Observations on Groundwater Law from the Federal Perspective

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OBSERVATIONS ON
GROUNDWATER LAW
FROM THE FEDERAL PERSPECTIVE

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GROUNDWATER: ALLOCATION, DEVELOPMENT AND POLLUTION

A short course offered by the Natural Resources
Law Center University of Colorado School of Law
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I. The federal perspective on groundwater law has undergone a significant evolution during the past twelve months.

A. The federal judiciary has, after years of anticipation by water lawyers, injected federal constitutional limits on state decisions involving interstate allocation of groundwater supplies.

1. In *Sporhase, et al. v. Nebraska ex rel. Douglas*, No. 81-613 (decided July 2, 1982), the U.S. Supreme Court struck down a Nebraska law which restricted the export of groundwater from the state. The Court held it was an impermissible burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

2. In *City of El Paso, et al. v. Reynolds, et al.*, No. 80-730HB (Jan. 17, 1983), the federal district court for the District of New Mexico struck down a set of New Mexico laws which precluded the use of New Mexico groundwater by the City of El
Paso in Texas. The court held that the laws also violated the Commerce Clause.

B. In the wake of the Sporhase and El Paso rulings, there has been considerable congressional activity, including several proposals for federal legislation to respond to the rulings. Much of this activity has occurred in the context of pending legislation to grant the power of eminent domain to coal slurry pipeline companies.

C. The executive branch of the federal government, including the Department of Justice, has spent considerable effort analyzing both the recent bills and providing counsel to Congress in this area.

II. The Reagan Administration joins those who are firmly committed to maintaining the historic primacy of state law in the area of the allocation of waters, including groundwaters. The recent court decisions have rekindled the debate regarding how "state primacy" is best achieved.

A. At the outset, development of appropriate federal perspective on recent
developments requires careful review and assessment of *Sporhase* and *El Paso*.

1. In striking down Nebraska's reciprocity requirement, the *Sporhase* Court addressed three basic issues (copy of opinion attached).

   a. **Whether groundwater is an article of commerce and, therefore, subject to congressional regulation:** The Court answered this in the affirmative, discarding the theory that state "ownership" defeated congressional power. The Court stressed the multi-state character -- both physical and economic -- of groundwater.

   b. **Whether the Nebraska restrictions on the interstate transportation of groundwater imposes an impermissible burden on Commerce:** The Court agreed that conservation was a legitimate important purpose but could not justify Nebraska's reciprocity
requirement which, due to Colorado's export ban, prohibited export to Colorado, because there was no "close fit" between the requirement and conservation. The Court held that other facially-discriminatory conservation requirements in Nebraska law were valid.

c. **Whether Congress has granted the states permission to engage in groundwater regulation that would otherwise be impermissible:** The Court held that neither specific interstate compacts nor federal statutes deferring to state water law revealed the explicit congressional intent necessary to remove Commerce Clause constraints.

2. In *City of El Paso v. Reynolds*, the federal district court invalidated New Mexico's statutory constitutional prohibitions on the interstate transportation of groundwater which
blocked use of New Mexico ground-
water by El Paso, Texas (copy
of opinion attached).

a. The court rejected New Mexico's threshold defense that the Rio Grande Interstate Compact, not the challenged laws, blocked the use of the groundwater by El Paso. That Compact, according to the court, did not address the issue and, in any event, New Mexico had not established that the prohibition was necessary for adherence to the Compact.

b. The court reasoned that New Mexico's restrictions amounted to impermissible burdens because they were facially discriminatory, yet not justified in terms of needs for "human survival" (i.e., public health and safety), but only "public welfare" needs.
c. The court also held that even if the expressed purpose of the restriction was public health and safety, the New Mexico laws were not sufficiently tailored to serve that purpose because there were no restrictions on in-state use.

d. Finally, the court ruled that New Mexico could not justify its ban on the grounds (explicitly approved by Sporhase Court) that it was an arid state where intrastate transfer was feasible regardless of distance. The court concluded no shortage existed in New Mexico and no concrete plans for intrastate transportation facilities were evident.

B. Although Sporhase and El Paso are very significant rulings, to those of us committed to state determination of water allocation, it is not clear, upon review, how serious a threat they present to state primacy.
1. These decisions were not totally unexpected. Water lawyers, some dreading, others demanding, but all anticipating, such a ruling for years.

2. It is not clear how significant a problem Sporhase presents because it left states with considerable discretion and power over waters.

   a. Court rejected state ownership as legal fiction but that holding was consistent with other recent decisions rejecting theories of "ownership" of other natural resources.

   b. Court recognized that state control of groundwaters must be far-reaching because:

      i. state regulation of the use of water is at the core of its police power.
ii. states have developed a legal expectation, fostered by congressional legislation and judicial decrees, that they may restrict waters within their borders.

iii. state ownership claims may be "fictitious" but they are sufficient to support a limited preference for a state's own citizens.

iv. states have acquired additional rights to water within their borders due to their continuing conservation efforts.

c. Although the Court struck down the reciprocity requirement, the Court approved of another aspect of Nebraska law -- a conservation restriction that applied only to out-of-state groundwater
exports -- notwithstanding that it was facially discriminatory.

d. Court even said a complete ban might be justifiable in certain circumstances.

e. Court's basic holding was, therefore, that a discriminatory law must be narrowly drawn in terms of legitimate objectives.

3. El Paso decision does go further than Sporhase, but a district court decision is clearly not of same significance as Supreme Court ruling.

a. El Paso court confined legitimate scope of facially-discriminatory state restrictions on water only to those necessary for "health and safety" -- thus wholly excluding sound economic justifications. This is considerably narrower than Sporhase and not compelled by it.
b. El Paso court discounted legitimacy of state consideration of "future" shortages. This is also further than Sporhase compelled.

c. In any event, New Mexico restrictions would not even have passed muster under the less harsh Sporhase analysis because those water laws make no concerted effort to conserve water for future use or direct to most productive use now.

B. Still, no doubt that immediate practical effect of these decisions on state water law is significant.

1. Most western states have not developed a record to justify facially-discriminatory water laws such as export bans and reciprocity requirements. These laws are now vulnerable to judicial invalidations. According to a recent NWF compilation:
a. At least seven western states have absolute bans on groundwater export: Colorado, Idaho, Kansas, Montana, New Mexico, Oregon, and Wyoming.

b. At least five other western states have reciprocity requirements: California, Nebraska, Nevada, South Dakota, and Washington.

c. At least two other western states have discriminatory laws providing state agency authority to forbid exports: Arizona and Utah.

