New Sources of Water for Energy Development and Growth: Interbasin Transfers: A Short Course (Summer Conference, June 7-10) 1982

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This paper was prepared for a short course sponsored by the Natural Resources Law Center, University of Colorado School of Law, to be held June 7-10, 1982. It was sent to the typist the preceding April 30, 1982, while the El Paso-New Mexico litigation, to be discussed by Mr. John P. Frank, and the Sporhase litigation, to be discussed by Assistant Attorney General Dennis Montgomery of Colorado, were under submission to the United States District Court and the United States Supreme Court, respectively.

The writer discloses that he has served as a consultant to the Attorney General of New Mexico in the El Paso case, and prior to 1966 was an Assistant Attorney General of California representing that State in Arizona v. California, 373 U.S. 546 (1963), 376 U.S. 340 (1964).

Title of the short course is "New Sources of Water for Energy Development and Growth: Interbasin Transfers."

Can one state in the federal Union constitutionally forbid the acquisition within its territory of a water right for diversion and use in another state? The Supreme Court has addressed an opinion to that question only once prior to this year. Justice Holmes wrote in Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908), that a state

> "finds itself in possession of what all will admit to be a great public good, and what it has it may keep and give no one a reason for its will."

Some have opined that McCarter may be about to be overruled, possibly in the Sporhase case which is under submission to the Supreme Court as I write, or possibly in some other case. My opinion is that the principle Holmes pronounced cannot be doubted if the principle is understood--as all judicial opinions should be understood, including any the Court may write in Sporhase--in the light of the salient facts of the case in which Holmes said it.

The first such fact is that the Passaic River, from which Hudson County Water Company proposed to make a diversion to Staten Island, New York, is in New Jersey and nowhere is it contiguous to any point in New York State. The second fact is

that no act of Congress authorized the out-of-state diversion. If the water had been accessible to both states, the federal interstate common law of equitable apportionment would have applied to give both states some right in their common resource. Holmes recognized this in his citations, at 355, to Kansas v. Colorado, 185 U.S. 125, 141, 142; S.C., 206 U.S. 46, 99 (1902, and 1907). And if Congress had authorized the diversion, the result since 1937, at least, would clearly have been different. The Act of Congress would be upheld.

This paper revisits an article I contributed a few years ago to the Idaho Law Review which reached both of the conclusions I have just restated. Can a State Embargo the Export of Water by Transbasin Diversions, 12 Ida. L. Rev. 135 (1976). This is a welcome occasion to review the reasons I so concluded then, and why none of the recent developments has changed my mind. But to disclose fully my biases, and to discount them accordingly, I must tell you that at the moment of writing (April 30, 1982) I can think of no ground which might constitute a holding in Sporhase which would alter that conclusion. That is not because I entertain any doubt that the Constitution is indeed what the Supreme Court holds that it is. It

is because I believe it is profoundly important to the institution of judicial review that all who read and try to follow Supreme Court decisions recognize that whatever that or any other court says, unnecessary to its decision, is a dictum, to be treated with appropriate respect but not as a constitutional authority more entitled to obedience than, say, an Attorney General's opinion.

The first widespread attention given the constitutional issues about appropriations of out-of-state water across state lines was in the aftermath of Arizona v. California, 373 U.S. 546 (1963), 376 U.S. 340 (1964). The Court there decided that Congress not only can authorize the interstate allocation of water among the states, but it had done so in the Boulder Canyon Project Act of 1928. 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1976).

That shot reverberated in the Pacific Northwest with plans to meet shortages in the Colorado River Basin with water from the Columbia Basin. The Attorney General of Washington was asked whether an interstate compact, with consent of Congress, would permit the Pacific Northwest States to save the Columbia. He said, unequivocally, no. Wash. Ops. Att'y Gen. 63-44 No. 88

(March 4, 1964). My friend Charles B. Roe, Jr., wrote the opinion, and it is an opinion impossible to quarrel with. Witness the fact that Charlie not only was not fired, but he is a Senior Assistant Attorney General known in Washington as "the father of waters."

