

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Boundaries and Water: Allocation and Use of a  
Shared Resource (Summer Conference, June  
5-7)

1989

---

6-6-1989

### State Resource Sovereignty in a Post-Sporhase World: The Hueco Bolson

A. Dan Tarlock

Follow this and additional works at: <https://scholar.law.colorado.edu/boundaries-and-water-allocation-and-use-of-shared-resource>



Part of the [Administrative Law Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Environmental Health and Protection Commons](#), [Environmental Policy Commons](#), [Hydrology Commons](#), [Litigation Commons](#), [Natural Resource Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

---

#### Citation Information

Tarlock, A. Dan, "State Resource Sovereignty in a Post-Sporhase World: The Hueco Bolson" (1989). *Boundaries and Water: Allocation and Use of a Shared Resource (Summer Conference, June 5-7)*. <https://scholar.law.colorado.edu/boundaries-and-water-allocation-and-use-of-shared-resource/14>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

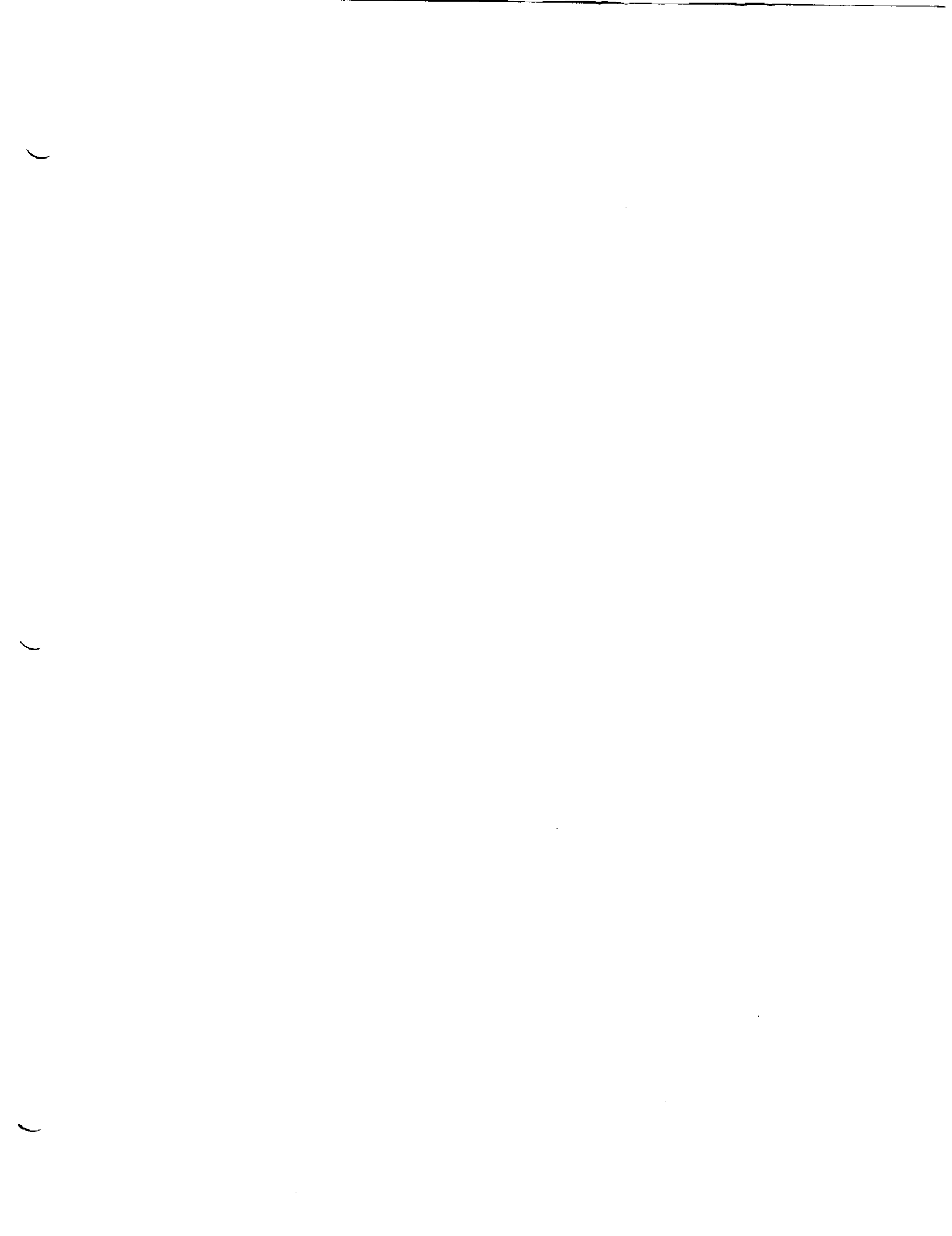


A. Dan Tarlock, *State Resource Sovereignty in a Post-Sporhase World: The Hueco Bolson*, in BOUNDARIES AND WATER: ALLOCATION AND USE OF A SHARED RESOURCE (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1989).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

STATE RESOURCE SOVEREIGNTY IN A POST-  
SPORHASE WORLD: THE HUECO BOLSON

A. Dan. Tarlock  
Chicago Kent College of Law  
Illinois Institute of Technology



STATE RESOURCE SOVEREIGNTY IN A  
POST-SPORHASE WORLD: THE CASE OF  
THE HUECO BOLSON

- I. The Resource Conflict: The Hueco Bolson is an interstate aquifer shared by New Mexico and Texas and each states seeks to control its sustained yield. The current, on-going conflict between the two states is a modern twist on the classic interstate allocation problem: a faster growing downstream state claims a disproportionate share of the interstate "stream" against the slower growing upstream state. The twist is that El Paso seeks to perfect a water right under New Mexico law, but ultimately relies neither on the grace of New Mexico or the reciprocal enforcement of interstate priorities. Instead, Texas asserts that New Mexico has a federal constitutional duty to approve applications for out of state groundwater appropriations.
  