2. Thus, practical upshot of Sporhase and El Paso is that states will now have to craft water laws carefully, including groundwater laws, provide for a comprehensive conservation and management plan that justifies preference for in-state uses. Notably, in Sporhase, Court found that facially-discriminatory groundwater conservation
requirements directed solely at exports could survive scrutiny.

III. Responding to Sporhase and El Paso:
Federal Legislation, Interstate Compacts, and Better State Laws.
A. Federal legislation and risks of congressional overreaction.
1. It is well settled that Congress may authorize otherwise permissible burdens on interstate compacts. See, e.g., Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). Question of whether and how Congress should do so in response to Sporhase and El Paso is a difficult question.
2. The broader the legislation, the more difficult it will be to control interest groups encumbering legislation with amendments;
3. Extremely difficult to draft broad language and eliminate unintended implications, including unintentionally affecting some areas and unintentionally failing to affect others;
4. Upshot of any congressional action would be adverse precedent of the federal government having entered into the field of state water allocation.

B. Examples of current congressional proposals.

1. Much recent activity in context of pending coal slurry proposals. S.1844 and H.R. 4230 in 97th Congress and H.R. 1010 in 98th Congress all appear to be narrowly-drawn legislative responses to Sporhase in the context of providing federal eminent domain authority to coal slurry pipelines (copies of pertinent provisions of all three bills attached). Such a narrow one-issue approach is:
   a. Less likely to have unintended consequences.
   b. Less likely to have broad negative implications because shows Congress clearly intended to affect only one particular area.
2. Proposal by Congressman Regula (H.R. 1207 (copy attached)) to sanction generally state control of interstate transfer of waters, including groundwaters.

a. Language of the bill:

Sec. 2. "The regulation of the interstate transfer of water shall be subject to the laws of the several States which relate to the regulation of the interstate transfer of water."

Sec. 3. "No Act of Congress pursuant to the Commerce Clause of the United States Constitution shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the interstate transfer of water."

b. Language of bill borrowed from prior congressional sanction of state regulation of insurance approved by Supreme Court in Prudential
Meaning of business of insurance, however, more easily confined than regulation of waters.

c. Bill notably fails to provide exception for existing or future federal legislation that relates to the interstate transfer of water (e.g., Colorado River Basin Project, 43 U.S.C. 616aa-1 et seq., Boulder Canyon Project Act, 43 U.S.C. 617 et seq.).

d. There are numerous existing federal laws, the policies and purposes of which could potentially be frustrated by state water laws governing interstate transfer. This broad provision might limit federal preemption even in rare circumstances when implicit preemption is
legitimate (e.g., military or national interests at stake).
e. Intended scope of bill difficult to discern from language of bill alone. "Interstate transfer of water" is ambiguous. It may or may not include all state regulation governing acquisitions, use, or disposition of water.
f. This bill demonstrates problems with overbroad responses to Sporhase and El Paso. At least the potential consequences of such a broad approach should be carefully studied before Congress enters the domain of state water allocation.

3. Proposal by Midwestern congressmen (H.R. 1749) to prohibit any state from selling or otherwise transferring interstate waters located in such state for use outside such state unless all
states in the drainage basin consent to such sale or transfer.

a. No apparent constitutional problems with proposal.

b. This bill, however, suggests a continuing federal supervisory role over extraterritorial diversions, arguably inconsistent with state primacy.

c. Significance of this proposal is reliance on interstate compacts (discussed further below).

B. Benefits of Leaving Initial Responses to the States.

1. States are in best position to respond to challenge of Sporhase.

a. Western states must inventory and assess the ability of nondiscriminatory laws to provide adequate protection to water supplies.

b. States could rely more on the enactment of nondiscriminatory laws (e.g., Montana's declaration that coal slurry not a
"beneficial use" is suggestive of possibilities).

c. States need not surrender to the narrow reading of Sporhase in El Paso.

i. the Supreme Court has explicitly recognized the propriety of preference to in-state uses, perhaps even absolute bans, and challenges the states to demonstrate now to the courts that their preference for in-state uses is necessary for water conservation and management.

Comprehensive groundwater planning with concrete efforts to address shortages will be central to making such a showing.

ii. "health and safety goals" need not be the only legitimate basis
for in-state preference under Sporhase.

2. Of course, individual state measures will never solve all problems of interstate allocation conflicts.

C. The Need for Interstate Compacts.

1. Groundwater allocation conflicts between states do exist and cannot be ignored. Need mechanism for dispute resolutions.

2. Sporhase and El Paso rulings underscore problem of interstate allocation conflicts, but did not create it.

3. Existing interstate water compacts do not cover enough of the hard allocation decisions in the West.

4. In present vacuum, states are too often left with vagaries of judicial application of federal common law ("equitable apportionment") or unilateral congressional intervention to resolve allocation disputes.

5. Alternative of interstate compacts is sensible and consistent
with the key principle of state primacy. But development of compacts will not be easy. It will require hard choices and sacrifices by states.

D. Mechanism for Establishing Interstate Compact.

1. Art. 1, § 10, cl. 3 of the U.S. Constitution allows for interstate compacts only with congressional consent (once consented to, compacts have status of federal law).

2. Congressional consent may be given in advance or after the fact, either explicitly or implicitly.

Examples:


b. Clean Water Act, 33 U.S.C. 1154(b): advance consent to negotiations, but agreements not effective until subsequently approved by Congress.
c. Delaware River Basin, 75 Stat. 716: exhibits new trend with direct federal participation in negotiations with advance congressional consent to binding nature of agreement reached, including binding on U.S. (so long as designated federal participant in negotiations concurs).

IV. Several difficult legal issues remain unanswered in the wake of Sporhase and El Paso.

A. Interstate compacts are based on the premise that waters allocated to the state are reserved to that state's beneficial use. Does Sporhase upset that fundamental premise?

B. Would congressional consent to an interstate compact demonstrate congressional approval of state restrictions on water allocation that would otherwise amount to impermissible burden on commerce.