The authority is the second Wheeling Bridge case, decided before the Civil War. Wheeling and Belmont Bridge Co. v. Pennsylvania, 59 U.S. (18 How.) 421 (1855). The reasoning is incontrovertible. If a compact between two states, with the consent of Congress, could deprive all future Congresses of a power to legislate the Constitution itself could be in effect amended by interstate compact, without the required two-thirds vote of each house and the ratification of three-fourths of the states.

In 1964 the question debated today was answered by an implicit, bedrock assumption in that opinion. Without an Act of Congress, the Pacific Northwest states--like all the other states with which they are on equal footing--are parens patriae with respect to their natural resources. Why? The short answer, or rather the words which have been used to label that answer, is "territorial sovereignty." The label has tended to go out of use, and some assume that

General Lee surrendered it to General Grant at Appomatox Courthouse in 1865 and Grant buried it. But sovereignty means the power of government. The ordinary geographic limits to the exercise of that power between states and between nations are interstate and international boundaries.

Of course, there are limits to sovereign power of both state and nation. The purpose of constitutions is to locate those limits. A state cannot embargo, it cannot impose unreasonable limits on export or import of milk. Hood v. Du Mond, 336 U.S. 525 (1949). Why is water different from all other commodities?

It may be that the Court will continue to seek an answer to that question, and it may become persuaded that constitutionally there is no significant difference. Or it may conceivably construct intelligible doctrine out of the fact that milk is marketed by the quart or gallon, while water is dealt with (but rarely marketed) by the acre-foot. An acre-foot of milk would be more than 1,300,000 quarts.

That possibility, however, is unpromising. The distinction which is much more useful is a distinction between water, milk, eggs, natural gas, and chickens on the one hand, and water rights on the other. At first blush, you might

suppose that if you have a right to water, you have a water right, but this is not so. Everybody on earth drinks water, and most drink water which they have a right to drink. But few individuals own a water right.

A water right is an incorporeal hereditament related to real property, a right to the use (or "usufruct") of water as distinguished from a right to the physical substance of water itself. You may well tell me that this is medieval nonsense, which a legislature can and should abolish because no one understands it and it makes no sense. I shall be happy to second any such motion if the mover will come up with different and better words, but the ideas that those words represent have been painfully learned from experience. If, in forgetting the words, we forget the ideas they represent, we seriously risk turning back much of the irrigated west to the desert from which it was reclaimed.

In the beginning, water rights were riparian. They could be used only on riparian land, contiguous to a water course. But if that is true, and in fact it is sound doctrine, how did any great city in a riparian state acquire a water right for municipal use? The answer is that cities got water from the same authority that gave them their

charters--from their states. If the legislature overlooked giving it, prescription based on the fiction of a lost grant provided security for the water right after it had been exercised for the requisite number of years. Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14312 (1827) (Joseph Story on Circuit in Rhode Island).

The concept of state authority which I have just described is a feature of water law which has not only survived but flourished under appropriation in the west. In fact, the exercise of public authority attends the acquisition, the use, the transfer, and the relinquishment of water rights. The shorter the supply of water and the more urgent the demand, the more necessary is the careful and vigorous enforcement of water law. The more necessary also is the supervision and power of the legislature to modify the law of water rights, of water quality, or water management.

In theory, water law in the west might have been federal. The United States owns most of the watersheds, and has always had at least two constitutional bases to regulate and control water resources. United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899). One is the commerce power, which has had a close relationship

to navigation and navigable waters since John Marshall wrote Gibbons v. Ogden, 24 U.S. (9 Wheat 1) 1 (1824). The other is the federal ownership of the public lands which is the basis of a claim under the common law riparian doctrine by which a right to use water from the contiguous water course is "part and parcel" of the soil. Federal land ownership also permits Congress to grant, to forbid, or to condition rights of way across federal lands which are necessary to water use.

