An Agricultural Law Research Article

Interstate Transfers of Water: State Options After *Sporhase*

Part Two

by

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part of the Nebraska statute in *Sporhase* that was expressly declared unconstitutional.

2. *Unintentional Discrimination Against Interstate Commerce*

a. *Legislation With a Discriminatory Effect*

On occasion, a statute not only is neutral on its face but there is no evidence of a legislative purpose to discriminate against interstate commerce. Nonetheless, the Supreme Court will look at the statute to decide whether its *effect* is to discriminate against interstate commerce. A facially neutral statute that produces a discriminatory effect on interstate commerce is not automatically invalid, but many such statutes are held unconstitutional.

The facts of *Hunt v. Washington State Apple Advertising Commission*[211] illustrate how facially neutral statutes can result in unconstitutional discrimination against interstate commerce. In *Hunt*, a North Carolina statute required that closed apple containers either bear labels specified by the U.S. Department of Agriculture or be marked as not graded. Apple growers in Washington challenged the North Carolina statute on the theory that Washington had a state grading system that was superior to that of the U.S.D.A. According to the Washington apple growers, the North Carolina statute burdened interstate sales of Washington apples and also discriminated against them.

On its face the North Carolina statute did not discriminate against interstate commerce because its requirements applied both to in-state and out-of-state growers. The statute nonetheless had a discriminatory effect: it forced Washington shippers to alter their labeling and marketing practices. Increased costs for Washington growers in turn shielded local North Carolina growers from competition. Because of the discriminatory effect, the Supreme Court held North Carolina had to "justify [the burden] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[212] That North Carolina could not do.[213]

b. *The* Bruce Church *Test for State Regulatory Policy*

Suppose in the New Jersey landfill case described above, the state had not discriminated against out-of-state waste but instead had regulated evenhandedly the transport of all waste products, whether gen-

211. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

212. *Id.* at 353.

213. For a good discussion of Supreme Court treatment of state statutes that purposefully discriminate, those that have a discriminatory effect, and those with neither purpose nor discriminatory effect, see Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395, 397-98 (1986).

erated in state or out of state. Scrutiny under the negative Commerce Clause still would be triggered because the state statute would "affect" interstate commerce. The operative test for deciding whether to invalidate state regulatory legislation that affects, but does not discriminate against, interstate commerce comes from *Pike v. Bruce Church*, a case decided by the Supreme Court in 1970.[214]

In *Bruce Church* an Arizona statute required all cantaloupes grown in Arizona and offered for sale to be identified as Arizona cantaloupes and packed in closed containers bearing the name and Arizona address of the packer. Bruce Church grew cantaloupes of exceptionally high quality at its Parker, Arizona, ranch where it had no packing shed. It transported them in bulk thirty-one miles to Blythe, California, where it packed them in compliance with both Arizona and California standards. Contrary to the Arizona statute, however, the containers bore only California address information and the cantaloupes were not identified as Arizona cantaloupes. To comply with the Arizona statute would have required a $200,000 capital outlay to pack an annual crop worth $700,000. The Supreme Court held that the state's tenuous interest in having the company's cantaloupes identified as originating in Arizona could not constitutionally justify the requirement that the company build an unneeded $200,000 plant in the state.

The *Bruce Church* Court articulated the following test to decide whether a nondiscriminatory state statute nonetheless violates the commerce clause:

> Where the [state] statute regulates even-handedly 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.[215]

As a practical matter, the *Bruce Church* test requires that the nature and importance of the potential local benefit be balanced against the burden imposed on interstate commerce. If the Supreme Court

214. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). *Bruce Church* was cited in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350, 353 (1977), which struck down a North Carolina law that required all apples marketed in the state in closed containers to be graded according to United States standards. *Bruce Church* was quoted in Raymond Bros. Motor Transp., Inc. v. Rice, 434 U.S. 429, 441-42 (1978), which held Wisconsin regulations on truck lengths unconstitutional. *Bruce Church* was cited with approval in City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978), disapproving a New Jersey statute that prohibited the import of liquid wastes collected outside New Jersey's territorial limits. And then finally, in Hughes v. Oklahoma, 441 U.S. 322, 331 (1979), *Bruce Church* was characterized as "[t]oday's principle."

215. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

decides that the benefit to the state from the regulatory scheme is outweighed by the burden on interstate commerce, then the state statute will be declared unconstitutional. If, by contrast, the local benefit seems to outweigh in importance the burden on interstate commerce, then a further inquiry must be made: whether the state purposes could be accomplished through means that impose a lesser burden on interstate commerce.

Whether a state could accomplish its purpose with a lesser burden on interstate commerce depends on alternatives reasonably available to a state. A reasonably available alternative is not one that requires a state to take extraordinary measures or attempt new, unproven, and costly methods to solve a problem.[216]

With regard to the nature of the local benefit, not all local interests are equally strong. Health and safety concerns top the list of legitimate state interests. By contrast, a state's interest in promoting its local economy is least likely to succeed when balanced against burdens on interstate commerce.

Under the *Bruce Church* test, a state has a clear and legitimate interest in adopting nondiscriminatory water conservation measures, particularly where the conservation measures are justified on health or safety grounds. In fact, the Supreme Court in *Sporhase* acknowledged the extraordinary degree of police power regulation that states have asserted with respect to allocating water among potential users. The Court also acknowledged that this long history of sovereign prerogatives over water makes state claims regarding interest in the allocation of water rights even more substantial than similar claims regarding other natural resources.

c. *The* Complete Auto Transit *Test for State Tax Policy*

State taxes, as well as state regulation, can violate the Commerce Clause. In *Complete Auto Transit, Inc. v. Brady*,[217] the Supreme Court announced a four part test to be used to assess the constitutionality of state taxes under the Commerce Clause. To be sustained, state taxes must (1) be applied to an activity with a substantial connection to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.

In 1985, the Attorney General of Colorado considered the constitutionality of a $50 per acre-foot export fee that Colorado sought to impose on water being transferred from Colorado to another state. The Attorney General considered the *Complete Auto Transit* test in con-

216. Maine v. Taylor, 477 U.S. 131, 147 (1986).
217. 430 U.S. 274 (1977).

cluding that the export fee was not constitutional.[218] The opinion states in part:

> There is no question that section 37-81-104(1) on its face discriminates against interstate commerce, since the $50 per acre-foot FEE is not a charge on all water diverted, carried, stored, or transported in Colorado, but is only imposed on water to be used outside the state. Therefore, . . . the statute can be upheld only if it satisfies "strictest scrutiny". . . . I conclude that Colorado cannot meet this burden for the export FEE provision. . . . The imposition of a FEE on exports . . . is not narrowly tailored . . . to conservation purposes . . . and is certainly not the least discriminatory means to achieve them. . . . The statute suffers from the same defect that was condemned in *Philadelphia v. New Jersey*—it imposes the full burden of conserving the scarce resource on out-of-state interests. Finally, it is unclear, in light of *Commonwealth Edison Company v. Montana* and the *Complete Auto Transit* test applied therein, that any FEE that on its face discriminates against interstate commerce, no matter what its justification, can withstand constitutional scrutiny.