C. Could a judicial allocation of interstate waters (through the application of equitable apportionment) serve as
a defense to a claim that state restrictions on the use of those waters violated the Commerce Clause?

D. What is the relevance of the California Supreme Court's recent decision in National Audubon Society v. Superior Court of Alpine County, involving the relationship of the public trust doctrine to state water rights, to state control over interstate diversions of waters.
S. 1844
(97th Congress)

COAL DISTRIBUTION AND UTILIZATION ACT OF 1982

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby finds and declares that--

(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and increases in inflation and unemployment in the domestic economy;

* * * * *

(6) the construction of interstate coal pipeline distribution systems is a beneficial public use that justifies granting the Federal power of eminent domain to those systems for which a findings of national interest has been made pursuant to this Act;

(7) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;

(8) the national interest is best served by developing interstate coal pipeline distribution systems only in the context of those State laws and interstate compacts, notwithstanding the potential burden on interstate commerce; and

(9) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law and interstate compacts on the allocation of water.

(b) the purpose of this Act is to facilitate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined to be in the national interest: Provided, That such development is consistent with State water law and interstate compacts, as provided herein.

DEFINITIONS

Sec. 3. For purposes of this Act, the term --

(1) "coal" means any of the recognized classification of coal, including anthracite, bituminous,
semibituminous, subbituminous, and ignite;

(2) "interstate coal pipeline distribution system" means any pipeline system the primary economic purpose of which is the distribution of coal in a liquid or solid state, but in no event may the primary purpose be the distribution of water, whether alone or mixed with other substances--

(A) from one or more points outside a State to one or more points within a State or between two or more points within a State through another State, or

(B) from one or more points within Alaska to one or more points in a foreign country. Such a pipeline system shall be deemed to be in interstate or foreign commerce if coal that enters the pipeline system is delivered for commercial use in a State other than Alaska in which the coal was placed in the pipeline, in a Territory of the United States, or in a foreign country.

An interstate coal pipeline distribution system includes line pipe, the right-of-way, valves, pumping stations, water supply pipelines, and such dewatering facilities as are necessary to delivery operations. Such systems shall not include rail, port, highway, or other auxiliary coal-gathering or coal-storage facilities. Access to water for the operation and maintenance of the pipeline shall be governed by State laws and procedures except where application of such State laws and procedures would prohibit such access; * * *

EMINENT DOMAIN AUTHORITY

Sec. 4. (a) AUTHORITY TO MAKE NATIONAL INTEREST DETERMINATION.--(1) Upon application of any persons proposing to construct an interstate coal pipeline distribution system, who has filed and secured approval of a water permit or acquired other appropriate authorization for preservation, appropriation, use, or diversion of water under applicable State law as provided in section 5, the Secretary shall determine whether the construction of such system shall be in the national interest.

* * * * *

(e) EMINENT DOMAIN AUTHORITY.--(1) Any person proposing to build an interstate coal pipeline distribution system, the construction of which has been determined by the Secretary to be in the national interest, may
acquire rights-of-way over, under, upon, or through private lands by exercise of the power of eminent domain in the United States district court for the district in which such lands are located or in the appropriate court of the State in which such lands are located. In any action or proceeding to acquire rights-of-way under this section, relating to the general eminent domain law of the State where the property is situated, except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, such State law, practice, or procedure shall not be applicable.

(2) Nothing in this section shall be construed to permit any person to acquire any right to take, use, dispose of, or develop water through exercise of the power of eminent domain granted under this Act.

(3) No project constructed pursuant to the authorities of this section shall be considered to be a Federal project for purposes of the application for or assignment of water rights.

PRIMACY OF STATE WATER LAW

Sec. 5.(a) The United States or its agents, permittees, licencees, or transferees or any interstate coal pipeline distribution system shall not reserve, appropriate, purchase, transfer, use, divert, dedicate, or claim water within any State for an interstate coal pipeline distribution system, unless such reservation, appropriation, purchase, transfer, use, diversion, dedication, or claim takes place pursuant to and in compliance with substantive and procedural law of that State relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights.

(b) Pursuant to the commerce clause in article, 1, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions, on permits or authorize interstate coal pipeline distribution system shall be determined pursuant to the law of the State granting such permit or authorization.

(c) Nothing in this Act shall --

(1) affect in any way the validity of or preempt any provisions of State law, regulation, or rule of law or of any interstate compact governing the
appropriation, purchase, transfer, use, or diversion of water;

(2) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(3) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resources; or

(4) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(d) No waters to which the Federal right can be asserted shall be used in any interstate coal pipeline distribution system, unless authorized pursuant to an subject to State law, the same as other water rights acquired under subsection (a).

* * * * *

APPLICATION OF STATE AND LOCAL LAW

Sec. 7. Nothing in this Act shall or in any way preempt the applicability of any State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system.

* * * * *
H.R. 4230
(97th Congress)

A BILL

To facilitate the transportation of coal by pipeline across Federal and non-Federal lands.

SHORT TITLE

SECTION 1. This Act may be cited as the "Coal Pipeline Act of 1981".

FINDINGS

SEC. 2. The Congress finds and declares that --

(1) the construction of pipelines to transport American coal will be facilitated by granting the power of eminent domain to certain coal pipeline carriers, and

(2) the construction of pipelines to transport American coal is a beneficial public use that justifies granting the Federal power of eminent domain to coal pipelines for which certification of public convenience and necessity are issued under this Act.

DEFINITIONS

SEC. 3. As used in this Act --

* * * * *

(2) The term "coal pipeline" means any pipeline system for the transportation of coal in a liquid or solid state, whether alone or mixed with other substances, from a point outside a State to a point within such State or between two points in a State through another State. A coal pipeline includes the line pipe, valves, pumping stations, coal collection lines or systems, and similar equipment or facilities used or useful in the transportation of coal.

* * * * *

"SUBCHAPTER III--COAL PIPELINE CARRIERS

SEC. 5

* * * * *

"§10951. Eminent domain authority

"(a) Subject to the other provisions of this section, any person holding a certificate issued under section 10952
may acquire rights-of-way, under, upon, or through private lands by exercise of the power of eminent domain in the United States district court for the district in which such lands are located or in the appropriate court of the State in which such lands are located. The practice and procedure in any action or proceeding to acquire right-of-way under this section in a district court of the United States shall conform as nearly as may be practicable with the practice and procedure in a similar action or proceeding in the courts of the State where the property is situated.