However, Congress never moved in the direction of creating a law of federal water rights, even when it had occasion to do so in the Reclamation Act of 1902 providing for construction of great federal irrigation projects. The reasons may have been partly doctrinal, since the formative reclamation period was the period of dual federalism in which the Tenth Amendment was often regarded as a separate and independent limitation on power of the states. The major reason, however, was found in the recognition that water rights and their administration must be carefully tailored to the diverse needs of each state and widely different conditions within different parts of each state.

Cooley v. Board of Wardens of the Port of

Philadelphia, 53 U.S. (12 How.) 299 (1851), marks the occasion on which the Supreme Court adapted commerce clause doctrine to a federal system. The first Congress in 1789 enacted a law that all pilots in ports and inland waters would continue to be regulated under existing state laws and those that might thereafter be enacted by the states, until Congress might otherwise enact. In Cooley the issue was whether this Act could constitutionally apply to a Pennsylvania statute enacted in 1803.

The entire Court assumed that incorporating a future state law would unconstitutionally delegate Congress constitutional power. However, a six-Justice majority signed the opinion by Justice Benjamin R. Curtis, which announced a formula saying in effect that there are two commerce clauses. If the subject demands a uniform rule, throughout the United States, only Congress can legislate to provide it. But where the subject matter demands diversity, the states can legislate unless and until Congress does so.

There were two minority opinions, either of which would have put the nation on the road to disaster had it been followed and become a consistent course of decision. McLean

and Wayne, JJ, would have held the power of Congress to regulate pilots to be exclusive and beyond the power of Pennsylvania. That course would have resulted in a rigid line making the commerce power of Congress exclusive wherever it exists, and never concurrent with state power. Long before our time the national agenda for Congress would have become so large that the nation could not have functioned.

Justice Daniel concurred. He would also have hewed to a rigid line, but he would have held that regulating pilots is beyond the states' power in any and all circumstances. This result would have left Philadelphia, New York, Boston, and other port cities astride the highways of commerce and able to demand, unchecked by Congress, tribute from that commerce with the interior.

The Cooley formula continues alive and well. See Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). It is essential to survival. The only probable modification through time has been abandonment of the notion that some kinds of commerce are beyond Congress' power to yield to yield to state legislation. United States v. Sharpnack, 355 U.S. 286 (1958), reenforced that particular doubt, holding that Congress can adopt future state laws

on a military enclave to which the state has ceded its jurisdiction to the United States. However, the "uniformity" branch is not important to the subject with which we are concerned. The Constitution commands uniformity for bankruptcy and naturalization laws, but conspicuously it does not specify uniformity for commerce.

And the commerce clause is the source of the only significant reason to discuss constitutionality of state legislation which we are now discussing. Equal protection, due process, and Article IV privileges and immunities clauses are, so far as decided cases are concerned, largely "also ran" arguments.

Three cases--only one of which has been concluded--constitute the principle of most of the case law on the question we are discussing. I shall deal with them not so much for their law or doctrine. That is diverse. They offer interesting and provocative examples of difficulty in deriving adequate doctrine from constitutional litigation.

These are the cases:

1. City of Altus v. Carr, 255 F. Supp. 828, aff'd, 385 U.S. 85 (1966).

Altus, Oklahoma, was faced with a population increase from 10,000 to more than 23,000 people and

a water crisis because of the location of a military base nearby. Relying on a 1963 opinion by the Attorney General of Texas, the city bought a right from a Mr. and Mrs. C. F. Mock to pump water from the Mock's Texas farm. Altus had floated a bond issue and spent a substantial sum when the local Texas legislator persuaded his colleagues to enact a law ordering water export stopped without the Legislature's express approval. Then the Legislature went home for the rest of a biennium, and Altus brought suit before a three-judge federal court in Texas. That court held that the statute unreasonably burdened commerce. The Supreme Court affirmed on direct appeal by per curiam order, without citation or opinion.

