COMMERCE CLAUSE LIMITS ON STATE REGULATION OF INTERSTATE WATER EXPORT

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State legislatures have long sought to restrict the export of water from sources located within the state for use elsewhere. Such efforts trace back at least as far as 1905, when the New Jersey legislature enacted a statute prohibiting the export of water to any other state. Three years later, the United States Supreme Court ruled in *Hudson County Water Co. v. McCarter* (209 U.S. 349 [1908]) that the New Jersey embargo statute did not violate any provision of the United States Constitution. In the decades that followed, many state legislatures —especially those in arid western states—enacted statutes prohibiting or significantly restricting the interstate export of water. It was generally assumed, in view of the *Hudson County* case, that these statutes were constitutionally valid.

In 1982, the United States Supreme Court shattered that long-standing assumption in *Sporhase v. Nebraska ex rel. Douglas* (458 U.S. 941). The Court ruled that a Nebraska statute regulating interstate water export was subject to scrutiny under the negative commerce clause of the Constitution and that one provision of the statute was constitutionally impermissible and thus invalid. This paper focuses on what limits the dormant commerce clause, as interpreted in *Sporhase* and later cases, imposes on states wishing to regulate interstate water export.

NEGATIVE COMMERCE CLAUSE BASICS

The commerce clause of the United States Constitution states that "Congress shall have . . . Power . . . to regulate Commerce . . . among the several States." This clause obviously grants Congress power to enact laws regulating interstate commerce. But the United States Supreme Court has found in the clause more than an affirmative grant of regulatory power to Congress. The Court has also found implicit in the clause the assertion of a "national interest in keeping interstate commerce free from interferences which seriously impede it." (Southern Pacific Co. v. Arizona, 325 U.S. 761 [1945].) Moreover, the Court has established that this implicitly asserted national interest operates to prohibit states from enacting laws that interfere too much with the free flow of interstate commerce. This latter aspect of the commerce clause, as distinguished from the affirmative grant of power to Congress, is often called the negative commerce clause since it negates power states would otherwise have to regulate interstate commerce. It is also called the dormant commerce clause since it limits state power to regulate interstate commerce even if Congress has not affirmatively enacted any laws regarding the particular kind of interstate commerce at issue.

The critical question that arises under the negative commerce clause is how much state interference with the free flow of commerce between states is too much. The Supreme Court has used different approaches over the years in dealing with that question. Generally, however, the Court in its modern cases has weighed the national interest in the free flow of interstate commerce against whatever interest a state might advance to justify the interference. The Court proceeds somewhat differently with the weighing process, depending on whether the state regulation being scrutinized discriminates against interstate commerce. A state regulation might be discriminatory on its face, or it might be facially evenhanded but be found to be discriminatory in its purpose or its practical effect. Nondiscriminatory state regulations are judged by a test articulated as follows in *Pike v. Bruce Church, Inc.* (397 U.S. 137 [1970]):

> 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 commerce is clearly excessive in relation to the putative local benefits. . . . 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 lesser impact on interstate activities.

Discriminatory state regulations are treated less deferentially. The Court gives them "strictest scrutiny" (Hughes v. Oklahoma, 441 U.S. 322, 337 [1979])

regarding (1) whether the regulation serves a legitimate state objective and (2) whether that objective could be accomplished as well by some less discriminatory approach.

THE *SPORHASE* CASE

The appellants in *Sporhase v. Nebraska ex rel. Douglas* jointly owned two contiguous parcels of land, one in Nebraska and the other in Colorado. They had a well on the Nebraska parcel from which they pumped water to irrigate both parcels. A Nebraska statute required a permit to transport groundwater taken from a well in that state for use in an adjoining state. The statute did not allow an export permit to issue unless (a) the groundwater withdrawal was reasonable, (b) it was not contrary to the conservation of groundwater, (c) it was not otherwise detrimental to the public welfare, and (d) the state of export granted reciprocal rights to withdraw groundwater from a well within its borders for use in Nebraska. The appellants had not obtained a permit, and it was clear they could not get one because Colorado did not grant reciprocal rights. When the State of Nebraska sued to enjoin the appellants from transporting water to their Colorado parcel for lack of a permit, they responded by asserting that the statute was invalid under the negative commerce clause.