C. Market Participant Theory: An Exception to the Negative Commerce Clause

1. Background

The Commerce Clause limits a state only when it acts in its sovereign capacity to tax or regulate the activities of private enterprise in interstate commerce. The Commerce Clause has nothing to say about what private enterprise chooses to do independent of state regulation. A state statute that requires flour mills operating in the state to use only wheat that is produced in the state is unconstitutional under the Commerce Clause because it discriminates on its face against out-of-state wheat growers. By contrast, a privately owned flour mill on its own may choose to use only local wheat. Because there is no activity by the state to direct the flour mill to make that particular choice, there is no Commerce Clause issue.

The market participant exception to the Commerce Clause recognizes that a state does not always act in its sovereign, governmental capacity when it enacts legislation. Sometimes a state acts as a proprietor, participating in the market like any private enterprise. When a state acts as a market participant, it is treated for Commerce Clause purposes as if it were a private enterprise. A state that owned and operated a flour mill, for instance, could purchase all wheat locally without offending the Commerce Clause.

Market participant status is illustrated by a recent case involving the city of Boston.[219] Boston sought to preserve city jobs for city residents by requiring that all construction projects funded in whole or in part by city funds or by federal funds administered by the city[220] be

218. AG File No. ONR 8504 066 Op. Colo. Att'y Gen. (1985).

219. *See* White v. Massachusetts Council of Const. Employers, 460 U.S. 204 (1983).

220. Discrimination in use of those funds provided by the federal government and sim-

performed by a work force comprised of at least half Boston residents. This home-town preference, one that clearly discriminated against out-of-state workers, was held to not violate the Commerce Clause. On the facts, Boston did not regulate the hiring practices of private contractors. Instead, Boston spent its own money on its own construction projects. Boston, therefore, was a market participant, not a market regulator.[221] By contrast, a local ordinance requiring all contractors to employ at least half Boston residents would clearly violate the Commerce Clause.

When acting as a market participant, a state may control only its direct relationship with a contracting partner. It may not control what happens to a commodity after it reaches private hands. As an example, a state that owns and operates a cement plant may restrict sales to its own citizens, but it cannot prevent resale out of state, require that cement be used only in the state, or require that cement be used only in construction projects that benefit the state.[222] The latter requirements are regulatory and governmental in nature, not the permissible actions of a proprietor.

2. *Applicability to Natural Resources*

While *Sporhase* made it clear that a general assertion of "state ownership" of water is a legal fiction, not all state assertions of ownership are fictional. Sometimes a state "owns" water rights in the same way private individuals "own" water rights. A state may, for instance, have a vested water right to irrigate state owned land. In addition, a state may acquire water rights by eminent domain. If a water market exists, a state also may compete for water by offering a better price or by reserving to itself a statutory right of first refusal.

With regard to natural resources, however, it is not entirely clear how far the Supreme Court will permit a state to go in acquiring rights to a resource and then reserving or dispensing that resource for the benefit only of its own citizens. There is language in at least two of the cases in which the Supreme Court discussed the market participant exception that suggests that the Supreme Court will not permit a state, even when acting as a market participant, to hoard a natural

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ply administered by the city was authorized by federal regulations and, because so authorized, also did not fall under the bar of the negative Commerce Clause. *Id.* at 215.

221. An additional constitutional question regarding the Boston hiring scheme is whether Boston violated the Privileges and Immunities Clause of the Constitution. No Privileges and Immunities challenge was made in *White*. In a similar case, involving Camden New Jersey's home-town hire policy, such a challenge was made. United Bldg. and Const. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984). For a discussion of *Camden*, see *infra* text accompanying notes 240-44.

222. *See generally* Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

resource for the exclusive benefit of its own citizens.[223] In any event, the economic and political costs that would be faced by a state attempting to acquire private property rights in natural resources undoubtedly will insure that the constitutional boundaries, whatever they may be, will not be reached.

3. Legal Consequences of Market Participant Status

A state seeking to enter the market to avoid Commerce Clause invalidation of an activity affecting interstate commerce should consider its decision carefully as the market participant approach is not cost free. Private enterprise is subject to federal antitrust laws, to federal taxation, and to suits for damages filed by private citizens claiming injury caused by an enterprise. Once a state enters the market as a participant, it loses not only its antitrust exemption but almost certainly its sovereign immunity (in other words, its prerogative to refuse to be sued). In addition, the state subjects itself to federal taxation of the activity. If state actions are private for purposes of the Commerce Clause, the actions probably are private for all other purposes. In short, a state may not have its cake and eat it too.

The fiscal impacts on a state acting as a private enterprise are difficult to quantify absent a particular example, but the impacts might well be substantial. Federal tax liability depends on (1) a Congressional decision to tax the activity; and (2) the net, after-tax, benefit to the state of operating the enterprise or managing the resource. The impact from the loss of sovereign immunity depends on the degree to which a state already permits itself to be sued and the likelihood, type, and money amount of injury it likely would face with regard to its activity. No state today holds itself always immune from lawsuits for injury caused. Nebraska, for example, through its tort-claims act waives sovereign immunity for claims of personal injury or property damage caused by the negligent acts or omissions of state agencies or employees.[224] With respect to antitrust liability, a state's acquisition of water rights might be categorized as an attempt to monopolize. In that event, the loss of antitrust immunity[225] could have significant fis-

223. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)(four members of Supreme Court rejected Alaska's claim to market participant status in part because the commodity at issue was timber, a natural resource); Reeves, Inc. v. Stake, 447 U.S. 429 (1980)(majority rejected argument that cement is a natural resource, noting specifically that South Dakota did not limit out-of-state access to the natural materials needed to make cement).

224. NEB. REV. STAT. § 81-8,209 (1987).

225. Currently, states that are not acting as market participants are immune from federal antitrust laws if two requirements are met:

(1) the state restraint on trade must be clearly articulated and affirmatively expressed as state policy; and

(2) the state must actively supervise the state policy.

cal impact because successful litigants are entitled to damages equal to three times the money amount of the actual injury caused by an antitrust violation.

D. Privileges and Immunities and Equal Protection

The Commerce Clause is not the only constitutional provision implicated by state legislation that discriminates against interstate commerce. The Privileges and Immunities Clause and the Equal Protection Clause also must be considered.

1. Privileges and Immunities Clause

> The Citizens[226] of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
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> U.S. CONST. art. IV, § 2, cl. 1.