The result is surely right. One can argue about its ratio decidendi. I think it rests primarily on reliance, creating estoppel. The Texas Supreme Court has recently expressed its belief--which is more authoritative than the United States Supreme Court about Texas law--that the result rests on continued adherence to the doctrine of Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (1843), which insists that the owner of the land surface "owns" all the water he can pump from beneath his land. Friendswood Development Co. v. Smith-Southwest Industries, 576 S.W.2d 21, 26 (Tex. 1978).

Those who want to believe that McCarter is

wrong, rest on the District Court's analogy between percolating groundwater and natural gas. Holmes, they point out, dissented in both those cases. Pennsylvania v. West Virginia, 262 U.S. 533 (1923), West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). I think the analogy is too strained to be helpful. Natural gas is trapped in the earth and does not move, like water. Gas is the subject of sale in interstate markets, as water is not. And gas is not renewable; a gas well has no "safe yield." Most important, there is no "gas right" with any resemblance to a "water right."

2. State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981), prob. juris noted, 102 S. Ct. 631 (1981).

If the Nebraska statute challenged in Sporhase survives unscathed, every other statute is likely to do so also. On the facts in the Jurisdictional Statement, the Sporhases are the Davids, defending against a bureaucratic Goliath the right to pump water from their own well for use on their own farm. That right is attacked by the State of Nebraska only because part of their farm is in Colorado, and Nebraska's objection appears to be based not on what will happen to the aquifer or its contents, but on the fact that Colorado law does not recognize a right to irrigate the Nebraska portion of a Colorado farm if positions of the states were reversed.

Furthermore, Nebraska groundwater law is a recent and uncertain version of the "reasonable use" doctrine. Unlike the other cases, Sporhases' attack includes due process grounds. The Nebraska Court's opinion is plausible. It says that water is not a "commodity" in interstate commerce, pointing to the undeniable fact that what is paid for is usually not water but service in delivering water. And, alternatively if that argument is rejected, the burden on commerce is not unreasonable. Chief Justice Krivosha dissented on Fourteenth Amendment and state constitutional grounds, emphasizing the unreasonableness of making the Sporhases' right depend on Colorado law.

The broadest Supreme Court opinion might say of the Nebraska embargo-reciprocity statute "unconstitutional," or "unconstitutional on its face," or "unconstitutional as applied." An opinion which stopped with only one of those terms might well fail to give any clue about the nature of the constitutional defect, or the freedom of other states to legislate. And even an illuminating dictum, confined to the facts of the case, might not illuminate. We do not know from the Nebraska Court's opinion whether the Sporhase well in Nebraska pumps intrastate or interstate water. (Mr. John P. Frank, I hope, will tell you about

that issue in the El Paso v. Reynolds litigation. El Paso's proposed new wells would be located in New Mexico, and would pump from two aquifers, both interstate in a technical sense, but the water they would reach is mostly intrastate water which can be pumped only in New Mexico.)

3. Imperial County v. Munoz, 667 F.2d 811 (9th Cir. 1982).

This case involves export of groundwater from Imperial County by tank truck to Mexico, contrary to a county ordinance confining delivery to Imperial County. Whether the quantities are significant or the purpose of its use is unclear. Earlier litigation involving the Imperial pumper terminated when the California Supreme Court held that one accepting a license from the County cannot attack the constitutionality of the statute under which it was issued. County of Imperial v. McDougal, 19 Cal. 3d 505, 564 P.2d 14 (1977), app. dismissed, 434 U.S. 944 (1977). In County of Imperial v. Munoz, 449 U.S. 54 (1980), litigation involving the Mexican federal plaintiffs was remanded to determine if they were strangers to the state court proceeding.