- II. The Allocation Problem: El Paso claims that it will have a population of 2,100,000 by 2080 and that it will require 300,000 acre feet per year to serve this population. El Paso has 80% of the population in the region, which it defines as the reach of the Rio Grande from Caballo Reservoir in New Mexico to

Fort Quitman on the Texas-Mexico border. New Mexico uses the water primarily for irrigated agriculture.

- A. Sources of El Paso's Existing Supplies: El Paso draws most of its water from the Texas side of the Hueco Bolson aquifer, 90% of which is owned by the United States, and is mining it. The city estimates that it has 10,000,000 acre feet in its water account including Fort Bliss and that it will be depleted in 30 to 50 years. The city relies on groundwater because the Rio Grande treaty only apportioned water for agricultural use and the city initially did not contract with the Bureau of Reclamation for a share of the stream flow appropriated by the Bureau to construct Elephant Butte dam in New Mexico. See Reynolds and Mutz, Water Deliveries Under the Rio Grande Compact, 14 Nat. Res. J. 201 (1974). Subsequently, the city did contract with the Bureau for an allocation of water for land within the city limits and for wild or surplus irrigation water. Day, Urban Water Management of an International River: The Case of El Paso-Juarez, 15 Natural Resources L. J. 453 (1975).

B. Conservation: Until the early 1970s, El Paso offered a 20% discount for summer use of water to encourage a humid landscape in an arid environment. The city is now implementing various conservation measures, but argues that it has exhausted its water conservation options.

C. Further References:

Schenkkan, The El Paso Case:  
Interstate Issues in Groundwater  
Regulation, Water Law Conference  
Proceedings (University of Texas  
School of Law 1985).

I. Clark, Water in New Mexico: A  
History Of Its Management and  
Use (1987).

III. The Law of Interstate Allocation: States have a duty to share interstate rivers, but the extent of sharing remains undefined because the "law" of interstate sharing in a mix of Supreme Court rules, compacts and legislation.

