allocated through national private markets rather than through the state and national political and administrative process. e.g., Cuzan, Appropriators Versus Expropriations: The Political Economy of Water in the West, in Water Rights: Scarce Resource Allocation, Bureaucracy, and the Environment) (T. Anderson ed. 1983).

II. ACQUISITION OF RIGHTS IN INTERSTATE STREAMS AND BARRIERS TO SUCH ACQUISITION

A. Types of Interstate Claims. Rights in interstate streams are generally claimed by the following methods:

1. A private user appropriates water in State A. for use in State A., but claims a priority against users in State B.

2. A private user appropriates or otherwise perfects a right under the laws of State A. for use in State B.

3. State A. asserts its police power by bringing an equitable apportionment action in the Supreme Court to claim a portion of an interstate stream for the benefit of its citizens to the detriment of State B.'s citizens.

4. State A. agrees to sell water that it claims that it "owns" to private parties for use in State B.

5. States A. and B. enter into an interstate compact to allocate an interstate stream between them.

6. Congress exercise its commerce power to allocate a stream between states A. and B.

B. Me First. States have a variety of means to resist exports. In addition on to the legislation discussed in IV., some states have area of origin protection legislation that poses a barrier to the use of water in and out of state. See Final Report to the President and Congress of the United States by the National Water Commission, Water Policies For the Future 317-333 (1973). The entire permit approval process can be used to protect in-state users.

1. Public trust considerations may be cited by states to boulster in-state protection decisions. e.g. National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

2. In-stream flow protection strategies have also been urged an effective method for a state to embargo water. e.g., In Re Permit #21-7282 To Establish Minimum Stream Flows on Henry's Fork In The Name of Idaho Water Resources Board, Western Natural Resources Litigation Digest 12.16, April, 1985.

III. PRIVATE INTERSTATE RIGHTS

A. Export The Early Norm. The doctrine of prior appropriation allows water tc be used without regard to the locus of the place of diversion or withdrawal. The early cases thus assumed that priorities should be enforced across state lines. See generally 1 W. Hutchins, Water Rights Laws in the Nineteen Western States pp. 389-396 (1971) for a summary of the law state by state. The issue generally arises because a downstream user in State A. seeks to protect a State A. priority against junior priorities in upstream State B. Interstate priorities should logically not exist because:

1. State appopriation statutes, absent a reciprocity provision, have no extraterritorial application. Willey v. Decker, 11 Wyo. 496, 73 P. 210 (1903).

2. Courts have viewed themselves without jurisdiction to adjudicate water rights of out of state users, but this lack of jurisdiction has been questioned. Corker, Water Rights in Interstate Streams §131.3(B), in Waters and Water Rights (R.E. Clark ed. 1967).

B. Interstate Priorities Enforced. Priorities in interstate streams have been protected against out of state juniors under three different rationales:

1. The Act of 1866 created private appropriative water rights on the public domain enforceable against all juniors. Howell v. Johnson, 89 Fed. 556 (C.C.D. Mont. 1898).

2. By judicial fiat the relative rights of appropriators are the same regardless of the situs of the appropriations. Willey v. Decker, supra.

   a. Relief is in personam not in rem. 1 Wiel, Water Rights in the Western States §344 (3ed. 1911).

   b. A court must have jurisdiction over the parties and thus interstate rights are

usually enforced only if the State A. claimant sues in State B.

3. State B. must a honor State A. priority. The mutual adoption of the same system of water law creates reciprocal interstate rights because each state equally benefits from the rule. Bean v. Morris, 221 U.S. 485 1911).

IV. EXPORT RESTRICTIONS.

In addition to the usual problems of acquiting an appropriative right, proof of unappropriated water and protection of vested rights, State A. may impose statutory restrictions on the export of water to state B.