"(b) Nothing in this subchapter shall be construed to permit any person (including the Commission, any other official or employee of the United States, or any coal pipeline carrier) to acquire any right to take, use, or develop water through exercise of the power of eminent domain.

* * * * *

RIGHTS-OF-WAY ACROSS FEDERAL LANDS

SEC. 6. (a) Except as provided in this section and section 8 of this Act, the Secretary of the Interior may grant or renew to a person holding a certificate under section 10952 of title 49, United States Code, rights-of-way over, under, upon, or through any Federal lands for the construction, operation, maintenance, or extension of coal pipelines, except that in any case in which such Federal lands are administered by the head of any other agency, department, or instrumentality of the United States, the Secretary of the Interior shall first consult the head of such other agency, department, or instrumentality before granting such rights-of-way. The Secretary of the Interior shall enter into interagency agreements with the heads of all other agencies, departments, or instrumentalities of the United States administering Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of applications for rights-of-way under this section, issuing joint regulations, and assuring a decision by such Secretary based upon a comprehensive review of all factors involved in any application for a right-of-way under this section. Each head of any such agency, department, or instrumentality shall administer and enforce the provisions of this title, appropriate regulations, and the terms and conditions of rights-of-way granted by the Secretary of the Interior insofar as they involve Federal lands under the jurisdiction of such agency, department, or instrumentality.

(b) Notwithstanding any other provision of law relating to any Federal lands, rights-of-way over, under, upon, or
through Federal lands for the construction, operation, maintenance, or extension of coal pipelines for which certificates are issued under section 10952 of title 49, United States Codes, shall be granted or renewed after the date of enactment of this Act only as provided in this section and sections 7 and 8 of this Act.

* * * * *

STATE WATER LAW

SEC. 10. (a) The United States or its agents, permittees, licensees, or transferees shall not reserve, appropriate, use, divert, dedicate, or claim water within any State for a coal pipeline holding a certificate issued under seciton 10952 of title 49, United States Code, unless such reservation, appropriation, use, diversion, dedication, or claim takes place pursuant to State substantive and procedural law.

(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions terminating use, on permits or authorizations for the reservation, appropriation, use, or diversion of water for a coal pipeline for which a certificate is issued under section 10952 of title 49, United States Code, shall be determined pursuant to State law notwithstanding any transportation, use, or disposal of such water in interstate commerce.
H.R. 1010
(98th Congress, as amended 5/3/83)

SHORT TITLE
SECTION 1. This Act may be cited as the "Coal Pipeline Act of 1983".

* * * * *

"TITLE II
"FINDINGS AND PURPOSE

"Sec. 201(a)

* * * * *

"(6) the construction of coal pipelines is a beneficial public use that justifies granting the Federal power of eminent domain to those pipelines for which a finding of national interest has been made pursuant to this Act;

"(7) State water law and interstate allocations are carefully balanced and structured systems for the allocation of water;

"(8) the need for coal pipelines is subservient to the national interest in the primacy of State water law and interstate allocations;

"(9) therefore, the national interest is best served by developing coal pipelines only if such development is now or hereafter permitted by those State water laws and interstate allocations, notwithstanding the otherwise impermissible burden which may thereby be imposed on interstate commerce;

"(b) The purpose of this Act is to facilitate the development of coal pipelines by granting the Federal power of eminent domain to those coal pipelines that are determined to be in the national interest: Provided, however, That Congress declares that the development of coal pipelines may occur only if now or hereafter permitted by State water law and interstate allocations, and hereby delegates to and ratifies the exercise of such authority by the States as further set forth herein.

* * * * *

(6) The term 'coal pipeline' means any pipeline system for the movement of coal in a liquid or solid state, whether alone or mixed with other substances, from a point outside a State to a point within such State or between two points in a State through another State. A coal
pipeline includes the line pipe, valves, pumping stations, coal collection lines or systems, and similar equipment or facilities used or useful in the movement of coal.

* * * * *

"(10) The term 'State law' includes all that body of constitutional or statutory law, judicial precedent, administrative regulation and administrative decision, whether now in existence or hereafter enacted, decided, or promulgated by a State or its properly constituted officials.

"(11) The term 'interstate allocation' means the allocation of water between states by interstate compact or legislative or judicial allocation.

* * * * *

"STATE WATER LAW

"Sec. 207. Notwithstanding any other provision of this title or any other federal law:

"(a) Neither the United States nor any other person or entity shall reserve, appropriate, use, divert, dedicate, export, or otherwise claim or exercise any right or interest in, water within any State for a coal pipeline unless such reservation, appropriation, use diversion, dedication, export or claim takes place pursuant to the substantive and procedural law of that State.

"(b) Pursuant to the commerce clause in Article I, section 8, of the United States Constitution, the Congress hereby expressly delegates to the States the power to establish and exercise in State law, whether now in existence or hereafter enacted, terms or conditions (including terms or conditions denying or terminating use) for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, notwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.

"(c) Nothing in this title shall alter in any way or affect the validity of any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, export, or diversion of, or other claim of right to, water, except as provided in subsections (a) and (b) of this section. Nothing in this title shall alter the rights of any State to its
apportioned share of the waters of any body of surface or ground water, whether determined by past or future interstate compacts, or by past or future legislative or judicial allocation. No State acting under the authority of this section may restrict the importation or movement through the State of water acquired in another State and within a coal pipeline. Nothing in this title shall affect water rights of any Indian or Indian tribe. In the event of any conflict between the provisions of this section and any other provision of this title or other federal law, the provisions of this section shall govern.

"EMINENT DOMAIN AUTHORITY

"Sec. 208.(a) Subject to the other provisions of this section, any person to whom a certification has been issued under section 209 of this title may acquire rights-of-way over, under, upon, or through private lands by exercise of the power of eminent domain. Any action shall be filed in the appropriate Court of the state in which such lands are located by may, upon petition of the affected landowner or landowners, be removed to the U.S. District Court for the District in which such lands are located. In any such action or proceeding to acquire rights-of-way in any State under this section, such action or proceeding shall conform to the laws, practices, and procedures of that State relating to compensation, trial by jury, and siting alternatives in the exercise of eminent domain authority: Provided, however, That no such State law, practice or procedure, the effect of which would be to prohibit any acquisition for reasons unrelated to the acquisition or use of water rights by a coal pipeline, shall be applicable to such a proceeding unless it would allow a reasonable alternative acquisition to occur.