1. Fair is Fair? A state is entitled to a fair share of an interstate watercourse, which presumptively includes aquifers. *Kansas v. Colorado*, 206 U.S. 46 (1907). The law of equitable apportionment does not give adequate protection to unallocated water because prior uses are entitled to preference to protect existing economies. *Wyoming v. Colorado*, 259 U.S. 419 (1922).
  
2. Locking In Future Supplies: A state may reserve a share and an interstate watercourse for future use by an interstate compact, or by a congressional apportionment. Cf. *ETSI v. Missouri*, \_\_\_ U.S. \_\_\_ (1988). *Arizona v. California*, 373 U.S. 546 (1963). See Note, *New Mexico Continues to Study Water Embargo Measures: A Reply to the State Water Law Study*, 16 *Texas Tech. L. Rev.* 939 (1985).
  
3. Dormant Commerce Clause Duties: A state may have a duty to share its portion of an interstate aquifer because the dormant commerce clause prohibits state protectionism. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).



IV. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982): Judicial Deregulation of State Permit Systems: The Supreme Court decision in this case is one of the most important water decisions rendered by the Court because the application of the dormant commerce clause to state water allocation regimes undermines all of the assumptions upon which state allocation institutions have been premised.

A. Nebraska's Unconstitutional Statute: The statute prohibited withdrawals for out of state groundwater use unless the host state granted reciprocal export privileges, which Colorado did not in part to conserve its share of the Ogallala aquifer. *Thompson v. Colorado Groundwater Commission*, 575 P.2d 372 (Colo. 1978).

B. Prior case law: The Supreme Court originally held that state resource conservation measures were immune from the dormant commerce clause. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) held that export bans did not violate the dormant commerce clause. The cases were always wrong because conservation is simply the application of the state's

police power to property. Subsequent cases eroded McCarter, West v. Kansas Natural Gas Co., 221 U.S. 229 (1911); Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Altus v. Carr, 255 F. Supp. 828 (W. D. Tex.), summarily aff'd, 385 U.S. 35 (1966), and thus Sporhase was not a surprise.

C. Holding: The Nebraska statute was unconstitutional because it was not an even-handed conservation statute and the state failed to demonstrate a close fit between the reciprocity requirement and the conservation of groundwater.

D. Did the Court Really Mean What it Held? The "Demonstrably Arid State" Exception: Justice Stevens recognized both the tradition and continued importance of state allocation primacy and suggested that some states could demonstrate a relationship between export bans and conservation. Cf. Maine v. Taylor, \_\_\_ U.S. \_\_\_ (1986).

V. The Higher Avoidance of Sporhase: A broad reading of case prevents a state from controlling the future use of unappropriated water. Not surprisingly, the western states have sought to limit the holding and to reconcile the holding with the Court's traditional deference to state allocation primacy. Commentators have suggested the following theories to avoid the invalidation of state allocation schemes that prefer in to out of state users.

A. The "Equitable Apportionment Exception." See Trelease, State Water Law and State Lines: Commerce in Water Resources, 56 U. Colo. L. Rev. 347 (1985). and U Hon, The El Paso Case: Reconciling Sporhase and Vermejo, 23 Nat. Res. J. ix (1983).

B. Water Marketing: Water marketing is premised on both legal and economic assumptions.

1. The Supreme Court has held that the dormant commerce clause does not apply when the state is a market participant, Reeves, Inc. v. Stake, 447 U.S. 429 (1980), as opposed to a regulator. South-Central Timber Development Co.,

Inc. v. Wunnicke, 467 U.S. 82 (1984). See generally Anson & Shenkkan, Federalism, the Dormant Commerce Clause and State-Owned Resources, 59 Texas L. Rev. 71 (1980) and Rodgers, Limits on State Activity in the Interstate Water Market, 21 Land & Water L. Rev. 357 (1986)