In 1982 the Court of Appeals of the Ninth Circuit holds that the prior Supreme Court opinion offers no barrier to reaching the merits, and on

the merits, the county ordinance which confined tank trucks to deliveries within the county is unconstitutional. The ordinance has been selectively enforced. 667 F.2d at 812 n. 1. And the commerce clause does not permit barring sales of water to Mormons or anyone else. 667 F.2d at 816.

The readiness with which the Court reached the commerce clause issue should be a source of concern to those who represent states in defense of their water laws. However, they may be comforted to be reminded that counties in California do not administer water rights. Moreover, the case if it is decided by the Supreme Court on the merits is likely to be decided on a basis which leaves interstate and international water rights law beyond the reach of freely enterprising tank trucks, or any other water-carrying devices.

International water rights are the subject, almost exclusively, of agreement by treaty, just as interstate water rights are the province principally of control by interstate compacts. Like most law relating to water (but see N.M. Laws § 72-1-6 which makes all sources of water free to travellers and their animals (if the animals are not too numerous)),

treaties and compacts do not deal with de minimis quantities of water such as those which a man or a horse might drink. However, treaties with both Mexico and Canada control international water rights. They would fail to the extent there are significant alternative methods of diversion which the silent commerce clause constitutionally protects.

That concludes all of the cases which bear directly on the subject. However, a hydroelectricity case decided this year by a unanimous court should be discussed. New England Power Co. v. New Hampshire, 102 S. Ct. 1096 (1982), is a decision by Chief Justice Burger. In 1913, New Hampshire enacted a statute permitting a state commission to order power companies to cease exporting hydroelectric energy. The commission did so in 1980, and the Supreme Court of New Hampshire upheld the action based on New Hampshire's ownership of the bed of the Connecticut River, which extends to the Vermont side rather than to a boundary in midstream. The Power Companies, which are licensed by the FERC (formerly FPC), secured a unanimous reversal.

Only in one respect relevant to water rights is the opinion unfortunate. Section 201(b) added as part of Title II to the Federal Power Act in

1935 says that the 1935 federal statute shall not "deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. § 824(b) (1976). The Court disposes of this as "a standard 'non-preemption' clause." 102 S. Ct. at 1103. It does not affect the result because the state has no such power.

This smacks of the treatment which the Court has frequently given federal legislation dealing with navigability and electrical energy. A classic example is the holding in Arizona v. California, 283 U.S. 423 (1931), that Congress meant what it said when it insisted that Hoover Dam was built to aid navigation. Cf. United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), where Justice Robert Jackson wrote the opinion for the Court, holding a like recital in the Central Valley Project to be "fictitious." In First Iowa Hydro-Electric Co. v. FPC, 328 U.S. 152 (1946), the Court read Section 9(b) of the Federal Power Act (16 U.S.C. § 802(b) (1976)) out of the statute. The section requires an applicant to submit "satisfactory evidence" of compliance with state law and Section 27 (16 U.S.C. § 821 (1976)) is a "non-preemption" provision, both held

to be meaningless.

One can hypothesize that a Justice not as conscientiously devoted to the "plain meaning rule" of statutory construction as Chief Justice Burger would have rested the decision on the other ground argued--statutory preemption, not the silent commerce clause. Statutory preemption puts responsibility on the responsible agency which can change the result of a judicial decision much more directly than does a negative commerce clause holding. The latter attributes primary responsibility to James Madison, and associates, for a result which Congress can change if there are sufficient reasons. However, negative commerce clause cases and preemption cases are otherwise indistinguishable in their result. Pre-emption as a Preferential Ground: A New Canon of Statutory Construction, 12 Stan. L. Rev. 208 (1959). Often both issues are litigated in the same case.

This choice of grounds of decision is important. If the states lose any essential power to administer their water rights, Congress should by every means at hand be called on to give the matter attention. Water rights--particular groundwater rights where the states should be encouraged to employ the skilled, but expensive management techniques they have been developing only since

1927--demand administration by governmental authority. That means by laws enacted by Congress if the states constitutionally cannot. Prolonged delay because of constitutional doubts would risk permanent damage to the nation's fragile and destructible groundwater aquifers.