Applicability of the Commerce Clause to Water

When the Supreme Court upheld New Jersey's water embargo statute in 1908, it ruled that the negative commerce clause did not even apply to the state's regulation of water export. The Court reasoned that the state owned unused waters within its borders in trust for its people and, as the initial owner, could limit what rights private parties were allowed to acquire from the state in those waters. Moreover, said the Court, by limiting private parties to using water only within the state, New Jersey prevented state waters from becoming articles of commerce. Since the waters were not articles of commerce, state regulation of the waters was not subject to the negative commerce clause.

In 1979, the Court rejected similar reasoning regarding alleged state ownership of wild fish and game. The Court ruled that Oklahoma's asserted state ownership of uncaptured minnows within state borders did not exempt a state statute banning the interstate export of minnows from scrutiny under the negative commerce clause. (Hughes v. Oklahoma, 441 U.S. 322.) This set the stage for the Court in *Sporhase* to overrule its 1908 *Hudson County* precedent regarding water. The Court said in S*porhase* that Nebraska's asserted state ownership of unused groundwater within its borders was merely a legal fiction—a fiction expressing in shorthand the valid point that the state must have power to regulate the resource but not giving the state power to regulate it free of the limits of the negative commerce clause.

The groundwater source in *Sporhase* was the Ogallala aquifer, which underlies six states. Most commentators on *Sporhase* have concluded, however, that the negative commerce clause generally would apply also to state regulation of interstate export from a water source located wholly within the regulating state. (Grant 1991: § 48.03(a)(1)). Perhaps the most persuasive reason for this broad reading of *Sporhase* is that the Court's opinion seemed to equate the reach of the negative commerce clause with the reach of the affirmative aspect of the commerce clause, and the affirmative aspect would enable federal regulation of all but the most minor of intrastate water sources. (See Kaiser Aetna v. United States, 444 U.S. 164 [1979]).

Effect of the Negative Commerce Clause on Water Export Regulation

In applying the negative commerce clause to the Nebraska statute, the Supreme Court divided the statute into two parts. The Court found that the first part of the statute—stating the three requirements that the groundwater withdrawal must be (a) reasonable, (b) not contrary to groundwater conservation, and (c) not otherwise detrimental to the public welfare—was evenhanded. This part did not discriminate against interstate commerce because Nebraska imposed similar limits on the withdrawal of groundwater for use within the state. The Court found further that the statute effectuated the legitimate state interest of conserving diminishing sources of groundwater. The first part of the statute thus came within the *Pike* formula.

As noted above, the *Pike* formula states that an evenhanded state regulation that pursues a legitimate local objective but incidentally interferes with the flow of interstate commerce will be upheld unless the burden imposed on interstate commerce is "clearly excessive" relative to the local benefits. The *Pike* formula adds that the nature of the local interest served by the state regulation affects how much burden on interstate commerce will be tolerated before it becomes excessive. In *Sporhase*, the Court expanded on these points as they pertain to water. It announced that it was "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." It said that this reluctance stemmed from a confluence of four realties, which will be examined below. The Court concluded that the first part of the Nebraska statute did not excessively burden interstate commerce in light of the legitimate conservation objective.

The second part of the Nebraska statute—the reciprocity provision—fared differently. The Court found that because Colorado did not reciprocate, Nebraska's reciprocity requirement was an explicit barrier to interstate commerce in water. Moreover, the Court treated the reciprocity requirement as facially discriminatory, so that it was subject to strict scrutiny of whether it served a legitimate state objective and whether that objective could be accomplished as well by some less discriminatory approach. The reciprocity requirement did not survive this scrutiny. The Court concluded that Nebraska failed to show a close fit between the requirement and the asserted objective of conserving diminishing sources of groundwater. This was because the reciprocity requirement would prevent export to Colorado even if the water supply at a well in Nebraska was abundant and the most beneficial use of the water would be in Colorado. In other words, the reciprocity requirement was overbroad as a means of pursuing the asserted conservation objective.

STATE REGULATORY ALTERNATIVES UNDER *SPORHASE*

The *Sporhase* decision leaves two basic approaches for a state that wants to regulate the interstate export of water. One is for the state to enact a discriminatory statute and try to defend it against strict judicial scrutiny. Some people have found encouragement for use of this approach from two statements in the *Sporhase* opinion. First, the Court said that a reciprocity provision might be valid if a state could show that overall it has a water shortage, that water could feasibly be transported from its areas of abundance to areas of shortage, and that the import of water from adjoining states would roughly compensate for any export to those states. Second, the Court said that a demonstrably arid state conceivably might even be able to show a close fit between the purpose of conserving and preserving water and a total ban on export.