A. Export Prohibitions. Prior to Sporhase v. Nebraska 458 U.S. 741 (1982), many states had flat prohibitions on applications to divert water out of state. See Clyde, State Prohibitions on the Interstate Exportation of Scarce Water Resources 53 University of Colorado Law Review 529 (1982). These prohibitions are presumptively unconstitutional, but they still can be found in state statutes. e.g., Colorado Revised Statutes 1973 §37- 81- 101, repealed; Montana Code Annotated §85-1-121, repealed 1983, Laws of Montana, Cptr. 706, H.B. 908; and Nevada Revised Statutes §533.520 (post-March 23, 1951 diversions)

B. Moritoria. In response to El Paso's proposed appropriation for use in Texas, New Mexico imposed a two year moritorium starting on March 6, 1984 on appropriations in all aquifers hyrologically related to the Rio Grande River below Elephant Butte dam. New Mexico Statutes 1978 §72-12-3.1 (1984 Supp.).

C. Allowance of Interstate Appropriations.

1. Appropriations for a beneficial use in a specific state or city may be allowed. Idaho Code §42- 401 (use in Oregon); Idaho Code §42-411 (appropriation for the City of Pullman, Washington authorized)

2. Appropriations for a beneficial use in another state may be allowed if the host state has reciprocal export privileges. Idaho Code §42-409 (use in Wyoming); Nevada Revised Statutes §533.522 (interstate streams);

D. Allowance of Interstate appropriations for Specific Projects. Wyoming authorized the construction of two specific coal slurry pipeline subject to detailed conditions. Wyoming Statues Ann. §41-2-301 and §41.3-111 (1984 Cumulative Supp.).

E. X-ing Out the Facial Discrimination Most states have responsed to Sporhase v. Nebraska by statutes that allow interstate transfers subject to restrictive conditions:

1. Colorado Revised Statutes §37-82- 101 (1984 Cumulative Supp.):

> (3) Prior to approving an application, the state engineer, ground water commission, or water judge, as the case may be, must find that:
> (a) The proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states:
> (b) The proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state; and
> (c) The proposed use of water will not deprive the citizens of this state of the beneficial use of waters apportioned to Colorado by interstate compact or judicial decree.
> (4) Any diversion of water from this state which is not in compliance with this section shall not be recognized as a beneficial use for purposes of perfecting a water right to the extent of such unlawful diversion or use.

2. Kansas Statutes Annotated §82a- 726 (1984) allows interstate appropriations subject to conditions imposed by the chief engineer "including an express condition that should any such water be necessary to protect the health and safety of the citizens of this state, such approved application may be suspended, modified or revoked by the chief engineer for such necessity."

3. New Mexico Statutes 1978 §72-12B-1 (1984 Supp.) allows appropriations for use in

another state subject to the following standards:

C. In order to approve an application under this act, the state engineer must find that the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico.

D. In acting upon an application under this act, the state engineer shall consider, but not be limited to, the following factors:
   (1) the supply of water available to the state of New Mexico;
   (2) water demands of the state of New Mexico;
   (3) whether there are water shortages within the state of New Mexico;
   (4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the state of New Mexico;
   (5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
   (6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

E. By filing an application to withdraw and transport waters for use outside the state, the applicant shall submit to and comply with the laws of the state of New Mexico governing the appropriation and use of water.

F. The state engineer is empowered to condition the permit to insure that the use of water in another state is subject to the same regulations and restrictions that may be imposed upon water use in the state of New Mexico.

G. Upon approval of the application, the applicant shall designate an agent in New Mexico for reception of service of process and other legal notices.

4. Nebraska Revised Statutes Reissue 1984 §46-613.01:

> Any person, firm, city, village, municipal corporation, or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in another state shall apply to the Department of Water Resources for a permit to do so. In determining whether to grant such permit, the Director of Water Resources shall consider:
> (1) Whether the proposed use is a beneficial use of ground water;
> (2) The availability to the applicant of alternative sources of surface or ground water;
> (3) Any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal; and
> (4) Any other factors consistent with the purposes of this section that the director deems relevant to protect the interests of the state and its citizens.
> Issuance of a permit shall be conditioned on the applicant's compliance with the rules and regulations of the natural resources district from which the water is to be withdrawn. The applicant shall be required to provide access to his or her property at reasonable times for purposes of inspection by officials of the local natural resources district or the Department of Water Resources.