The "doctrine" and the rhetoric in New England Power make it essential that the Court understand why water rights are unlike rights to hydroelectric power. This is what the Chief Justice said:

> "Our cases consistently have held that the Commerce Clause . . . precludes a State from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or the products derived therefrom." Id. at 1100.

These are the cases he cited, prefaced by an e.g.: Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma cannot bar export in quantity of its natural minnows); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey cannot bar Philadelphia garbage from its sanitary landfill), and the two natural gas cases earlier referred to: Pennsylvania v. West Virginia, 272 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

The principle stated by the Chief Justice is one with which no one would quarrel, subject to two exceptions. His word "consistently" has more than a touch of hyperbole, applied to Supreme Court cases on almost any subject, but particularly on interstate commerce. But far more important, this qualification is essential:

> "Preference to local residents is permitted when demonstrably necessary to the protection of the resource."

The minnow case (Hughes v. Oklahoma) is illustrative. There was no reason in the record, and none is justiciably noticeable, why Oklahoma wished to bar export of natural minnows, except one that the Court's opinion said had the flavor of "post hoc rationalization." Oklahoma apparently dreamed it up for the first time in the Supreme Court. For some reason, it might be better for the ecology to return natural minnows to the stream as bait, and to leave artificial minnows available for export. In addition, that is, to the impermissible reason to Oklahoma minnow growers from competition.

Hughes overruled one venerable precedent, Geer v. Connecticut, 161 U.S. 519 (1896), which held that a state owns its wildlife--feathered, furry, or finny--and because of "ownership" may

bar their export. The overruling produced a vigorous dissent, because Geer had a recent history of deferential citation, and everybody should know that state "ownership" is a fiction. All of us sometimes take a liking to a fiction. I was particularly fond of this one because I liked to think of the astonishment of a wild goose crossing an interstate boundary if he only knew what had happened to his "title." The fact is that "ownership" had ceased to be a useful word for this purpose. The overruling of Geer v. Connecticut in the long run should improve the law because it will be easier to understand. The line between percolating water in the ground and water in a Coca Cola bottle is not "title" or "ownership." For purposes of determining validity of one state's regulation, the line should relate to the effect and necessity of the regulation.

Thus, Texas lost in Altus v. Carr not because Texas courts label their groundwater doctrine "absolute ownership." That is a misnomer. But Texas lost because Texas' law does nothing to conserve its groundwater for use in Texas. This is true, or should be, insofar as "doctrine" of the commerce clause controlled the outcome.

Finally, this word of cheer. If the Court

fails to understand all this, it will not in any event decide the issue beyond the power of Congress to reverse the answer, just as Congress did in the Wheeling Bridge case. But it is quite possible that the Court may be persuaded that Congress has already made its policy clear.

Five years after Arizona v. California in 1963, the Congress reacted to that decision and to the awesome power it has. It enacted in 1968 the Colorado River Basin Storage Project Act, set up the National Water Commission to study transbasin diversions in general, and declared that for ten years the Secretary of the Interior should not even think about diverting water from the Columbia River to the Colorado Basins. That date has been extended until it is now 1988.

More significantly, however, it stated the criteria to be applied if diversions ever take place. Section 203 of the 1968 Act gives two protections to "the States and areas of origin" of the water that might be imported. Water is to be made available to them when they need it "at prices to users not adversely affected by the exportation of water to the Colorado River system." 82 Stat. 887 (1968), 43 U.S.C. § 1513 (a). Second, basins exporting "shall have a priority of right in perpetuity to the waters of that

river basin, unless otherwise provided by interstate agreement." Ibid. 43 U.S.C. § 1513(b).