But the discriminatory approach is risky. The Court's statement in *Sporhase* concerning when a reciprocity provision might be valid involved an unusual fact situation, and the Court's suggestion that a total ban on water export might conceivably be the only means available to achieve a legitimate conservation purpose was unexplained and no more than tentative.

The second basic approach under *Sporhase* is for the state to enact a nondiscriminatory statute in an effort to avoid strict scrutiny and qualify for the general *Pike* test. Although this approach is less risky than the first one, it still can be unclear in a particular case whether a court would decide that the state burden on commerce is clearly excessive in relation to the local benefits. The process of weighing the national interest in the free flow of interstate commerce against whatever legitimate local interest a state asserts for a challenged regulation is more than a little subjective. A critic of the process, one who happens to sit on the Supreme Court, has written: "[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is . . . like judging whether a particular line is longer than a particular rock is heavy." (Bendix Autolite Corp. v. Midwesco Enterprises, Inc. 486 U.S. 888, 897 [1988] (Scalia, J., concurring opinion)).

It might seem that evenhanded state water export regulation would fare well under the negative commerce clause given the Supreme Court's stated reluctance in *Sporhase* to condemn as unreasonable measures taken by a state to conserve and preserve for its own citizens vital water resources in times of severe shortage. This statement by the Court is less reassuring, however, when one examines the four realities that the Court said gave rise to its reluctance and notes some questions that the Court's discussion of the realities did not address.

The first reality is that a state's power to regulate water use during shortages to protect the health of its citizens, and not simply the health of its economy, is at the core of its police power. But what if the state's water shortage is not severe enough to threaten the health of its citizens? The second reality is that interstate water compacts and the Court's equitable apportionment decrees between states have fostered the expectation that under "certain circumstances," a state can restrict water within its borders. Exactly what are those circumstances? The third reality, said the Court, is that although Nebraska's claimed ownership of unused water did not prevent the water from being an article of commerce and thus subject to the commerce clause, the state's claim of ownership might support a "limited preference" for state citizens. Just what is the scope of this limited preference? Would

it shrink if a state does not restrict intrastate commerce in water as much as Nebraska does? The fourth reality is that the continued availability of groundwater in Nebraska depended upon state conservation measures, thus giving the water "some indicia" of a publicly produced and owned good in which a state can favor its citizens in time of shortage. On this point, the Court cited a case which ruled that South Dakota could give state residents a preferred right to purchase cement from a state operated cement plant. But how significant is it that the cement plant case was decided principally under an exemption from the negative commerce clause that exists when a state acts as a market participant rather than as a market regulator?

POST-*SPORHASE* LITIGATION

The City of El Paso, Texas, located just below the southern border of New Mexico, filed with the New Mexico State Engineer 326 applications to appropriate almost 300,000 acre-feet of groundwater annually for export to the city. The city was seeking the new water supply because it projected that within 30 years its existing primary source of water would become too saline for use. The state engineer denied the permit applications under a statute that flatly prohibited the transport of water outside the state. In 1983, shortly after the *Sporhase* decision, El Paso challenged the statute under the negative commerce clause in the federal district court in New Mexico.

There was little doubt (and the court found) that the statute was facially discriminatory. New Mexico sought to sustain the statute by arguing that a water embargo was the only way it could avoid a projected statewide water shortage by the year 2020. New Mexico was relying, of course, on the statement in *Sporhase* that a demonstrably arid state might be able to show a close fit between conserving and preserving water and a total ban on export. The court, however, declared the statute unconstitutional. The court focused on the first of the four "realities" from *Sporhase*, namely, the Supreme Court's statement that a state's power to regulate water use during shortages to protect the health of its citizens, and not simply the health of its economy, is at the core of its police power. The court inferred from this statement that "a state may discriminate in favor of its citizens only to the extent that water is essential to human survival," and that "[o]utside of fulfilling human survival needs, water is an economic resource." The court was therefore unimpressed by New Mexico's argument that it would suffer a statewide water shortage by 2020 because that argument was based on estimated water needs for various economic activities, rather than on needs for public health and safety. (City of El Paso v. Reynolds, 563 F. Supp; 379 [D.N.M. 1983]).