"(b) Nothing in this title shall be construed to permit any person (including the Secretary, any other official or employee of the United States, or any coal pipeline carrier) to acquire any right to take, use, or develop water through exercise of the power of eminent domain.

* * * * *

"CERTIFICATION

"Sec. 209.(a) Subject to the provisions of this title, a person who has filed and secured approval of a water permit or obtained other appropriate authority
or right for the reservation, appropriation, export, use, or diversion of water under applicable state law as provided in this title, may apply to the Secretary for a certification that it is in the national interest to construct, operate, and maintain a coal pipeline or to extend a coal pipeline for which a certification has been issued under this section.

"(b)(1) If the Secretary determines in writing that it is in the national interest to construct, operate, and maintain the coal pipeline (or, in the case of an application for extension, that it is in the national interest to extend the pipeline), the Secretary shall (A) approve the application as filed, or (B) approve the application with modifications and require compliance with such terms and conditions as the Secretary finds necessary."
SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS v. NEBRASKA, EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[July 2, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:1 (1) whether ground water is an article of commerce and therefore subject to Congressional regulation; (2) whether the Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with

the State of Nebraska in 1971, but neither they nor the present owners applied for the permit required by § 46-613.01 of the Nebraska Revised Statutes. That section provides:

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

Appellee brought this action to enjoin appellants from transferring the water across the border without a permit. The trial court rejected the defense that the statute imposed an undue burden on interstate commerce and granted the injunction. The Nebraska Supreme Court affirmed. 208 Neb. 703, 305 N.W. 2d 614 (1981). It held that, under Nebraska law, ground water is not "a marketable item freely transferable for value among private parties, and therefore [is] not an article of commerce." Id., at 705, 305 N.W. 2d, at 616. The Chief Justice, while agreeing that the statutory

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2Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement. Cf. Larson v. Valente, — U. S. — (1982).

*The Nebraska Supreme Court also rejected appellants' equal protection and due process challenges. Appellants renew those challenges before this Court, but we need not reach these issues in light of our dispo-
criteria governing the transfer of water to an adjoining State did not violate the Commerce Clause, dissented on the narrow ground that appellee violated both the Federal and Nebraska Constitutions by attempting "to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control." Id., at 713, 305 N.W. 2d, at 620.

1

In holding that ground water is not an article of commerce, the Nebraska Supreme Court and appellee cite as controlling precedent *Hudson County Water Co. v. McCarter*, 209 U. S. 349 (1908). In that case a New Jersey statute prohibited the interstate transfer of any surface water located within the State. The Hudson County Water Company nevertheless contracted with New York City to supply one of its boroughs with water from the Passaic River in New Jersey. The state attorney general sought from the New Jersey courts an injunction against fulfillment of the contract. Over the water company's objections that the statute impaired the obligation of contract, took property without just compensation, interfered with interstate commerce, denied New York citizens the privileges afforded New Jersey citizens, and denied New York citizens the equal protection of the laws, the injunction was granted. This Court, in an opinion by Justice Holmes, affirmed.

Most of the Court's opinion addresses the just compensation claim. Justice Holmes refused to ground the Court's holding, as did the New Jersey state courts, on "the more or

sition of the Commerce Clause claim.

"The Court quoted the statute: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." 209 U. S., at 353.

"The Courts below assumed or decided and we shall assume that the
less attenuated residuum of title that the State may be said to possess." *Id.*, at 355. For the statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. Putting aside the "problems of irrigation," the State's interest in preserving its waters was well within its police power. That interest was not dependent on any demonstration that the State's water resources were inadequate for present or future use. The State "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.*, at 357.

Having disposed of the just compensation claim, Justice Holmes turned very briefly to the other constitutional challenges. In one paragraph, he rejected the Contract Clause claim. In the remaining paragraph of the opinion, he rejected all the other defenses. His treatment of the Commerce Clause challenge consists of three sentences: "A man defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale." *Id.*, at 354.

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Id.*, at 356.
cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer v. Connecticut, 161 U. S. 519 [(1896)]." 209 U. S., at 357.

While appellee relies upon Hudson County, appellants rest on our summary affirmance of a three-judge district court judgment in City of Altus v. Carr, 255 F. Supp. 828 (W. D. Tex.), aff'd mem., 385 U. S. 35 (1966). The City of Altus is located near the southern border of Oklahoma. Large population increases rendered inadequate its source of municipal water. It consequently obtained from the owners of land in an adjoining Texas county the contractual right to pump the ground water underlying that land and to transport it across the border. The Texas legislature thereafter enacted a statute that forbade the interstate exportation of ground water without the approval of that body.7 The City filed suit in federal district court, claiming that the statute violated the Commerce Clause.

The City relied upon West v. Kansas Natural Gas Co., 221 U. S. 229 (1910), which invalidated an Oklahoma statute that prevented the interstate transfer of natural gas produced within the State," and Pennsylvania v. West Virginia, 262 U. S. 553 (1923), which invalidated a West Virginia statute that accorded a preference to the citizens of that State in the purchase of natural gas produced therein.9 The Texas attorney general defended the statute on two grounds. First, he

7The district court quoted the statute: "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." 255 F. Supp., at 830.

9Justice Holmes, the author of the Court's opinion in Hudson County, noted his dissent. See 221 U. S., at 262.
asserted that its purpose was to conserve and protect the State's water resources by regulating the withdrawal of ground water. The district court rejected that defense because similar conservation claims had met defeat in West v. Kansas Natural Gas Co., supra, and Pennsylvania v. West Virginia, supra. Second, the State argued that the statute regulated ground water and that ground water is not an article of commerce, citing Geer v. Connecticut, supra, and Hudson County, supra. The court rejected this argument since the statute directly regulated the interstate transportation of water that had been pumped from the ground, and under Texas law such water was an article of commerce. The court then had little difficulty in concluding that the statute imposed an impermissible burden on interstate commerce."

"The district court opinion, 255 F.Supp., at 839, included these quotations from the two cases:

"The statute of Oklahoma recognizes [natural gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?"