That statute is repealable. But so is every statute Congress or any state legislature enacts, except insofar as private and vested property rights have attached, and then repeal is still possible. Property rights make only the difference that compensation must be paid for their taking. U.S. Const., Amend. V. Nevertheless that statute provides a strong statement, until and unless it is repealed, of a policy of Congress to protect states and regions in their water rights until they are given the assurance Congress provided in 1968.

Can that assurance be provided by El Paso in the litigation Mr. Frank will describe? I would suppose not, because El Paso is only a corporate creature of the State of Texas. Texas alone can make an effective agreement with the State of New Mexico. Can it be provided by Nebraska or by Colorado in Sporhase? Of course not. Only Nebraska parties are before the court.

Many of the various state laws are oddly drawn in response I think to some odd case law. In Kansas v. Colorado, 206 U.S. 46 (1907), the Court held that Kansas' case was not ripe. In Colorado v. Kansas, 320 U.S. 383 (1943), it held

that Kansas had slept on its rights. That sort of thing tends to destabilize a conscientious legislative draftsman. There is no doubt that if all of these so-called embargo laws were to be literally applied to the full extent of their apparent terms, many of them would be unconstitutional in many applications. A motorist in New Mexico cannot, I think, be constitutionally forbidden to fill his radiator from a well and drive on out of the state. At least not if the well owner permits.

But no such attempt at enforcement by any state is at all likely. If litigation results in broad declarations of unconstitutionality, the result will probably be to make the problem harder to solve, because they will become impossible to understand. The basic reality, I think, can be put in two sentences. I hope that I have persuaded everybody within sound of my voice that they are true.

By invoking the negative implications of the commerce clause the only result which any federal court can produce is to prevent, in whole or in part, the administration of the only law of water rights which now exists in the United States or is likely soon to be created. A law of water rights, well administered, is essential to civilization in

in all of the states which have been created from the desert.

Addendum

The direction from Professor David Getches was to omit footnotes from this paper. That was a good idea. But it resulted in having citations to a number of recent Supreme Court cases left over because they do not fit well in text. However, they are all interesting cases from which the Superme Court might find starting points to construct doctrine should it attempt to take a different course from that which, I have argued, physical necessity will compel it to follow. The only generality which all the recent cases seem to support, relevant to the subject matter of this paper, is that the state prevails whenever five or more justices are persuaded that Congress has either intended to occupy a particular field or to relinquish it, or the state has an interest in conservation, environmental protection, economic policy, or tax revenue which the challenged state law plausibly serves. And that interest must be different from mere "protectionism."

Here are the important cases:

A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976). A ban on milk imports based on the exporting state's failure to give reciprocity is not a constitutional health measure.

Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978). State can impose sharply higher fees on nonresident big game hunters.

Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981). State can impose steep tax -- up to 30 percent of value -- on coal mined in state.

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). State cannot unreasonably limit out-of-state interests in offshore fishing.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). State can bar refiner-owned gasoline service stations even though refiners are all out-of-state.

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). State can prefer local sellers and processors of junked autos in subsidized program to rid state of hulks.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). Statute requiring 50 percent or

more of nonrefillable milk containers to be made of local wood products is constitutional, even though state Supreme Court was persuaded that purpose was to aid local industry impermissibly.

Hicklin v. Orbeck, 437 U.S. 518 (1978). "Hire Alaska" law is invalid because it does not bear sufficient relationship to its purpose in dealing with Alaska unemployment.

Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977). North Carolina law regulating apple packaging to disadvantage of Washington apple growers is invalid based on close examination of purpose and impact of state law and alternatives.

Lewis v. BT Investment Managers, 447 U.S. 27 (1980). Prohibition against out of state ownership by financial institutions of in-state investment advisory services is invalid.

Reeves v. Stake, 447 U.S. 429 (1980). State-owned cement plant, survivor of post World War agrarian populism, can prefer in-state customers when cement is short.

Western & S.L. Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981). Retaliatory insurance tax on out-of-state insurers held valid on basis

of McCarran-Ferguson Act, relinquishing insurance to state control after United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944), decided that insurance is commerce.