2. The economic assumptions are that water should be treated like oil and that there is an inter-state market for water.

C. State Allocation Primary Reborn: Traditional sovereignty requires judicial deference to state "reservations." Trelease, Interstate Use of Water - "Sporhase v. El Paso, Pike & Vermejo," 22 Land & Water L. Rev. 315, 321 (1987) has set forth an elaborate argument that unappropriated water is still subject to state control:

Sporhase is right and El Paso is wrong. States can live with Sporhase's ruling that a state cannot tell its citizens that they cannot sell out of state when it permits them to sell within the state. This applies to both sales of water and

sales of water rights. A state cannot expect to prevent the interstate sale of water rights to "preserve the neighborhood" any more than it could prevent a steel mill from closing in a factory town or dictate the way of life to its rural inhabitants. On the other hand, the states cannot live with El Paso. El Paso would require a state to sit by and see other states deprive its people of future opportunities for growth and development, while preserving only "noneconomic" water for the public health and safety of stagnating communities. Without overruling Sporhase, but with some clarifications with regard to shortages and explanations of legitimate local interests, much water might be saved within states on a territorial-opportunity cost theory, discussed later, without freezing out neighboring cities. Neighboring cities might be put to more expense either because they have to pay the opportunity costs or because they must available, though more expensive, source in their own state. The remainder

of this article will examine these issues.

VI. The Broader Question: How Should Interstate Groundwater Be Allocated. The Huceo Bolson controversy raises all the institutional issues of interstate allocation.

A. State Administrative Allocation Within state Boundaries. This is the status quo but it presumptively offends the national common market ideal upon Sporhase is premised.

B. Equitable Apportionment. This allocation solution is premised on the idea that interstate resources should be shared among common states. See Utton, In Search of An Integrating Principle For Interstate Water Law; Regulation versus The Market Palace, 25 Natural Resources J. 985 (1985).

3. Market Allocation. The market recognizes no borders or willing buyers and sellers. The market further tends to discount claims that the value of a resource will rise over time

and thus should be reserved for future use.

a. Resource economists argue that the function of the law should be to define exclusive property rights to the maximum extent possible to facilitate transfers. See Anderson, in T. Anderson, *Water Rights Scarc Resource Allocation, Bureaucracy, and the Environment* (1983).

b. The Dormant Commerce Clause is a market facilitating doctrine because it ignores state boundaries. Varat, *state Citizenship and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981).

D. State Allocation Through Legislative Bargains with Interstate Appropriators. One function of the dormant commerce clause is to cure failures in the political process. There is no need to invalidate state legislative processes open to out-of-state interests. See Tarlock, *So It's Not "Ours", Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 23 Land & Water L. Rev. 137 (1983)

VII. State Law: "Equitable apportionment" is difficult because the two state had different groundwater regimes and have historically placed different values on conservation.

A. Texas: Texas follows the absolute ownership rule of groundwater. Groundwater is the property of the overlying land owner and is subject to capture, City of Sherman v. Public Utilities Commission of Texas, 643 S.W.2d 681 (Tex. 1983). There are minimal restrictions on its use:

1. Negligent pumping. Friendswood Development Co. v. Smith Southwest Industries, Inc., 576 S.W.2d 75 (Tex. 1978).

2. Critical areas may be designated but the state relies on education and the voluntary adoption of conservation technologies.

B. New Mexico: New Mexico was the first state to conserve groundwater by applying the doctrine of prior appropriation. New Mexico enacted a groundwater appropriation statute in response



to pressure from the Federal Land Bank which refused to make loans in the Pecos Valley because artesian pressure had steadily declined since settlement. *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929) and *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950).

1. New Mexico has firmed up groundwater rights by (1) defining the allowable extent of interference with other wells, (2) by limiting the "right to lift", and (3) by allowing mining of designated aquifers. *Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771 (1966). See generally Grant, *Reasonable Ground-water pumping Under the Appropriation Doctrine: The Law and Underlying Economic Goals*.
2. Ground and surface water rights are coordinated through the protection of prior rights in an interconnected source. *Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1962).