The New Mexico Legislature responded to this setback with several new statutes, and El Paso promptly challenged them in the same federal district court as before. The court struck down two of the new statutes on the ground that they were facially discriminatory and did not survive strict scrutiny. (City of El Paso v. Reynolds, 597 F. Supp. 694 [D.N.M. 1984]).

A third new statute was modeled after the part of the Nebraska statute that was upheld in *Sporhase*. It authorizes the State Engineer to issue a permit to appropriate water for interstate export only if the proposed use would not impair existing rights, would not be contrary to water conservation within the state, and would not be otherwise detrimental to the public welfare of New Mexico citizens. (N.M. STAT. ANN. § 72-12B-1). Unlike the Nebraska model, however, the New Mexico statute also lists six specific factors for the State Engineer to consider in acting on export applications. The first four relate to water use conditions within New Mexico—the supply, the demand, whether shortages exist, and the feasibility of transporting water at the proposed point of diversion to alleviate shortages in the state. The remaining two factors relate to water supply and demand conditions in the state of proposed export. The federal district court hearing the second *El Paso* case rejected the city's claim that this statute was unconstitutional on its face.

The court ruled that the statute was facially nondiscriminatory because in-state water appropriations were subject to similar requirements of not impairing existing rights, not being contrary to water conservation, and not being otherwise detrimental to the public welfare of New Mexico citizens. The court viewed the six factors relating to water supply and demand conditions in New Mexico and in the state of proposed export as simply necessary considerations in applying the balancing test prescribed by *Sporhase* for evenhanded regulation that effectuates a legitimate state interest. On that basis, the court upheld the statute.

The court reiterated the view it expressed in the first *El Paso* case that a state may not limit water export merely to protect local economic interests. Unlike in the first case, however, the court in the second *El Paso* case called attention to the possibility that a state might restrict water

export based on the third reality in *Sporhase*. This reality was that a state's public ownership of groundwater may support a "limited preference" for its own citizens. The court interpreted this point in *Sporhase* to mean that a state could give some preference to conserving water for its citizens to achieve noneconomic benefits such as promoting health, safety, recreation, aesthetics, and environmental values. This interpretation enabled the court to uphold the New Mexico statute even though its "not detrimental to the public welfare" requirement referred only to the welfare of New Mexico citizens and did not mention the welfare of people in the state of proposed export. The court reasoned that *Sporhase* sometimes allows a state to restrict interstate export to promote the noneconomic welfare of its citizens.

The second *El Paso* case was decided before the New Mexico State Engineer had applied the new statute to the city's pending permit applications. For that reason, the court's decision finding no negative commerce clause problem related only to the validity of the statute on its face, that is, to the statute in the abstract rather than as the factors listed in the statute had been applied to reach a result in a particular fact situation. The court cautioned that although the statute was constitutional on its face, that did not mean the State Engineer was free to apply the listed factors without regard to the negative commerce clause. In other words, the State Engineer's application of the factors to particular fact situations would still be subject to scrutiny under the negative commerce clause, and some applications resulting in restriction of water export might constitute an impermissible burden on interstate commerce.

After the second *El Paso* decision, the State Engineer processed El Paso's permit applications. At this stage of the proceedings, yet another New Mexico statute became critical. This statute provides that no municipality can acquire and hold unused water rights in excess of its needs for the next 40 years. (N.M. STAT. ANN. § 72-1-9). After conducting a hearing, the State Engineer found that El Paso's available sources of water apart from the proposed wells in New Mexico will be sufficient for its needs until 2020, which is 40 years from the date of its permit applications. He thus denied all of the city's applications. (In re Applications of the City of El Paso, Texas, Nos. LRG-92 through LRG-357 and HU-12 through HU-71, State Engineer's Findings and Order [Dec. 23, 1987]).