5. Wyoming requires legislative review of coal slurry appropriation applications. Wyo. Statutes Ann. §41-3-115 (1984 Cumulative Supp) requires that the legislature consider:

> (i) The amount of water proposed to be appropriated and the proposed uses;
> ii) The amount of water available for appropriation from the proposed source, and the natural characteristics of the source;
> (iii) The economic, social, environmental and other benefits to be derived by the state from the proposed appropriation;

(iv) The benefits to the state by the use of the water within the state that will be foregone by the proposed appropriation;
(v) The benefits presently and prospectively derived from the return flow of water in intrastate use which will be eliminated by the proposed out-of-state use;
(vi) The injury of existing water rights of other appropriators that may result from the proposed use;
(vii) Whether the use formulated and carried out promotes or enhances the purposes and policies of the state's water development plans and water resources policy, and that the use will not unreasonably interfere with other planned uses or developments for which a permit has been or may be issued;
(viii) Whether the proposed use will significantly impair the states interest and ability to preserve and conserve sufficient quantities of water for reasonably foreseeable consumptive uses and other beneficial uses recognized by law to include but not limited to domestic, livestock, agricultural, municipal and industrial purposes;
(ix) Whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use;
(x) Whether, to the greatest extent possible, the correlation between surface water and groundwater has been determined, to avoid possible harmful effects of the proposed use on the supply of either.

V. NEGATIVE COMMERCE CLAUSE LIMITATIONS ON STATE EXPORT BANS

A. The Negative Commerce and The "Ownership" Immunity.

State laws that interfere with interstate commerce are subject to judicial scrutiny. Cooley v. Board of Wardens, 12 How. 299 (1851). However, the Supreme Court held in 1896 that resources owned in "trust" by a state were immune from the negative commerce clause. Geer v. Connecticut, 161 U.S. 519

(1896) (wild game). Geer's result, but not reasoning, was applied to water by Justice Holmes. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) upheld a water export prohibition.

B. Bad Precedent. The logic of Geer and McCarter was flawed from the start. It was never applied to oil and gas. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). The ownership in trust theory is simply an assertion of the state's police power and exercises of the police power are subject to the commerce clause. Geer was overruled in Hughes v. Okalhoma, 441 U.S. 322 (1979). See generally Tarlock, So Its Not "Ours" Why Can't We Still Keep It? A First Look At Sporhase v. Nebraska, 18 Land & Water Law Review 182 (1983) and Hellerstein, Hughes v. Oklahoma: The Court, The Commerce Clause and State Control of Natural Resources, 1979 Supreme Court Review 51.

C. Hudson County Falls. Negative Commerce clause scrutiny was extended to state water law in Sphorhase v. Nebraska, 458 U.S. 941 (1982) The Court held that the a Nebraska statute that prohibited the export of water unless the host state granted reciprocal privileges violated the negative commerce clause.

1. Facts. Sporhase owned a tract of land that straddled the border between Colorado and

Nebraska and wanted to pump from a Nebraska well to supply the Colorado portion. He failed to comply with a Nebraska statute that required him to apply for a permit to transfer groundwater out of Nebraska. The Nebraska statute provided that a permit would be granted to an applicant if the Director of Water Resources found that the groundwater withdrawal was "reasonable" . . . . not contrary to the conservation and use of ground water, and . . . . not otherwise detrimental to the public welfare" and that the host state allowed the transport of its groundwater to Nebraska. Because Colorado lacked such a reciprocity agreement, it was unlikely that appellants would have received a permit.

2. Result and "Reasoning". The Court reversed the Nebraska supreme court's decision to uphold the state's right to enjoin the transfered groundwater to Colorado and held that groundwater is an article of commerce. Because Nebraska's reciprocity clause was an explicit barrier to interstate commerce, it must be "narrowly tailored" to the state's purported interest in conservation. The statute was unconstitutional because the fit between the statute and Nebraska's

conservation objectives was not "close" enough.

D. What Does Sporhase Mean? Sporhase implicates both facially and non-facially discriminatory legislation.

1. Facially Discrimination Legislation. It is unlikely that a straight export prohibition can be sustained under Sporhause. Most state legislatures so assume.