VIII. New Mexico's Response Legal Response: New Mexico has refused to allow El Paso's appropriations or to bargain with the city. Instead, it has adapted public interest review to a post-Sporhase world.

A. New Mexico initially applied its anti-export state and defended it on the ground that it needed the water for a long-term statewide water shortage, but this "arid state" defense dried up. *El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) rejected the defense because water was just another commodity: "Outside of fulfilling human survival needs, water is an economic resource."

B. New Mexico enacted the following statute: N.M. Stat. 72-12B-1

[A]. The state of New Mexico has long recognized the importance of the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of New

Mexico also recognizes that under appropriate conditions the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.

[B]. Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of New Mexico and transport it for use outside the state or to change the place or purpose of a water right from a place in New Mexico to a place out of that state shall apply to the state engineer for a permit to do so. Upon the filing of an application, the state engineer shall cause to be published in a newspaper of general circulation in the county in which the well will be located or the stream system from which the surface water will be taken, at least once a week for three consecutive weeks, a notice that the application has been filed and that objections to the granting of the application may be filed within ten days after the last publication of the notice. Any person, firm or corporation or other entity objecting that

the granting of the application would impair or be detrimental to the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or objections. Provided, however, that the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions shall have standing to file objections or protests. The state engineer shall accept for filing and act upon all applications filed under this section in accordance with the provision of this section. The state engineer shall require notice of the application and shall thereafter proceed to consider the application in accordance with existing administrative law and procedure governing the appropriation of surface or ground water.

[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.

D. El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984) rejected three challenges to the statute but upheld a fourth:

1. Conservation within the state is not a per prohibition against out of state export.
2. Conservation and public welfare are meaningful standards for in-state users in light of the long tradition of public interest review.
3. Concern for the public welfare of the citizens of New Mexico is not intrinsically discriminatory. [597 F. Supp. at 694]: A state may favor its own citizens in times and places of shortage. Sporhase, 458 U.S. at 956-957, 102 S. Ct. at 3464-3465. Of course, this does not mean that a state may limit or bar exports simply because it anticipates that one day there will not be enough water to meet all future uses. Even some of the most water-abundant states predict shortages at some future date. The preference envisioned by the Supreme Court must be limited to the times and places where its exercise would not place unreasonable burdens on interstate

commerce relative to the local benefits it produces.

On the other hand, it would be unreasonable to require a state to wait until it is in the midst of a dire shortage before it can prefer its own citizen's use of the available water over out-of-state usage. A limited preference which could not be exercised until water resources were almost depleted would be no preference at all. If the limited preference is to be meaningful the states must be permitted to prefer local usage while there is still water to conserve. The proximity in time of a projected shortage, the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage are all factors which must be weighed when balancing the total interests served by the exercise of a preference against the burdens it places on interstate commerce.

New Mexico need not wait until the appropriate time and place of shortage arises to enact a statute limiting



exports. The State may enact a law to provide for future contingencies. If facially valid, any constitutional attack on such a statute for violation of the Commerce Clause must await its application.

Other factors which inform the determination whether a state's preference for its own citizens reasonably or unreasonably burdens interstate commerce are the degree to which the state claims public ownership of ground water and whether the availability of the water is in part the result of the state's conservation efforts. Sporhase, 458 U.S. at 956-957, 102 S. Ct. at 464-3465. These factors, as with those relating to the extent of shortages and the public welfare interests being protected, cannot be evaluated in a vacuum. Only when the defendants exercise a preference for the citizens of New Mexico can the local benefits from the preference be weighed against the resulting burden on interstate commerce.

4. The consideration of conservation and public welfare for only out of state transfers is facially discriminatory because it requires interstate commerce to shoulder the entire burden of conservation.

E. Moses Speaks But the Waters Do Not Divide: In the Matter of the Applications of the City of El Paso, Texas Nos. LRG-92 through LRG-357 and HU-12 through HU-71 found that "no water rights in New Mexico are needed by El Paso for a water development plan or to protect its water supply for reasonably projected needs within 40 years . . . "

1. El Paso will require 163, 000 acre feet by 2020 and has 167,420 acre feet available from the Hueco Bolson and Canutillo well fields and Rio Grande surface diversions.