Another post-*Sporhase* case on the negative commerce clause is worth noting though it did not involve state legislation regulating water export. *Maine v. Taylor* (477 U.S. 131 [1986]) concerned a Maine statute banning the import into that state of live baitfish. Although the statute facially discriminates against interstate commerce in baitfish, the United States Supreme Court ruled that it did not violate the negative commerce clause. The Court accepted Maine's argument that (1) the ban served the legitimate local objective of protecting the state's wild fish population from parasites in imported baitfish and from non-native species inadvertently included in baitfish shipments that would threaten the state's wild fish population and (2) there was no less discriminatory means available to accomplish this local objective because there was no satisfactory way to inspect imported baitfish shipments for parasites or commingled non-native species. The Court also commented:

> The Commerce Clause . . . does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

While this statement may offer some encouragement to state legislatures that want to enact discriminatory restrictions on interstate water export, it should be remembered that no state has yet been able to sustain a discriminatory water export statute. Counting the reciprocity provision in the *Sporhase* case and the New Mexico statutes evaluated in the *El Paso* cases, the box score on facially discriminatory water export measures is 0 for 4.

POST-*SPORHASE* LEGISLATION

The Nebraska/New Mexico Model

The *Sporhase* opinion affected western states more than eastern states, since statutes restricting interstate water export were more common in the West. Many western states have re-examined how they regulate interstate water export in the fifteen years since *Sporhase* was decided. As noted above, New Mexico was forced to do this quite soon after *Sporhase* and settled upon using the three requirements of the Nebraska statute upheld in *Sporhase*—that the water withdrawal must be reasonable, not contrary to conservation, and not otherwise detrimental to the public welfare—together with some embellishments of its own. After the second *El Paso* case, several other states enacted legislation modeled after

the Nebraska statute as embellished by New Mexico. (ARIZ. REV. STAT. ANN. § 45-292; IDAHO CODE §§ 42-203A(5), -222(1), -401; MONTANA CODE ANN. § 85-2-141(7), -311(4), -316(4); UTAH CODE ANN. § 73-3a-101 to -109). The *Sporhase* statute applied only to groundwater, but these newer statutes apply to surface water as well.

Colorado borrowed a single requirement from the Nebraska/New Mexico model—that the export must be consistent with reasonable conservation of the state's water resources—but added a new requirement—that the export must be consistent with interstate water allocation compacts and Supreme Court equitable apportionment water decrees to which Colorado is a party. (COLO. REV. STAT. § 37-81-101(3)). Another Colorado statute imposes an export fee of $50 per acre-foot and directs that the accumulated fees should be spent on water projects for the state. (COLO. REV. STAT. § 37-81-104). The Colorado Attorney General has opined that the export fee violates the negative commerce clause since no similar fee is imposed on water use within the state. (OP. ATT'Y GEN., AG File No. ONR 8504 066/AON [Sept. 10, 1985]).

Interestingly, Nebraska has now repealed the *Sporhase* statute in its entirety, including the three requirements that the Supreme Court upheld. Nebraska has enacted a new statute that, like the old one, applies only to groundwater. The new statute seems to be based on some of New Mexico's embellishments to the *Sporhase* statute. It lists the following criteria for evaluating a proposed export: whether the water will be put to a beneficial use, the availability to the permit applicant of other water supplies, any adverse effect the export would have upon ability of the area from which the water will be taken to meet its reasonable future needs, and any other factors consistent with the state objective of maintaining an adequate source of groundwater essential for social stability of the state and the health, safety, and welfare of state citizens. (NEB. REV. STAT. § 46-613.01).

Other Approaches

Several states do not leave individual export decisions entirely to state water resources agencies but require legislative approval, at least for some export proposals. (IDAHO CODE § 42-108; MONT. CODE ANN. §§ 85-2-402(5) to -(6); OKLA. STAT. ANN. tit. 82, § 1085.2(2); OR. REV. STAT. § 537.810 to -.870; S.D. CODIFIED LAWS ANN. § 46-5-20.1; WYO. STAT. § 41-3-115). The statutes vary widely as to which proposed exports receive legislative scrutiny. For example, the South Dakota statute requires legislative approval for new appropriations for export that exceed 10,000 acre-feet annually but excludes those made by a named conservancy district or made for use in the energy industry, while Idaho requires legislative approval to change the period or nature of use of an existing appropriation of more 5000 acre-feet or 50 cubic feet per second if the change will continue for three years or more. The statutes requiring legislative approval also vary regarding what criteria the legislature will apply. For example, the Oklahoma statute lists no specific factors for the legislature to consider while the Wyoming statute specifies numerous factors.