As the Supreme Court has described it, there is a "mutually reinforcing relationship" between the Privileges and Immunities and the Commerce Clauses regarding the management and use of natural resources.[227] Under the Commerce Clause, a state may not regulate to save for the exclusive use of residents the benefits of a natural resource once the resource is removed from the ground by private hands.[228] Moreover, except possibly in times of serious shortage, the Commerce Clause precludes a state from regulating the use of a natural resource owned by private citizens in a manner that prefers in-state uses and users.

Whether a natural resource is intended for interstate commerce also may be relevant in evaluating whether a preference for in-state use by residents offends the Privileges and Immunities Clause.[229] The Privileges and Immunities Clause does not require a state to provide citizens of other states the same services or entitlements that it provides to its own citizens. Only those interests fundamental to interstate harmony (not all state services or entitlements) are privileges and immunities covered by the clause. Chief among covered interests are the right to hold property and the ability to earn a living.[230] To

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California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)(quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978).

226. The word "citizens" in the Privileges and Immunities Clause of Art. IV, § 2, is read interchangeably with the word, "residents." The protection afforded citizens (residents) is inapplicable to corporations, however. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 656 (1981); Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).

227. Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

228. *Id.* at 532-33.

229. *Id.* at 533.

230. Privileges and immunities include the "right of a citizen of one State to pass through, or to reside in any other state, for purposes of trade, agriculture, profes-

claim protection of the clause, however, a nonresident must be present in the state that discriminates.[231] Finally, even when a particular interest clearly is treated as a covered privilege and immunity, and even when the out-of-state citizen is in the state that dispenses the privilege and immunity, disparate treatment of citizens and non citizens is not always forbidden. A state owes its primary governmental responsibility to its own citizens as they are the ones who pay the tax freight for the services their state provides.

The fact that a natural resource is involved does not exempt state activity from scrutiny under the Privileges and Immunities Clause. In fact, if a state allows residents to purchase water rights, it is clear the state cannot deny that right to nonresidents. A closer question, however, is whether nonresidents are equally entitled with residents to a share of a state's initial distribution of water. Early cases suggest that a state may restrict the use or disposition of state owned natural resources to residents without violating the Privileges and Immunities Clause.[232] Although later cases call the early cases into question,[233] Professor Trelease has argued that "territorial sovereignty" is sufficient justification for a state to discriminate against nonresidents in its initial disposition of resources.[234]

While state ownership of property is a factor, "often the crucial factor,"[235] in deciding whether there has been a violation of the Privileges and Immunities Clause, state ownership is not dispositive of the question. Indeed, a state's attempt to discriminate against nonresidents present in a state by limiting their use of state-owned natural resources, at least after the first sale, lease, or grant occurs, likely contravenes the Clause.[236]

Despite the fact that a state's permission to use a natural resource is a privilege and immunity protected by the Privileges and Immuni-

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sional pursuits, or otherwise;" and the right "to take, hold and dispose of property, either real or personal; . . ." Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

231. *See* Austin v. New Hampshire, 420 U.S. 656, 660-61 (1975); Toomer v. Witsell, 334 U.S. 385 (1948).

232. *See* McCready v. Virginia, 94 U.S. 391 (1876)(upholding the power of Virginia to restrict nonresidents from farming oysters on state lands underlying navigable waters).

233. *See* Toomer v. Witsell, 334 U.S. 385 (1948).

234. Trelease, *supra* note 199, at 323-25.

235. Hicklin v. Orbeck, 437 U.S. 518, 529 (1978).

236. *Id.* at 530:

> Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil and gas or ever set foot on state land.

ties Clause,[237] it is unclear whether state statutes regulating interstate water transfers trigger scrutiny under the Clause. Traditional antiexport statutes apply equally to residents and nonresidents. Antiexport statutes do not discriminate against nonresidents in their *in-state* use and enjoyment of a resource. It is unlikely that the Supreme Court would extend privileges and immunities coverage to discrimination based solely on out-of-state use of a resource. Even if it were to do so, however, it is not clear that the discrimination would violate the clause.[238]

Discrimination will be upheld in a Privileges and Immunities Clause challenge if: (1) there is a substantial reason for the difference in treatment afforded in-state citizens as compared to out-of-state citizens, and (2) the discrimination against out-of-state citizens is necessary because these out-of-state citizens "constitute a peculiar source of the evil at which the statute is aimed."[239]

The theory is illustrated by a case challenging a local-hire program implemented by Camden, New Jersey.[240] The Camden program was very much like the Boston local-hire program involved in *White v. Massachusetts Council of Construction Employers*.[241] The Camden program required that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be city residents.[242] As in *White*, this scheme was upheld under the Commerce Clause because Camden was a market participant when it awarded city contracts. Unlike *White*, however, the Camden local-hire program was also challenged under the Privileges and Immunities Clause.

The Supreme Court noted that for public projects paid for by public money, a city's right to hire its own citizens (as its right to dispense a natural resource owned by it) might be the most important factor to

237. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)(landfills); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978)(hunting).

238. On the other hand, the Privileges and Immunities Clause likely would operate to prevent a state from denying operation of a preference statute to interstate uses. For example, NEB. REV. STAT. § 46-613 (1988) provides that agricultural uses are preferred over industrial uses. Thus, a Colorado irrigator using Nebraska groundwater likely could assert a preference over a Nebraska industry that used water from the same source, even if the Nebraska use were the more valuable use.

239. United Bldg. & Const. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984)(quoting Toomer v. Witsell, 334 U.S. 385, 398).

240. United Bldg. & Const. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

241. White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983). *White* is discussed *supra* in this Part.

242. The Supreme Court made clear that the Privileges and Immunities Clause applies even if the state discriminates not solely against out-of-state citizens but, instead, discriminates against both out-of-state and in-state, out-of-city residents. United Bldg. & Const. Trade Council v. Mayor of Camden, 465 U.S. 208 (1984).

be considered in deciding whether the Privileges and Immunities Clause is violated.[243] Camden's policy reasons for discriminating against nonresidents were the high Camden unemployment rate and the reduced property tax base resulting from the exodus of residents from the city. Camden therefore argued that out-of-towners were a prime source of Camden's fiscal problems since they live off Camden without living in Camden. On the question whether Camden's reason for discriminating sufficed under the Privileges and Immunities Clause, the Supreme Court remanded to the trial court for fact findings on Camden's decay.[244]

In deciding whether discrimination against nonresidents is necessary, the Supreme Court will evaluate not only whether the nonresidents are a "peculiar source of the evil" caused but whether their different treatment is narrowly tailored to compensate the state for the harm that they cause. For example, nonresidents can be charged a higher fee than residents for fish and game licenses, but only if the fee differential relates to the extra enforcement, conservation, and other burdens created by the nonresidents, costs that residents pay through state taxes.[245]

2. *Equal Protection Clause*

> [No State shall] deny to any person[246] within its jurisdiction the equal protection of the laws.
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> U.S. CONST. amend. XIV.