2. Rio Grande Water is the most practical alternative source.

3. If the numbers are wrong, El Paso can condemn the necessary appropriative rights.

IX. New Mexico's Planning Response: Along with Montana, New Mexico have taken the most aggressive and thoughtful to Sporhase.

- A. The state funded a study of water needs and water marketing. Water Law Study Committee, Report to Governor Toney Anaya and the Legislative Council Pursuant to Laws 1983, Chapter 98, reprinted as Water Law Study Committee, The Impact of recent Court Decisions Concerning water and Interstate Commerce on Water Resources of the State of New Mexico, 24 Nat. Resources J. 689 (1984).
- B. A subsequent study, State Appropriation of Unappropriated Groundwater: A Strategy for Insuring New Mexico's Water Future (New Mexico Resources Research Institute and University of New Mexico, 1986) recommended:

1. State Appropriation of groundwater or purchase of groundwater rights could guarantee future long-term supplies.

The state may elect to appropriate a substantial amount of groundwater where available supplies exist, using a time horizon for development of 80-100 years. It would need to, concomitant with its application to appropriate water, develop a long-term plan for the use and development of the water resource and ultimately make the water available to actual water users for beneficial use. The most significant result of this strategy would be securing water supplies for future needs. In some areas of the state, the same result could be achieved through purchase by the state of existing rights with a lease-back arrangement to the owner until the owner no longer needs the rights. For example, in many areas of the state, the maximum depth to which a farmer can pump and still remain profitable is 230 to 250 feet. There may, however, be substantial amounts of water below that depth that could be put

to other commercial uses in the future. Therefore, as noted above, in those areas of the state, the state may wish to act now to begin to purchase rights and give the farmer a lease-back (in a sense, purchase "water futures") so that the balance of the aquifer is available over the long term if and when the financial base of these agricultural communities changes to other types of industries.

2. State Appropriation or purchase of groundwater may allow short-term marketing of water interstate to support New Mexico water projects.

The state may also wish to appropriate water in areas where the best market, at least in the near term, is out of state. Since water is an asset that can bring a high lease price and since the state needs revenues to develop other water projects throughout the state, leasing a portion of its water rights for use out-of-state or sale of water in bulk to out-of-state users could provide a source of badly needed revenues for areas

of the state that need substantial funds to develop public supplies. The benefit of this solution is that it allows New Mexico to capture revenue from an asset that otherwise is made available for free on the interstate market under the Sporhase decision. It would, of course, have to be understood that when the water is needed in New Mexico, the out-of-state use would end.

3. State Appropriation or purchase of groundwater could permit the state to develop and coordinate water transfer projects.

There will be areas of the state that, notwithstanding full use of water conservation technologies, may need to import water from other sources in New Mexico. This type of project could conceivably create conflict between the source area and the area to which the water is being transported. The only entity with jurisdiction over both areas is the state. The state, as owner, could

appropriate water in one area of the state for use in another while ensuring that: (1) the area from which the surplus water is taken is fully compensated for it, and (2) the area into which the water is being imported has met acceptable water conservation standards in advance. If such water transfers projects are left exclusively to regional development, experience in other states teaches us that intrastate water conflicts can develop that waste time and the limited economic resources of the state.

4. State Appropriation or purchase of groundwater could permit the state to develop and coordinate water importation projects where such plans are economically and hydrologically feasible.

The may be many areas of the state where the most rational source of a long term water supply is an out-of-state source that is proximate to a New Mexico community and distant from any water needs in a neighboring state. If the neighboring state has developed the water

supply, the choice may be to purchase the water from that state. If the neighboring state has not developed these supplies, and it is not inconsistent with the public welfare of that state, then New Mexico may seek to develop the water supply and make it available not only for New Mexico users, but also for users in the other state.

X Conclusion: What are the lessons of El Paso?