Montana and New Mexico have pursued an interesting approach to *Sporhase*. Both states have sought to take advantage of what is known as the market-participant exemption from the negative commerce clause. This exemption allows a state to favor residents over nonresidents when it acts as a market participant rather than a market regulator. If a state operates a cement plant, for example, it is entitled to limit sales to its residents in times of shortage without running afoul of the commerce clause. In an effort to make the state into a market participant regarding water allocation, Montana allows only the state to appropriate water for consumption in excess of 4000 acre-feet per year and 5.5 cubic feet per second, and it also allows only the state to appropriate water in any amount from six river basins for transport outside those basins. Then persons wishing to use such appropriated water must lease it from the state. (MONT. CODE ANN. § 85-2-141(10), -301(2). New Mexico has legislation authorizing a long-term state appropriation and leasing program. N.M. STAT. ANN. §§ 72-14-43 to -44). New Mexico does not bar private water appropriations but allows state appropriations to exist unexercised for up to a century. If the state makes significant appropriations in various regions, that might leave no unappropriated water available for private appropriation, while state-appropriated water would be available for leasing. The constitutional validity of these Montana and New Mexico programs is uncertain because the few Supreme Court cases that discuss the market-participant exemption leave important unanswered questions. It is unclear, for example, whether the exemption would apply when a state grants rights to a natural resource, like water, as contrasted with when the state sells a product it has manufactured. (See Grant 1991: § 48.03(c)(5)).

Some states have statutes restricting the right to use water outside the watershed or river basin where the water originates. (E.g., ALASKA STAT. § 46.15.035; KAN. STAT. ANN. § 82a-1502; TEX. WATER CODE ANN. § 11.085.) The regulatory focus of these statutes is interbasin export, not interstate export. The statutes apply, however, to some interstate exports, namely, those in which the water will be used not only in another basin but in another state.

The negative commerce clause limits the power of states, not the power of the United States Congress. Congress can authorize states to impose export restrictions that would otherwise violate the negative commerce clause, though such authorization must be unmistakably clear before a court will recognize it. (South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82 [1984]). Although Congress has seldom exercised its power to authorize export restrictions upon water, some states have managed to obtain such congressional authorization. For example, the congressionally approved Yellowstone River Compact contains a provision prohibiting interbasin export without the consent of all the states that were parties to the compact. Because Congress has consented to that provision, it can be validly applied to interbasin/interstate export as well as to interbasin/intrastate export. (Intake Water Co. v. Yellowstone River Compact Commission, 769 F.2d 568 [9th Cir. 1985].) Another instance of congressional exercise of its authorization power is found in the Water Resources Development Act of 1986. This Act prohibits export of water outside the Great Lakes basin without the consent of all the governors of the Great Lakes states. (42 U.S.C. § 1962d-20(d)).

CONCLUSION

The *Sporhase* case revolutionized the law regarding state restrictions on interstate water export by making such restrictions subject to judicial scrutiny under the negative commerce clause. The two *El Paso* cases technically are not binding law outside of New Mexico, but they provide interesting guidance on how the negative commerce clause might affect state water export restrictions. In those cases, the federal district court for New Mexico discussed implications of the first and third *Sporhase* realities, namely, that a state's power to regulate water use during shortages to protect the health of its citizens, and not simply the health of its economy, is at the core of its police power and that a state's public ownership of water may support a limited preference for its own citizens. The court concluded that a state could give limited preference to its own citizens but only for noneconomic purposes.

Neither *El Paso* opinion, however, addressed the effect of the second and fourth S*porhase* realities, namely, that interstate water compacts and Supreme Court equitable apportionment decrees have fostered the legal expectation that under certain circumstances a state may restrict water to being used within its borders and that state water conservation efforts may give water some indicia of a publicly owned and produced good in which a state may favor its own citizens in time of shortage. Interstate compacts and equitable apportionment decrees allocate water based on economic considerations as well as noneconomic ones. (See Grant 1991: §§ 45.06(c) & 46.03). Similarly, the reference to a publicly owned and produced good relates to the market-participant exemption from the negative commerce clause, and that exemption allows preferences based on economic considerations. In view of the perhaps mixed signals given by the four *Sporhase* realities, it remains to be seen whether other courts will agree with the *El Paso* court that no preference for in-state water use to achieve economic objectives is constitutionally permissible.

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