"Another consideration advanced to the same end is that natural gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." Pennsylvania v. West Virginia, 262 U.S. 553, 598, (1923).

"Considering the statute in question only with regard to whether it
In summarily affirming the district court in *City of Altus*, we did not necessarily adopt the court's reasoning. Our affirmance indicates only our agreement with the result reached by the district court. *Metromedia, Inc. v. City of San Diego*, 453 U. S. 490, 499 (1981). That result is not necessarily inconsistent with the Nebraska Supreme Court's holding in this case. For Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water that he has withdrawn. According to the district court in *City of Altus*, the "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F.Supp., at 833, n. 8. Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce. In Nebraska the surface owner has no comparable interest in ground water. As explained by the Nebraska Supreme Court, "the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in

regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear to us that [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation." 255 F.Supp., at 839-840.
excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole."

208 Neb., at 705, 305 N.W. 2d, at 617 (quoting Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

City of Altus, however, is inconsistent with Hudson County. For in the latter case the Court found Geer v. Connecticut, supra, to be controlling on the Commerce Clause issue. Geer, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them. One such restriction is a prohibition against interstate transfer of the captured animals. This theory of public ownership was advanced as a defense in City of Altus. The State argued that it owned all subterranean water and therefore could recognize ownership in the surface owner who withdraws the water, but restrict that ownership to use of the water within the State. That theory, upon which the Commerce Clause issue in Hudson County was decided, was rejected by the district court in City of Altus. 12 In expressly overruling Geer three years ago, this Court traced the de-

12 "This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce." Id., at 840.
mise of the public ownership theory and definitively recast it as "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Hughes v. Oklahoma, 441 U. S. 322, 334 (1979) (quoting Toomer v. Witsell, 334 U. S. 385, 402 (1948)). See also Baldwin v. Montana Fish and Game Comm'n, 436 U. S. 371, 384-387 (1978); Douglas v. Seacoast Products, Inc., 431 U. S. 265, 284-285 (1977). In Hughes the Court found the State's interests insufficient to sustain a ban on the interstate transfer of natural minnows seined from waters within the State.

Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in Geer, Hughes, and City of Altus the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, see Metropolitan Utilities District v. Merritt Beach Co., 173 Neb. 783, 140 N.W. 2d 626 (1966), but the Nebraska Supreme Court distinguished them on the ground that the transferror was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. 208 Neb., at 708, 305 N.W. 2d, at 618. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch
to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other. Cf. In re Rahrer, 140 U. S. 545, 558 (1891).

The second asserted distinction is that water, unlike other natural resources, is essential for human survival. Appellee, and the amici curiae that are vitally interested in conserving and preserving scarce water resources in the arid Western States, have convincingly demonstrated the desirability of state and local management of ground water. But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival,

"In California v. United States, 438 U. S. 645, 648 (1978), we explained some of the circumstances that support a general policy of local water management under differing legal systems:

"The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climate regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had."

studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archetypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource. Cf. Arizona v. California, 373 U. S. 546 (1963).

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, see infra, at 16-18, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it also would curtail the affirmative power of Congress to implement its own policies concerning such regulation. See Philadelphia v. New Jersey, 437 U. S. 617, 621-623 (1978). If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws.

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10 Comptroller General, Ground Water Overdrafting Must Be Controlled 7-8 (1980).
Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

II

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766-767 (1945); *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 548-549 (1944); *Cooley v. Board of Wardens*, 12 How. 299, 319 (1851). Determining the validity of state statutes affecting interstate commerce requires a more careful inquiry:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course 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." *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970) (citation omitted).

The only purpose that appellee advances for § 46-613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important,* and the other aspects of Nebraska's ground water regulation demonstrate that it is genuine. Appellants'
land in Nebraska is located within the boundaries of the Upper Republican Ground Water Control Area, which was designated as such by the Director of the Nebraska Department of Water Resources based upon a determination "that there is an inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply." Neb. Rev. Stat. §46-658(1); see App. 56-60. Pursuant to §46-666(1), the Upper Republican Natural Resources District has promulgated special rules and regulations governing ground water withdrawal and use. See App. 61-82. The rules and regulations define as "critical" those townships in the control area in which the annual decline of the ground water table exceeds a fixed percentage; appellants' Nebraska tract is located within a critical township. The rules and regulations require the installation of flow meters on every well within the control area, specify the amount of water per acre that may be used for irrigation, and set the spacing that is required between wells. They also strictly limit the intrastate transfer of ground water: transfers are only permitted between lands controlled by the same groundwater user, and all transfers must be approved by the district board of directors. Id., at 68-69.

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in §46-613.01 for the withdrawal of water for an interstate transfer. Those requirements are "that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare." Although Commerce Clause concerns are implicated by the fact that §46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to
prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of §46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." Hicklin v. Orbeck, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, e. g., Wyoming v. Colorado, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See Hicklin v. Orbeck, supra, at 533-534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See supra, at 7-9. Finally, given appel-
lee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See Reeves, Inc. v. Stake, 447 U. S. 429 (1980); cf. Philadelphia v. New Jersey, supra, at 627-628 and n. 6; Baldwin v. Fish and Game Comm'n, supra. A facial examination of the first three conditions set forth in § 46-613.01 does not, therefore, indicate that they impossibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Appellants, however, do challenge the requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska"—the reciprocity provision that troubled the Chief Justice of the Nebraska Supreme Court. Because Colorado forbids the exportation of its ground water, the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Hughes v. Oklahoma, supra, at 336; Dean Milk Co. v. City of Madison, 340 U. S. 349, 354 (1951).

The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be

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"Colo. Rev. Stat. § 37-90-136 provides as follows:

"For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein."
abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. 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 purpose 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. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Hughes v. Oklahoma, supra, at 337."

III

Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water is not well-founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.