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not deny the equal protection of its laws to persons within the state and, therefore, subject to its laws.[247] While the main focus of the Privileges and Immunities Clause is to assure that state legislation does not discriminate inappropriately against nonresidents, the main focus of the Equal Protection Clause is to assure that state actions do not inappropriately discriminate between classes of persons who are similarly situated regardless of residence.[248] Consistent with the Equal Protection Clause, a state may provide differing treatment

243. *Id.* at 222.

244. The Camden program affected only employees working directly on city projects; the program did not dictate beyond Camden's direct contracting partners. On that basis, the Supreme Court distinguished the Camden program from the Alaska-hire program that the Court invalidated under the Privileges and Immunities Clause. Hicklin v. Orbeck, 437 U.S. 518 (1978).

245. Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978); Mullaney v. Anderson, 342 U.S. 415 (1952).

246. The word "person" in the Equal Protection Clause of the fourteenth amendment includes within its scope corporations and other legal entities as well as living persons. Western & So. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 660 (1981).

247. Plyler v. Doe, 457 U.S. 202 (1982).

248. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985).

to distinct classes of persons provided the classifications are reasonable. When a classification—such as state citizenship or residence—does not involve race, nationality, or a fundamental right, then that classification will be upheld if it is rationally related to achieving a legitimate state purpose.[249]

The rational relationship test is the easiest for a state to meet. It requires only that a legislature have a rational basis for believing that a statute will promote the purpose for which it was enacted; the test does not require that the purpose *in fact* was promoted. If it is "at least debatable" that a statute could effect its purpose, the statute satisfies the rational relationship test.[250] In fact, it is difficult to show that a state statute is not rationally related to a legitimate state purpose. Consequently, the classifications normally applied to differentiate among categories of water user (such as large-small, irrigator-industrial, seasonal-continuous) are not likely to raise serious equal protection questions even though all water users are not treated equally.

One classification based on residence normally will fail even under the rational relationship test, however. The Equal Protection Clause makes it very difficult, if not impossible, to dispense state benefits in a way that prefers long-standing residents as against more recent arrivals in a state.[251] In other words, to paraphrase Gertrude Stein, a resident is a resident is a resident.

Despite the fact that the Equal Protection Clause prohibits state discrimination between classes of similarly situated persons, it is unclear to what extent a state statute regulating interstate water transfers raises an equal protection issue. A statute that treats in-state and out-of-state water transfers differently, but that treats residents and nonresidents alike regarding these transfers, does not appear to be a statute that differentiates between classes of persons similarly situated, particularly when the focus of the clause is on equal treatment "within" a state.

V. RESPONSES BY OTHER STATES TO THE *SPORHASE* DECISION

A. State Law at the Time of *Sporhase*

On July 2, 1982, the date of the *Sporhase*[252] decision, seventeen

249. As an example of a state classification scheme subject to the rational relationship test, see Texaco v. Short, 454 U.S. 516 (1982)(for purposes of abandonment, it is rational to classify mineral interests owners into those with 10 or more interests in a county and those with fewer than 10).

250. Western & So. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1971).

251. *See, e.g.*, Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Zobel v. Williams, 457 U.S. 55 (1982).

252. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).

states and the District of Columbia had statutes to either limit or completely prohibit transfers of water out of state.[253] The first such statute, enacted by California seventy-one years before *Sporhase* was decided,[254] absolutely prohibited any interstate transfer of water. The California approach was followed by Colorado in 1915,[255] and later in the 1950s, by Nevada and New Mexico.[256]

Another statutory approach, first used by Montana in 1921,[257] gave discretionary power over interstate water transfers to either the state legislature or to an administrative officer or agency. Wyoming, Oregon, Nebraska, Oklahoma, and Texas eventually adopted statutes that incorporated the Montana approach.

A third type statute was enacted by Arizona in 1919. The Arizona model, followed by Idaho, Kansas, South Dakota, Utah, Washington, and eventually Nebraska, permitted interstate transfers from a state only to those states that granted reciprocal export privileges.[258] It was

253. ALA. CODE, tit. 37, § 393 (1958); ARIZ. REV. STAT. ANN. § 45-153B (1956); CAL. WATER CODE § 1230 (West 1971); COLO. REV. STAT. ANN. § 37-90-136 (1973), § 37-81-101 (1981 Cum. Supp.); D.C. CODE ANN. § 43-1529 (1967); IDAHO CODE § 42-408 (1948); MONT. CODE ANN. § 85-1-121 (1981); NEB. REV. STAT. § 46-613.01 (1978); NEV. REV. STAT. §§ 533.515, 533.520 (1979); N.M. STAT. ANN. § 72-12-19 (1978); N.Y. CONSER. L. § 452 (McKinney 1967); OR. REV. STAT. § 537.810 (1977); R.I. GEN. LAWS § 46-15-9 (1970); TEX. REV. CIV. STAT. ANN. art. 7477b, § 2 (Vernon Supp. 1968); UTAH CODE ANN. § 73-2-8 (1980); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. § 4-3-1-115 (1977). *See* Note, *Interstate Transfer of Water: The Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249, 1250 n.8, 1252-53 (1981). *See Commerce Clause Limits State's Ability to Stop Groundwater Exports: Supreme Court Overrules Nebraska Reciprocity Rule*, 12 ENVTL. L. REP. 10083 (1982); Amicus Curiae Brief of the National Agricultural Land Center at 16, in Sporhase v. Nebraska, 458 U.S. 941 (1982).

The Senate Committee on Environmental and Public Works collected laws of twelve Western states forbidding or limiting interstate and/or interbasin water transfers. *The Impact of the Supreme Court Decision in Sporhase versus Nebraska, Hearings before the Subcomm. on Water Resources of the Senate Comm. on Environmental and Public Works*, 97th Cong., 2d Sess. (1982) (Serial No. 97-H63). The laws of fourteen states can be found in Comment, *Legal Impediments to Interstate Water Marketing: Application to Utah*, 9 J. ENERGY L. & POL'Y 237, 261-65 (1989).

254. Act of March 3, 1911, ch. 104, § 1, 1911 Cal. Stat. 271. The Act provided that "It shall be unlawful for any person, firm, association or corporation to transport or carry through pipes, conduits, ditches, tunnels, or canals, the waters of any fresh water lake, pond, brook, river or stream of this state into any other state, for use therein." The Act was repealed in 1917. The New Jersey law upheld in Hudson County Water Co. v. McCarter, 209 U.S. 349, 353 (1908) was nearly identical to the California statute.

255. Act of March 30, 1917, ch. 151, § 1, 1917 Colo. Sess. Laws 539.

256. Act of March 23, 1951, ch. 325, § 1, 1951 Nev. Stat. 543; Act of March 19, 1953, ch. 64, § 2, 1953 N.M. Laws 108.

257. Act of March 5, 1921, ch. 220, § 1, 1921 Mont. Laws 468.

258. Act of March 26, 1919, ch. 164, § 15, 1919 Ariz. Sess. Laws 278, 284.

this portion of the Nebraska statute that was struck down by the United States Supreme Court in *Sporhase*.

