

7-20-2004

Restricting the Use in Water Marketing - Sound Policy or Unjustified Economic Protectionism

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This is the abstract of a presentation given on Tuesday, 20 July 2004, in session 8 of the UCOWR conference.

Recommended Citation

Matthews, "Restricting the Use in Water Marketing - Sound Policy or Unjustified Economic Protectionism" (2004). 2004. Paper 104.
http://opensiuc.lib.siu.edu/ucowrconfs_2004/104

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“Restricting the Place of Use in Water Marketing—Sound Policy or Unjustified Economic Protectionism,” Olen Paul Matthews, Department of Geography University of New Mexico. 505-277-5041. opmatt@unm.edu.

The inability to freely sell water and move it to a different place of use, constrains water markets. Some of these constraints reflect sound policy, but others are designed to protect local economies. In the process of protecting local economies this policy choice may also create inefficiencies in water use. My paper examines these spatial constraints from the perspective of the constitution’s commerce clause. The commerce clause was designed to create a national free trade zone by removing barriers to the free movement of goods. Restrictions on the free movement of goods, including water, are unconstitutional if the motive is economic protectionism. Many kinds of spatial constraints exist for marketing water including the traditional riparian doctrine that limits water use to riparian land and prohibits movement outside a watershed. Additionally, the appropriation doctrine prohibits transfers that injure third parties. These spatial constraints may survive constitutional scrutiny, but others may not. Many of these spatial constraints exist in order to protect the water source’s “area of origin”. But, can an “area of origin” receive special economic protection and be constitutional? States have attempted to protect local areas by restricting water movement outside a watershed, county, region, water district and even the state itself. Some of these restrictions fall under an exception to the commerce clause, such as the Reclamation Act’s limitations on water use outside an irrigation district. Others are unconstitutional. My paper first examines the commerce clause tests for constitutionality, and then examines which of the spatial constraints are constitutionally acceptable.