2. Non-Facially Discriminatory Legislation. Non-facially discriminatory legislation will be tested by the Pike v. Bruce Church, Inc., 397 U.S. 237, 142 (1970): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." It

has been suggested that Sporhase applies to non-facially discriminatory groundwater management conservation programs such as the Arizona Groundwater Management Act, Arizona Revised Statutes Annotated §§45-401-637. Note, The Dormant Commerce Clause and the Constitutionality of Intrastate Groundwater Management Programs, 62 Texas Law Review 537 (1983).

VI. POST-SPORHASE EXPORT BANS

A. Is Water Still Unique? At various times the Court has suggested that health and safety regulations are entitled to greater deference compared to crass protectionist legislation, although the Court has collapsed this distinction when they have not accepted the state's health or resource conservation justification. City of Philadelphia v. New Jersey, 437 U.S. 47 (1978) and Raymond Motor Transportation Co. v. Rue, 434 U.S. 429 (1978). However, Justice Stevens went out of his way in Sporhase to suggest that water laws may stand of a different footing because of the unique role of water. The following language in Sporhase has been studied like the Talmud: "If it could be shown that the state as a whole suffers a water shortage, that the intrastate transportation of water from

areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining states would roughly compensate for any exportation to those states, then the conservation and preservation might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water."

B. End Runs Around Sporhase The following justifications for export prohibition have been suggested:

1. Hydrologic imperatives such as the interconnection between surface and groundwater resources dictate that water be treated differently from commodity resources, and thus the usual promotion-of-a- national-common-market rationale for judicial invalidation of state parochialism, e.g., H.P.Hood v. Dumond, 336 U.S. 525 (1949), does not apply. See Tarlock, National Power, State Resource Sovereignty and Federalism in the 1980's; Scaling America's Magic Mountain, 32 Kansas L. Rev. 111, 133-135 (1983) and Corker, Sporhase v. Nebraska Ex Rel. Douglas: Does

the Dormant Commerce Clause Really Limit the Power of A State To Forbid (1) The Export of Water and (2) The Creation of Water Right In Another State, 54 University of Colorado Law Review 393, 402-414 (1983).

a. New Mexico unsuccessfully attempted an arid lands defense to justify its refusal to allow El Paso to acquire state groundwater rights for export. City of El Paso v. Reynolds, 563 F.Supp. 379 (D.N.M. 1983). New Mexico argued that the state would have a shortage of at least 626,000 acre feet by 2020, but the court held that "outside of fulfilling human survival needs, water is an economic resource." The decision was vacated and remanded by the Tenth Circuit in light of N.M. Stat. §72-12B-1, supra, F.2d (10th Cir. 1983). Judge Bratton subsequently ruled that most portions of the statute are constitutional and the administrative hearing on El Paso's application was set to begin on May 15, 1985. Western Natural Resources Litigation Digest 12.15, April, 1985.

b. City of El Paso suggested that a state could overcome the claim that export

prohibitions discriminate against interstate commerce if they have a sophisticated water allocation plan and intrastate transfers are part of that plan. New Mexico had no such firm plans, but the decision has forced the state to begin to face some hard choices about water use. See The Impact of Recent Court Decisions Concerning Water and Interstate Commerce on Water Resources of the State of New Mexico (A Report to Governor Tony Anaya and the Legislative Council by the Water Law Study Committee), 24 Natural Resources Journal 688 (1984).

2. Congress can consent to unconstitutional state laws where the constitutional restrictions bind the states but not the federal government. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1947) and New England Power v. New Hampshire, 455 U.S. 331 (1982).

   a. Congressional intent must be express, but no other limitations have been recognized by the Court. Cohen, Constitutional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stanford Law Review 387

(1983), argues that the only limitations on federal power are federal constitutional guarantees of individual liberty and due process. This limitation might prohibit Congress from enacting water use legislation that discriminates on the basis of state citizenship because the equal protection clause limits Congress as well as the states. See Baldwin v. Fish & Game Commission, 436 U.S. 371, 394-406 (Brennan, J., dissenting).

b. Prudential has been applied to export prohibitions contained in congressionally approved interstate water compacts. Intake Water Co. v. Yellowstone River Compact Comm., 590 F. Supp. 292 (D. Mont. 1983), U.S. Supreme Court appeal denied, ___U.S.___(1984), appeal pending 9th Circuit Court of Appeals, upheld Article X of the Yellowstone River Compact which requires the approval of all three signatory states for an interbasin diversion because Congressional approval of a compact "may be considered the express statement of intent to immunize the compact" from negative commerce clause scrutiny:

> Furthermore, the Constitution requires congressional consent to an interstate compact only when the compact threatens to encroach upon the supremacy of the United States. A threat to the supremacy of the United States necessarily entails a threat to one of Congress's enumerated legislative powers since those powers are the source of supreme federal authority. Thus, when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area. See Cuyler v. Adams, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). In the present case, therefore to the extent that the Compact interferes with interstate commerce, Congress has exercised its commerce power in approving the Compact.