Over the years states periodically revised their export policies. At the time of the *Sporhase* decision three of the seventeen western states[259] (California, North Dakota, and Texas) had no restrictions on out-of-state transfers; four western states (Colorado, Idaho, Nevada, and New Mexico) had absolute bars on such transfers; six western states (Arizona, Oklahoma, Oregon, Montana, Nebraska, and Wyoming) reserved to themselves a discretionary power to restrict transfers; and the remaining four western states (Kansas, South Dakota, Utah, and Washington), plus Nebraska, required reciprocity. Current state statutes governing interstate transfers of water in the seventeen contiguous western states, along with detailed commentary and analysis, are set forth in the Appendix.

B. The New Mexico Litigation

1. El Paso I

a. *Factual Background*

Recent water rights litigation between El Paso, Texas and the state of New Mexico provides important insights into how *Sporhase* may be applied to other types of restrictive water transfer legislation. El Paso, with a population of 450,000 is located on the Rio Grande in west Texas across the border from New Mexico. El Paso is the economic hub of an interstate region that includes southern New Mexico. As the major trade center in the region, El Paso contains the principal employers and eighty percent of the population. Moreover, metropolitan El Paso is growing more rapidly than the area across the Rio Grande in New Mexico, an area primarily used for irrigated agriculture.

El Paso presently obtains water from the Rio Grande and from wells in Texas, but these sources are insufficient to meet projected future needs. Recognizing the need to develop an alternate water supply to meet the demands of its growing population, the city looked across the border to New Mexico. In due course, El Paso filed 326 applications for groundwater appropriation permits with the New Mexico state engineer, S. E. Reynolds. El Paso sought permission to pump and export to Texas up to 296,000 acre-feet of groundwater annually. Reynolds denied all of the permits because a New Mexico stat-

259. In water law, the western states are the 17 contiguous states with land on or west of the 98th meridian. The states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. *See* F. TRELEASE & G. GOULD, WATER LAW 13-14 (4th ed. 1986).

ute, with very minor exceptions, prohibited all transfers of groundwater outside the state.

b. Results of the Litigation

On September 5, 1980, in a case referred to as *El Paso I*[260], El Paso commenced proceedings in the United States District Court for the District of New Mexico before Chief Judge Bratton. El Paso challenged the constitutionality of the New Mexico statute as well as other statutes that the city felt were used by Reynolds as reason for the permit denials. Twenty-five attorneys were listed as participating in the litigation. At the conclusion of the trial, Judge Bratton enjoined Reynolds from enforcing the New Mexico statute to prohibit out-of-state water transfers.

Because the statute facially discriminated against interstate commerce, it was subject to the strictest scrutiny regarding whether it served a legitimate local purpose, whether it was narrowly tailored to meet that purpose, and whether there were any adequate nondiscriminatory alternatives available. The New Mexico statute could not withstand strict scrutiny review and in any event Judge Bratton decided that the Supreme Court in *Sporhase* authorized a state to discriminate in favor of its own citizens in granting water permits "only to the extent that water is essential to human survival."[261]

c. Key Issues Addressed by the Court

El Paso I involved an application for a *new permit to withdraw* water from New Mexico aquifers. *Sporhase*, in contrast, concerned the right of an *existing water right holder* to transfer water across state lines. Several aspects of Judge Bratton's opinion in *El Paso I* are of interest for the way in which he interpreted and applied parts of the *Sporhase* opinion. Given the different factual situation, at each point Judge Bratton may have read *Sporhase* more narrowly than was intended by the United States Supreme Court.

i. Can state regulation favor local economies?

First, in his discussion of the Commerce Clause, Judge Bratton pointed out the distinction between regulations designed to protect a state's economy on the one hand and those designed to protect the health and safety of the people on the other. Writing for the majority in *Sporhase*, Justice Stevens had said that a discriminatory export restriction might be valid if it were narrowly tailored to a "legitimate conservation and preservation interest."[262] But he did not clearly

260. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379 (D. N.M. 1983).
261. *Id.* at 389.
262. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982).

state what he meant by "legitimate conservation and preservation" interests. The issue in *El Paso I* was whether New Mexico could restrict exports of groundwater solely to preserve groundwater to support future economic growth in New Mexico.[263] In striking down the statute, Judge Bratton reasoned that the "legitimate conservation interest" referred to in *Sporhase* did not extend beyond what was needed to protect human health and safety; an interest in preserving the economy of the state was not constitutionally legitimate. In *Sporhase*, however, the Court stated 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. Our reluctance stems from the 'confluence of several realities.' "[264]

ii. Does water have unique constitutional status?

The second aspect of *El Paso I* that is of interest is Judge Bratton's comparison of water with other natural resources. New Mexico argued that its statute served a legitimate local purpose, that of conserving and preserving the state's "internal water supply."[265] Judge Bratton said this purpose was "unquestionably legitimate and highly important"[266] and might justify a limited, non-discriminatory burden on commerce, but "it cannot support a total ban on interstate transportation of ground water."[267] As he described the import of *Sporhase*, a state has power:

> 'to shelter its people from menaces to their health or safety' but not 'to retard, burden or constrict the flow of . . . commerce for their economic advantage. . . .' [citation omitted] Thus, the Supreme Court held that a state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource. For purposes of constitutional analysis under the Commerce Clause, it is to be treated the same as other natural resources.[268]

Notwithstanding Judge Bratton's opinion, however, *Sporhase* does not lead necessarily to the conclusion that the Commerce Clause requires water to be treated exactly the same as other natural resources—oil, gas, fish, and wildlife, for example. In fact, Judge Bratton's conclusion seems to contradict Justice Stevens' discussion of four "realities" that made the Supreme Court "reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens [water] in times of severe shortage."[269]

The "four realities" that Justice Stevens cited in *Sporhase* tend to

263. El Paso I, 563 F. Supp. 379, 390 (1983).
264. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. at 956.
265. El Paso I, 563 F. Supp. 379, 388-89.
266. *Id.* at 389.
267. El Paso I, 563 F. Supp. 379, 389.
268. *Id.*
269. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956.

distinguish water from other natural resources. First, according to Justice Stevens, a state's power to regulate the use of water in times of shortage to protect the health of its citizens is at the core of its police power.[270] Second, use of interstate compacts and equitable apportionment decrees to allocate water among states has created a "legal expectation" that state boundaries are relevant in the allocation of scarce resources.[271] Third, a state's claim of public ownership of water is "logically more substantial" than are similar claims with respect to other resources and may justify a "limited preference" in favor or its own citizens.[272] Fourth, given the importance of a state's conservation efforts in maintaining groundwater supplies, groundwater has "some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."[273]

iii. What is a "severe shortage" of water?