Abstracts of the relevant sections of the 37 statutes relied upon by appellee were submitted in connection with the Hearings on S. 1275 before the Senate Subcommittee on Irrigation and Reclamation, 88th Cong., 2d Sess., 302-310 (1964). Appellee refers the Court to that submission but only discusses §8 of the Reclamation Act of 1902, 32 Stat. 390. That section, it turns out, is typical of the other 36 statutes. It contains two parts. The first provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Such language defines the extent of the federal legislation's preemptive effect on state law. New England Power Co. v. New Hampshire, — U. S. —, — (1982); Lewis v. BT Investment Managers, Inc., 447 U. S. 27, 49 (1980). The second part provides that "the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Such language mandates that questions of water rights that arise in relation to a federal project are to be determined in accordance with state law. See California v. United States, 438 U. S. 645 (1978).

The interstate compacts to which appellee refers are agreements among States regarding rights to surface water. See The Council of State Governments, Interstate Compacts and Agencies 25-29, 31-32 (1979). Appellee emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. 195 (1926), and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86 (1943).

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, in they do not
indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy' to sustain state legislation from attack under the Commerce Clause" was "expressly stated.'" New England Power Co. v. New Hampshire, supra, at — (quoting Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 427 (1946)). Cf. Merrion v. Jicarilla Apache Tribe, — U. S. —, n. 21 (1982).

The reciprocity requirement of Neb. Rev. Stat. § 46-613.01 violates the Commerce Clause. We leave to the state courts the question whether the invalid portion is severable. The judgment of the Nebraska Supreme Court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

and continued deference to state water law by Congress." California v. United States, supra, at 653.

* Similarly, this Court has encouraged States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication. See Colorado v. Kansas, 320 U. S. 383, 392 (1943).

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of §46-613.01 of the Nebraska Revised Statutes, which relates to groundwater. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but activities which affect interstate commerce, including wholly intrastate activities. See, e.g., *Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942); *United States v. Darby*, 312 U. S. 100 (1941); *Houston & Texas Ry. v. United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft
building in which large quantities of goods for interstate commerce were produced; no one contended that these employees themselves, or the work which they actually performed, dealt with articles of commerce. Nonetheless, the provisions of the Fair Labor Standards Act were applied to them because Congress extended the terms of the Act not only to those who were "engaged in commerce" but to those who were engaged "in the production of goods for commerce." \textit{Id.}, at 522.

Thus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that groundwater overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate groundwater overdraft, even if groundwater is not an "article of commerce" itself. See, \textit{e.g.}, \textit{Hodel v. Virginia Surface Mining & Recl. Assn.}, 452 U. S. 264, 281-283 (1981); \textit{id.}, at 310-313 (REHNQUIST, J., concurring in judgment); \textit{Wickard v. Filburn}, 317 U. S. 111 (1942). It is therefore wholly unnecessary to decide whether Congress could regulate groundwater overdraft in order to decide this case; since Congress has not undertaken such a regulation, I would leave the determination of its validity until such time as it is necessary to decide that question.

The question actually involved in this case is whether Neb. Rev. Stat. § 46-613.01 runs afoul of the unexercised authority of Congress to regulate interstate commerce. While the Court apparently agrees that our equitable apportionment decrees in cases such as \textit{Wyoming v. Colorado}, 353 U. S. 953 (1957), and the execution and approval of interstate compacts apportioning water have given rise to "the legal expectation that under certain circumstances each State may restrict water within its borders," \textit{ante}, at 14, it insists on an elaborate balancing process in which the State's "interest" is weighed under traditional Commerce Clause analysis.
I think that in more than one of our cases in which a State has invoked our original jurisdiction, the unsoundness of the Court's approach is manifest. For example, in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), the Court said:

"This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

Five years earlier, in *Kansas v. Colorado*, 185 U. S. 125, 142, 145-146 (1902), the Court had made clear that a State's quasi-sovereign interest in the flow of surface and subterranean water within its borders was of the same magnitude as its interest in pure air or healthy forests.

In my view, these cases appropriately recognize the traditional authority of a State over resources within its boundaries which are essential not only to the well-being, but often to the very lives of its citizens. In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only used.

Of course, a State may not discriminate against interstate commerce when it regulates even such a resource. If the State allows indiscriminate intrastate commercial dealings in a particular resource, it may have a difficult task proving that an outright prohibition on interstate commercial dealings is not such a discrimination. I had thought that this was the
basis for this Court's decisions in *Hughes v. Oklahoma*, 441 U. S. 322 (1979), *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923), and *West v. Kansas Nat. Gas Co.*, 221 U. S. 229 (1911). In each case, the State permitted a natural resource to be reduced to private possession, permitted an *intrastate* market to exist in that resource, and either barred *interstate* commerce entirely or granted its residents a commercial preference.\(^1\)

By contrast, Nebraska so regulates groundwater that it cannot be said that the State permits any "commerce," *intrastate* or *interstate*, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in groundwater, but grants landowners only a right to *use* groundwater on the land from which it has been extracted. Moreover, the landowner's right to use groundwater is limited. Nebraska landowners may not extract groundwater "in excess of a reasonable and beneficial use upon the land in which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole." *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). With the exception of municipal water systems, Nebraska forbids any transpor-

\(^1\) Similarly, in *City of Altus v. Carr*, 255 F. Supp. 828 (W. D. Tex.), aff'd mem., 385 U. S. 35 (1966), Texas placed no restrictions upon the use or the *intrastate* sale of groundwater. The "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Texas' absolute ownership rule is an anomaly among the Western States. See 5 R. E. Clark, *Waters and Water Rights* § 441 (1972 & 1978 Supp.). In Nebraska, as in most of the Western States, groundwater is not treated as "any other species of property."

Nebraska places additional restrictions on groundwater users within certain areas, such as the portion of appellant's land situated in Nebraska, where the shortage of groundwater is determined to be critical. Water users in appellants' district are permitted only to irrigate the acreage irrigated in 1977, or the average number of acres irrigated between 1972 and 1976, whichever is greater, and must obtain permission from the water district's board before any additional acreage may be placed under irrigation. The amount of groundwater that may be extracted is strictly limited on an acre-inch-per-irrigated acre basis. There are also detailed regulations as to the spacing of wells and the use and operation of flow meters. App. 71–82.