3. State resources owned and marketd by the state are not subject to the negative commerce clause. Reeves v. Stake, 447 U.S. 429 (1980). Reeves was cited in Sporhase after the following "analysis" of Nebraska's claim that the state's groundwater was owned in trust for the public. The natural resource has some indicia of a good publically produced and owned in which a state may favor its own citizens in times of shortage."

a. South Dakota read Reeves and Sporhase broadly and enacted legislation that allows the state to sell stored Missouri River water for export, 1982 S.D. Sess. Laws, ch. 1, p. 4-10.

b. The South Dakota Water Management Board subsequently issued a permit, No. 1791-2, and South Dakota landowners challenged the Board's decision for lack of procedural due process and for its failure to file an environmental impact statement. In the Matter of the Decision of the State of South Dakota Water Management Board Approving Water Permit No. 1791-2, 351 N.W.2d 119 (S.D. 1984), held that landowners along the proposed pipeline route were not entitled to actual notice by letter because the water board hearing did not determine the pipeline route and thus "individual landowners within the state . . . had no greater interest in the matter than any other citizen of South Dakota. . . ." Landowners whose land would be condemned would be entitled to full due process. The court also held that the published

notice gave citizens a fair opportunity to participate in the hearing and that an EIS was optional. Justice Henderson dissenting argued that minimum compliance with South Dakota statutes governing publication notice and a right to challenge exercises of the power of eminent domain was not adequate due process in light of the magnitude of the issues:

> The state of South Dakota does not own the water in the State of South Dakota. Neither does ETSI. Indeed, the sovereign and this private corporation contracted between themselves concerning the people's water. SDCL 46-1-3 expresses that "all water within the state is the property of the people of the state. . . ." This justice hazards that this sweeping policy declaration is binding upon the people of this state concerning certain water in this state. What say the legal scholars or judges of this nation concerning the impounded water created by the great dams built across the mighty Missouri River in South Dakota? The downstream states--what are their rights to these impoundments? These questions will be answered in due time but are now blowing in the wind. Perhaps the flame of

> wisdom will open the horizons of legal minds so that this water will one day nourish the dry plain that it might be fruited. This I know: Several downstream states, including our sister stateof Nebraska, have filed a federal lawsuit to stop the sale. In early May 1984, United States District Judge Warren Urbom of Lincoln, Nebraska, issued an injunction blocking the sale of these impounded waters from South Dakota to ETSI. Therefore, the very subject of this appeal is now, in a sense, being litigated in federal courts. [351 N.W.2d at 126-127.]

Justice Henderson also noted that ETSI's and South Dakota's argument that western state communities would get a source of high quality water supply was a surprise issue on which opponents were ill-prepared.

c. Missouri v. Andrews, ___F.Supp.___ (D. Neb. 1982) challenged the federal government's authority to issue the necessary permits for the pipeline and to enter into a contract for a 20,000 acre foot transbasin diversion. The district court held that the Secretary of the Interior was without authority to enter into the contract, and the case was

appealed to the 8th Circuit. ETSI abandoned the project in August of 1984, and the issue is now mootness. Western Natural Resources Liigation Digest 12.21, April, 1985.

VI. EQUITABLE APPORTIONMENT

A. Judicial Export. Exquitable apportionment is a Supreme Court doctrine that defines the amount of water to which riparian states on interestate streams are entitled, and thus may both mandate "exports" by upstream states and limit the amount of water that an upstream state may export. Apportionments are made on the basis of federal common law. Kansas v. Colorado, 206 U.S. 46 (1907). See 2 Waters and Water Rights §132.1.