In *El Paso I* Judge Bratton interpreted Justice Stevens' discussion of the four realities to mean that a "severe shortage" would not exist unless supplies for drinking water, household uses, and fire protection were threatened. While Judge Bratton undoubtedly was correct in assuming that the Supreme Court would not give an expansive reading to the term "severe shortage", Judge Bratton's definition may be too

270. *Id.* at 956.

271. *Id.*

272. *Id.* at 956-57. This third reality arguably gives states a limited right to prefer their own citizens when allocating water, even if the preference is used to protect the economic health of the state. Immediately after he mentions the possibility of a "limited preference," Justice Stevens cites Hicklin v. Orbeck, 437 U.S. 518 (1978). In an unanimous opinion in *Hicklin*, the U.S. Supreme Court struck down an Alaska law that gave Alaska residents a hiring preference when seeking to work on Alaska oil and gas pipelines. According to the Court, the law violated the Commerce Clause and the Privileges and Immunities Clause. In discussing the Commerce Clause, the Court cited three decisions that had held state regulation of natural resources unconstitutional under the Commerce Clause, West v. Kansas Natural Gas, 221 U.S. 229 (1911), Pennsylvania v. West Virginia, 262 U.S. 553 (1923) and Foster Packing Co. v. Haydel, 278 U.S. 1 (1928). The three decisions established "that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders. . . ." Hicklin v. Orbeck, 437 U.S. at 533. *Haydel*, according to the Court, "*limited* the extent to which a State's purported *ownership* of certain resources could serve as a justification for the State's economic discrimination in favor of residents." Hicklin v. Orbeck, 437 U.S. at 533 (first emphasis added). Significantly, the opinion suggests that the Commerce Clause doesn't prohibit economic preferences, it only limits the extent of such preferences. In citing *Hicklin* for the proposition that alleged public ownership of water "may support a limited preference," the *Sporhase* Court gives a strong signal that it would not reject automatically an instate water preference to preserve a state's economy. *See* Comment, *Waterlaw - Discrimination Against Interstate Commerce in Ground Water for Economic Reasons*, 19 LAND & WATER L. REV. 471 (1984).

273. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. at 957.

narrow. Today, for example, certain environmental uses might be considered essential, especially if diminished water supplies threatened the health of endangered fish and wildlife populations.

iv. Can a state reserve water for future needs?

A final noteworthy aspect of *El Paso I* relates to the ability of a state to reserve present water supplies to meet projected, future shortages. New Mexico did not claim that its ban on interstate water transfers promoted health and safety, or that New Mexico suffered a current water shortage. Rather, New Mexico claimed that the state's limited water supply was insufficient to meet *future* foreseeable needs. According to the state engineer, by the year 2020 New Mexico would face an annual state-wide consumptive use shortage of 626,000 acre-feet. The shortage predicted by the state, however, was based not on minimal public health and safety needs, but rather on "public welfare" requirements that included future economic consumptive uses. Estimated statewide water demand for public health and safety purposes was only 220,000 acre-feet per year, one tenth the estimated renewable annual water supply of 2.2 million acre-feet.

Judge Bratton refused to allow New Mexico to include projected future uses by industry, energy production, and irrigated agriculture in its calculation of projected shortages. In other words, Judge Bratton refused to allow water needed to support the state's future economic base to be removed from the constraints of the Commerce Clause. To do so, he said, would be tantamount to economic protectionism.[274]

Judge Bratton then considered what a state must show to justify discrimination against interstate commerce. In *Sporhase*, Justice Stevens suggested that a narrowly tailored statute that permitted only

274. El Paso I, 563 F. Supp. at 390. The U.S. Supreme Court rejects the notion that certain levels of economic well-being are essential to human welfare. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)(striking down a New York statute that set a minimum resale price for imported milk and rejecting an argument that wholesome supplies of milk would be jeopardized if price competition drove producers out of business or required producers to reduce expenditures on sanitation). Justice Cardozo, writing for a unanimous Court, said: "Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity." *Id.* at 523. *See also* H.P. Hood & Sons, Inc., v. Du Mond, 336 U.S. 525 (1949)(holding a New York statute limiting interstate commerce in milk to promote local economic advantages violates the Commerce Clause and rejecting an argument that destructive competition would reduce the supply of milk in local markets), *cited in* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. at 956.

intrastate water transfers might be constitutional if an arid state as a whole suffered from a water shortage and if "the intrastate transfer of water from areas of abundance to areas of shortage is feasible regardless of distance."[275] In *El Paso I*, New Mexico attempted to show that locally abundant water near El Paso could be transported to other areas of New Mexico that were experiencing water shortages. Although New Mexico had no present plan to transport groundwater away from the El Paso area, evidence about technically feasible transportation projects was introduced.

Judge Bratton was not persuaded. Even if transportation projects were imminent, he said, discrimination could be justified under *Sporhase* only if narrowly tailored to times and places of shortage.[276] Moreover, to justify limitations in favor of future projects, a state must demonstrate the present economic feasibility of the project.[277] A state cannot simply prove that it is possible to move the water over enormous distances; engineers almost always can do that.

To place in context this final aspect of *El Paso I*, consider the doctrine of equitable apportionment. Briefly, equitable apportionment allocates shares in interstate waters to states or regions so they can plan their futures. Professor Utton summarized the matter well in the following language:

> Equitable apportionment is a doctrine which the courts have fashioned to maintain the balance between states by "dividing the pie" of an interstate stream between the states that share it. Thus, the doctrine assures each state of a fair share and prevents any state, simply because it is upstream, bigger, more economically advanced, or more aggressive, from taking more than its share of the river. Under equitable apportionment, the court is called upon to settle disputes between states "in such a way as will recognize the equal rights of both and at the same time establish justice between them." In *Nebraska v. Wyoming*, the court added that equitable apportionment demands "the delicate adjustment" of the interests of the states.[278]

In *El Paso I*, groundwater was hydrologically connected to the Rio Grande and the aquifer was under several states.[279] Under Judge Bratton's analysis, New Mexico could not restrain exports of groundwater to protect its economic interests. By contrast, under principles of equitable apportionment, New Mexico might well obtain an apportionment of the aquifer that it could then manage to maximize economic benefits to the state.

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275. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. at 958.

276. El Paso I, 563 F. Supp. at 391.

277. *Id.*

278. Utton, *In Search Of An Integrating Principle For Interstate Water Law: Regulation versus The Market Place*, 25 NAT. RESOURCES J. 985, 987 (1985).