Since Nebraska recognizes only a limited right to use groundwater on land owned by the appropriator, it cannot be said that "commerce" in groundwater exists as far as Nebraska is concerned. Therefore, it cannot be said that Neb. Rev. Stat. §46–613.01 either discriminates against, or "burdens," interstate commerce. Section 46–613.01 is simply a regulation of the landowner's right to use groundwater extracted from lands he owns within Nebraska. Unlike the

1 Unlike several other Western States, Nebraska does not entirely forbid groundwater extracted in Nebraska to be used in other States. See Brief for the City of El Paso as Amicus Curiae 2, n. 3. As noted by the Court, Nebraska merely places conditions on such a use of the State's groundwater. A permit must be obtained from the Nebraska Department of Water Resources. If the requested withdrawal of groundwater is determined to be "reasonable, not contrary to the conservation and use of ground water, and . . . not otherwise detrimental to the public welfare," a permit will be issued so long as the "state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that
Court, I cannot agree that Nebraska's limitation upon a landowner's right to extract water from his land situated in Nebraska for his own use on land he owns in an adjoining State runs afoul of Congress' unexercised authority to regulate interstate commerce.3
SUPREME COURT OF THE UNITED STATES

Syllabus

SPORHASE ET AL. v. NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM SUPREME COURT OF NEBRASKA

No. 81-613. Argued March 30, 1982—Decided July 2, 1982

A Nebraska statute requires any person intending to withdraw ground water from any well located in the State and transport it for use in an adjoining State, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources finds that such withdrawal is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, he will grant the permit if the State in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in Nebraska. Appellants own contiguous tracts of land in Nebraska and Colorado, on which a well on the Nebraska tract pumps ground water for irrigation of both the Nebraska and Colorado tracts, but they never applied for the permit required by the statute. Appellee brought an action in a Nebraska state court to enjoin appellants from transferring the water across the border without a permit. Rejecting the defense that the statute imposed an undue burden on interstate commerce, the trial court granted the injunction. The Nebraska Supreme Court affirmed.

Held:

1. Ground water is an article of commerce and therefore subject to congressional regulation. Pp. 3-11.

(a) Although appellee's claimed greater ownership interest in ground water than in certain other natural resources may not be irrelevant to Commerce Clause analysis, it does not remove Nebraska ground water from such scrutiny, since appellee's argument is still based on the legal fiction of state ownership. Pp. 3-10.

(b) The States' interests in conserving and preserving scarce water resources in the arid Western States clearly have an interstate dimension. The agricultural markets supplied by irrigated farms provide the
archtypical example of commerce among the States for which the Framers of the Constitution intended to authorize federal regulation. Here, the multistate character of the aquifer underlying appellants' tracts of land, as well as parts of Texas, New Mexico, Oklahoma, and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Pp. 10-11.

2. The reciprocity requirement of the Nebraska statute violates the Commerce Clause as imposing an impermissible burden on interstate commerce. While the first three conditions set forth in the statute for granting a permit—that the withdrawal of the ground water be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare—do not on their faces impermissibly burden interstate commerce, the reciprocity provision operates as an explicit barrier to commerce between Nebraska and its adjoining States. Nebraska therefore has the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Such requirement, when superimposed on the first three restrictions, fails to clear this initial hurdle, since there is no evidence that it is narrowly tailored to the conservation and preservation rationale. Thus, it does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Pp. 12-16.

3. Congress has not granted the States permission to engage in ground water regulation that would otherwise be impermissible. Although there are 37 federal statutes and a number of interstate compacts demonstrating Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional restraints on such state law. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. Pp. 16-18.

208 Neb. 703, 305 N. W. 2d 614, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REINHOLDST, J., filed a dissenting opinion, in which O'CONNOR, J., joined.
To authorize the States to regulate the interstate transfer of water to insure that Federal regulation pursuant to the commerce clause does not impair or impede the efforts of the States to protect and control this resource.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1983

Mr. Regula introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs and Public Works and Transportation

A BILL

To authorize the States to regulate the interstate transfer of water to insure that Federal regulation pursuant to the commerce clause does not impair or impede the efforts of the States to protect and control this resource.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,
3 That for purposes of this Act, the term "water" means sur-
4 face or ground water located in and belonging to the States.
5 Sec. 2. The regulation of the interstate transfer of
6 water shall be subject to the laws of the several States which
7 relate to the regulation of the interstate transfer of water.
SEC. 3. No Act of Congress pursuant to the commerce clause of the United States Constitution shall be construed to invalidate, impair, or supersede any law enacted by any State for the purposes of regulating the interstate transfer of water.
To require the Secretary of Agriculture, in consultation with the Secretary of the Interior, to study the effects of interbasin water transfers on agriculture and to prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all States in the drainage basin of such waters consent to such sale or transfer.

IN THE HOUSE OF REPRESENTATIVES
MARCH 1, 1983

Mr. Bedell (for himself, Mr. Bereuter, Mr. Harkin, Mr. Smith of Iowa, Mr. Leach of Iowa, Mr. Tauke, Mr. Evans of Iowa, Mr. Coleman of Missouri, Mr. Bono of Tennessee, Mr. Edgar, Mr. Skelton, Mr. Vento, Mr. Forsythe, Mr. Daub, and Mr. Hughes) introduced the following bill; which was referred jointly to the Committees on Agriculture, Interior and Insular Affairs, and Public Works and Transportation

A BILL
To require the Secretary of Agriculture, in consultation with the Secretary of the Interior, to study the effects of interbasin water transfers on agriculture and to prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all States in the drainage basin of such waters consent to such sale or transfer.

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2 That (a) the Congress finds that—
(1) adequate water resources are necessary to maintain the Nation's level of agricultural productivity;
(2) the redistribution of water resources may adversely affect agricultural production and the environment; and
(3) there is growing concern about the increasing demands on the Nation's limited water resources.

(b) The Secretary of Agriculture, in consultation with the Secretary of the Interior, shall study the effects of inter-basin water transfers in different regions of the United States on agriculture and agricultural productivity. Such study shall be completed, and a report of such study shall be submitted to the Congress, not later than eighteen months after the date of enactment of this Act.

SEC. 2. No State shall sell or otherwise transfer or permit the sale or transfer, for use outside of such State, water which is taken from any river or other body of surface water which is located in or which passes through more than one State or from any aquifer or other body of ground water which underlies more than one State unless—

(1) there is in effect an interstate compact (A) among the States in the drainage basin of such river or other body of surface water, or (B) among the States under which such aquifer or other body of ground water lies, which governs such sale or transfer, and
(2) all the States which are parties to such compact consent to such sale or transfer.