B. Staying in Court. A riparian state may bring an original action in the Supreme Court, but there are two primary barriers to an adjudication on the merits:

1. Parens Patriae. A state must sue to advance a general state water allocation interest rather than merely to vindicate a limited classes of users injured by a diversion. North Dakota v. Minnesota, 262 U.S. 361 (1923).

2. High Burden of Proof of Injury. Although the Court has been somewhat inconsistent, the

general rule is that the injured state must demonstrate a high decree of probable harm from another state's use of water. Missouri v. Illinois, 200 U.S. 496 (1906). The Court has held this burden satisfied on over-appropriated streams by an allegation that existing or proposed diversions will deprive a state of necessary water in dry years. Nebraska v. Wyoming, 325 U.S. 589 (1945).

C. Dividing the Waters. Initially the Court seemed to adopt a simple guideline for equitble apportionments. Riparian principles for riparian states, New Jersey v. New York, 283 U.S. 336 (1936), and enforcement of priorities between prior appropriation states. Wyoming v. Colorado, 259 U.S. 419 (1922). However, the Court never adhered strictly to common law rules or to the law of prior appropriation, and the Court has now adopted a multi-factor balancing test that permits deviations from state law for "equitable" reasons. Nebraska v. Wyoming, 325 U.S. 589 (1945).

D. Using Equitable Apportionment To Keep It.

1. Sporhase Pervades A state may use equitable apportionment claims either in original jurisdiction suits or compact controversies, e.g. Texas v. New Mexico, ___U.S.___ (1982), but in Idaho ex rel. Evans v. Oregon,

U.S.___ (1983) the Court for the first time linked the equitable appotionment doctrine with the negative commerce clause:

> At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its horders. See Philadelphia v. New Jersey, §87 U.S. 617, 627, 98 S.Ct. 2531, 2537 57 L.Ed.2d 475 (1978); see also New England Power Co. v. New Hampshire, 455 U.S. 331, 838, 102 S.Ct. 1096, 1100, 71 L.Ed.2d 188 (1982), Hughes v. Oklahoma, 441 U.S. at 880, 99 S. Ct. at 1789. Consistent with this principle, States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States. Colorado v. New Mexico, ___U.S. at ___, 108 S.Ct. at 546; Wyoming v. Colorado, 259 U.S. 419, 484, 42 S.Ct. 552, 564, 66 L.Ed. 999 (1922).

2. Conservation and Planning Are All? The Supreme Court has suggested that equitable apportionment allows a junior diversion to displace a senior diversion if the method of exercise in inefficient. See generally Tarlock, The Law of Equitable Apportionment Revisited. Updated and Restated, 56 University of Colorado Law Review _____ (1985

forthcoming). Colorado v. New Mexico, 459 U.S. 176 (1982). The Court subsequently held that the senior diversion would be protected against a proposed new diversion because the diverting state must justify its diversion by clear and convincing evidence:

> Requiring Colorado to present clear and convincing evidence in support of the proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote." Colorado v. New Mexico, 459 U.S., at 187, 103 S.Ct. at 547; see also id. at 182, n 9, 103 S.Ct.., at 544, n. 9. In addition, the clear-and convincing-evidence standard accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses: "[T]he rule of priority [will] not be strictly applied where it 'would work more hardship' on the junior user 'than it sould bestow benefits' on the senior use [r, . . . though] the equities supporting the protection of existing economies will usually be compelling." Id., at 186,

> 103 S.Ct. at 547 (quoting Nebraska v. Wyoming, 325 U.S. 589, 619, 65 S.Ct. 1332, 1351, 89 L.Ed. 1815 (1945). In short, Colorado's diversion should and will be allowed only if actual inefficiencies in present uses or future benefits from other uses are highly probable.

a. The diverting state must identify financially an physically feasible conservation measure.

b. The diverting state must itself take steps to minimize the need for the diversion, and this may include planning duties:

> Again, we find ourselves without adequate evidence to approve Colorado's proposed diversion. Colorado has not committed itself to any long-term use for which future benefits can be studied and predicted. Nor has Colorado specified how long the interim agricultural use might or might not last. All Colorado has established is that a steel corporation wants to take water for some unidentified use in the future.

VII. CONCLUSION