279. El Paso I, 563 F. Supp. at 380.

2. El Paso II

New Mexico reacted to *El Paso I* by doing three things. It appealed Judge Bratton's decision to the Tenth Circuit Court of Appeals; it repealed the statute the judge found unconstitutional; and it enacted new provisions to govern the transport of groundwater out of state.[280] On appeal, New Mexico argued that its new statute made the El Paso litigation moot and it urged dismissal. The Court of Appeals disagreed and sent the entire matter back to Judge Bratton "for fresh consideration of the respective rights and obligations of the parties in light of whatever intervening changes of law and circumstances are relevant."[281] This new round of litigation is referred to as *El Paso II.*

Before the *El Paso II* trial began, New Mexico enacted yet another statute. This one placed a two-year moratorium on all pending and future applications to appropriate groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir.

In *El Paso II* Judge Bratton had before him the new interstate transfer statute and the two-year moratorium. The transfer statute was the first statute especially drafted and enacted to comply with *Sporhase.* The new statute contrasts sharply with New Mexico's former explicit ban on all interstate transfers of water. It begins by stating that "under appropriate conditions," interstate transportation and use of New Mexico's waters are not in conflict with the public welfare of the state's citizens or conservation of its waters. Both surface and groundwater are included in the term "public waters."

Under the new statute, a person desiring to take water from New Mexico must apply for a permit from the State Engineer. Among other things, the State Engineer is directed to determine whether the withdrawal and transportation of water outside New Mexico will impair existing water rights within New Mexico. If existing water rights are impaired, then the State Engineer must deny the application. In addition, before approval of an application, the State Engineer must find that the proposed transfer of water out of state is neither contrary to water conservation policies within the state nor otherwise detrimental to the public welfare of New Mexico's citizens. In making his decision, the State Engineer must consider at least six factors:

(1) the supply of water available to the state of New Mexico;

(2) water demands of the state of New Mexico;

(3) whether there are water shortages within the state of New Mexico;

(4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the state of New Mexico;

280. N.M. STAT. ANN. § 72-12B-1 (1978).

281. City of El Paso v. Reynolds (*El Paso II*), 597 F. Supp. 694, 696-97 (D. N.M. 1984).

(5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.[282]

Under the statute, moreover, the State Engineer may condition a permit to guarantee that the water, once transported out of New Mexico, is used according to the same regulations and restrictions imposed on in-state users.[283]

In considering the new statute, Judge Bratton first examined what constitutes a legitimate local purpose under *Sporhase*. He made several findings:

(1) Conservation of a scarce resource is a legitimate local concern.[284]

(2) While the term "public welfare" is a broad term that includes such matters as health, safety, recreational, aesthetic, environmental, and economic interests, a legitimate public interest must be more than economic to avoid a per se rule of invalidity. If the public welfare criterion is used to promote a legitimate purpose with only an incidental burden on interstate commerce, the Court must try to accommodate the local and national interests, but if less burdensome alternatives are available the state must use them.

(3) A state may favor its own citizens in times and places of shortage. Whether the preference is reasonable depends on the proximity in time of a projected shortage, the certainty it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage. In other words, a state cannot bar exports because it anticipates that at some later time there will be insufficient water to meet all future uses. Instead, any preference for predicted shortages must be limited to times and places where its exercise would not place an unreasonable burden on commerce compared to the local benefits.[285]

(4) The six criteria which the State Engineer is to consider when acting upon an application to export are valid.

Judge Bratton concluded that the first four statutory criteria were necessary to determine if there is a water shortage in New Mexico. The final two criteria are valid because local benefits cannot be weighed against the burdens on commerce without knowledge of the export applicant's need for the water in comparison with the need of the prospective in-state users.[286]

282. N.M. STAT. ANN. § 72-12B-1D (1978).
283. N.M. STAT. ANN. § 72-12B-1F (1978).
284. El Paso II, 597 F. Supp. 694, 698 (D. N.M. 1984).
285. *Id.* at 701.
286. *Id.* at 703.

Judge Bratton also wrote that in determining whether a preference for a state's own citizens is reasonable a court will consider the extent to which a state claims public ownership of its waters and whether the availability of water is partially the result of the state's own efforts.[287]

Notwithstanding his approval of the statutory criteria, Judge Bratton held that the New Mexico statute did not operate evenhandedly within the meaning of *Sporhase* because New Mexico demanded that all out-of-state transfers not be contrary to the state's water conservation standards or detrimental to the public welfare while putting similar restrictions on only one kind of in-state transfer.[288] The difference in treatment discriminated on its face against interstate commerce and consequently was subject to strict scrutiny.[289] New Mexico could not meet the burden of proving that the disparate treatment served a legitimate local purpose, that it was narrowly tailored to that purpose, and that there were no adequate nondiscriminatory alternatives.[290]

Judge Bratton also held unconstitutional the two-year moratorium enacted by the New Mexico legislature on the Hueco and Mesilla Bolsons aquifers. Judge Bratton said that the moratorium was unconstitutional regardless of its nondiscriminatory effect because it involved a purpose to discriminate against interstate commerce.[291] New Mexico had argued that the moratorium regulated evenhandedly because it stayed new appropriations for use both in-state and out-of-state, but the only thing that distinguished these aquifers from others in the state was that El Paso had filed applications to take water from them and transport it to Texas.

Several things should be noted about *El Paso II*. First, Judge Bratton changed his position slightly from *El Paso I* by recognizing that dictum in *Sporhase* suggests that, under certain circumstances, states may discriminate against out-of-state users of water by giving their citizens a limited preference. He also acknowledged that the term "public welfare" contains some suggestion that states may preserve

287. *Id.* at 701.

288. *Id.* at 703-04. After *El Paso II*, New Mexico amended its statutes to add new conservation and welfare requirements that applied to both in-state and out-of-state water transfers. N.M. STAT. ANN. § 72-5-23 (Supp. 1985). Attempts by one state to impose conservation measures on another state also may be constitutionally suspect, however. In an extreme case, such attempts would operate much as reciprocity clauses, barring exports from a state of origin unless the importing state adopted laws that matched the laws of the state of origin.

289. El Paso I, 597 F. Supp. 694, 704 (D. N.M. 1984).

290. *Id.*

291. Judge Bratton said that the balancing test in *Bruce Church* presupposes that a statute has a legitimate purpose. That being so, evenhandedness cannot make valid an illegitimate purpose. He added that the moratorium was clearly calculated to effectuate a protectionist purpose: "the complete blockage of interstate commerce in water." *Id.* at 707.

their water supplies both for the health of their citizens and for the health of their economies.

In the end, Judge Bratton rejected three of El Paso's challenges to the New Mexico statute and concluded: (1) a state's conservation efforts or concerns for the public welfare of its citizens are not per se discriminatory against interstate commerce; (2) "public interest" and "conservation" are proper standards for evaluating a state's interests because of longstanding usage and tradition and the fact that the terms can be limited if necessary by the courts;[292] and (3) under *Sporhase* absolute evenhandedness is not always required because a claim of public ownership may justify a "limited preference" for a state's citizens and an arid state's conservation efforts may justify limits on groundwater transfers out of state.

Judge Bratton upheld El Paso's fourth challenge to the statute. He concluded that a state must evenhandedly evaluate in-state and out-of-state applications to transfer water. Because the New Mexico statute required the State Engineer to consider six factors when acting on applications for out-of-state transfers that he did not have to consider with regard to most applications for in-state transfers, the statute put the entire burden of conservation protection on interstate commerce. That result, according to Judge Bratton, constituted illegitimate discrimination against interstate commerce.

C. Legislative Studies in New Mexico

During the same session at which the New Mexico legislature enacted the state's new statute regarding interstate transfers of groundwater, the legislature also enacted SB 300. SB 300 directed the Governor, after consultation with the State Engineer and the Attorney General, to appoint a committee to study the impact on the state's water resources of "recent court decisions concerning water and interstate commerce."[293] Judge Bratton's decision holding New Mexico's embargo statute unconstitutional had been entered approximately two months before passage of S.B. 300.

The committee's report to the Governor considered alternative means of protecting New Mexico's water from out-of-state transfers.[294] The Governor issued a report after evaluating the committee's report. The *Governor's Report* recommended three possible methods to keep New Mexico groundwater at home:

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292. *Id.* at 702.

293. 1983 N.M. Laws, ch. 98.

294. Water Study Committee, *Report to Governor Tony Anaya and the Legislative Council Pursuant to Laws 1983, Chapter 98, reprinted sub. nom.* Water Law Study Committee, *The Impact of Recent Court Decisions Concerning Water and Interstate Commerce on Water Resources of the State of New Mexico*, 24 NAT. RESOURCES J. 689 (1984)[hereinafter Governor's Report].

(1) The state could appropriate available groundwater in an attempt to create a state proprietary interest that would support a ban on exports.[295]

(2) The state could seek congressional authorization of a state embargo on interstate water transfers.[296]

(3) The state could seek to allocate groundwater pursuant to an interstate compact. It was recommended that New Mexico enter into compact negotiations with Texas to clarify division of Rio Grande surface water below Elephant Butte Dam and in that way clarify as well the status of related groundwater. No compact has been entered into to implement this recommendation.

A 1986 critique of the *Governor's Report* discussed the numerous problems implicated in implementing the recommendations.[297] First, an allocation procedure would have to be developed if the state became the actual, rather than fictitious, owner of groundwater. This practical problem was recognized in the *Governor's Report*. Second, if the state has an illegitimate motive, such as economic protectionism, the motive must be effectively disguised or "courts will be strongly tempted to hold that the state's new scheme of ownership confers no greater justification for an embargo than its old public trust."[298] Third, although recent Supreme Court cases recognize that when a state conducts a business enterprise the Commerce Clause need not apply, still "it seems doubtful that the Court would allow a state to

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295. Creating a proprietary interest in groundwater is an attempt to come within the market participant exception to the Commerce Clause. For a discussion of this exception see Part IV, *supra*.

The legislative committee recommended immediate funding of a study, but not immediate implementation of the "state appropriation" option, which it regarded as a last resort if neither a federal solution nor an interstate compact could be reached.

A study to carry out this recommendation of the Water Law Study Committee was conducted as a joint venture between the Natural Resources Center at the University of New Mexico School of Law and the Water Resources Institute at New Mexico State University. *See* New Mexico Water Resources Research Institute and University of New Mexico Law School, *State Appropriation of Unappropriated Groundwater: A Strategy for Insuring New Mexico a Water Future* (Jan. 1986).

New Mexico Laws, ch. 98, sec.2, appropriated $125,000 from the general fund to the office of the governor for the purpose of paying the expenses of the water law study committee. New Mexico Laws, ch. 114, sec. 2, appropriated $200,000 from the general fund to the office of governor for additional studies.

296. For a discussion of the power of Congress to authorize exclusionary activity, see Part IV, *supra*. The legislative committee urged the state to make every possible effort to achieve federal legislation permitting New Mexico to keep its water resources within the state's boundaries. No federal legislation implementing this recommendation has been enacted.

297. Note, *New Mexico Continues to Study Water Embargo Measures: A Reply to the State Water Law Study Committee*, 16 TEX. TECH. L. REV. 939 (1985).

298. *Id.* at 947.

fashion a business for the purpose of discriminating against out-of-state citizens."[299] Fourth, negotiated regional resolutions, although theoretically appealing, will be difficult. Furthermore, a resolution involving congressional action may be no easier. Congress has been reluctant to involve itself in state water law issues.[300] Certainly Congress has little experience in apportioning interstate water resources. It did apportion one river, the Colorado, but lengthy litigation has been necessary to clarify what the congressional apportionment meant.[301] For all these reasons, the authors of the critique concluded that the best solution was for the parties directly involved to negotiate the most expedient and fair resolution possible.

D. Conclusion

The New Mexico litigation suggests that states will face substantial hurdles in attempting to draft legislation that complies with the dictates of *Sporhase*, and at the same time gives a preference in water use to in-state citizens. This is true even where a state is not attempting to restrict the rights of existing water rights holders to transfer their entitlements across state lines, but rather only attempting to limit the ability of out-of-state claimants to acquire *new* state water rights. A number of factors, however, suggest that a state should have some latitude to favor its own citizens in the initial distribution of water rights, even though it would have little ability to restrict interstate transfers of rights already distributed.

Most interstate water transfers have involved unappropriated water, that is water that has not yet been devoted to beneficial use. In most western states, but not in Nebraska, landowners must secure a permit from the state before extracting groundwater. Professor Trelease has argued that during the initial process of granting these permits for water use, state officials can take whatever actions are necessary to ensure that benefits resulting from the appropriation remain inside the state.[302] Although the Trelease position is at odds with the position taken by Judge Bratton in the El Paso litigation, it is not without merit.

According to Professor Trelease, a state is deprived of its sovereignty unless the distinction between unappropriated and appropriated water is made. This is true because water, as much as land, is

299. *Id.* at 952.

300. The critique gives several examples. *Id.* at 952-57.

301. Arizona v. California, 298 U.S. 558 (1936). Among other areas of dispute, Arizona and California could not agree whether the apportionment was limited to the main stream or whether the tributaries were included. *See* C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 432-73 (2d ed. 1980).

302. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347 (1985).

part of a state's assets which it should be free to retain or put into private hands. Congress, of course, would have the power to overturn state conservation decisions if state "hoarding" of water supplies became a serious problem.[303] Even if states cannot retain unappropriated groundwater, he argues, they should at a minimum have the ability to recoup lost benefits that result from out-of-state transfer of resources.

> *Sporhase* is right and *El Paso* is wrong. States can live with *Sporhase's* ruling that a state cannot tell its citizens that they cannot sell out of state when it permits them to sell within the state. This applies to both sales of water and sales of water rights. A state cannot expect to prevent the interstate sale of water rights to "preserve the neighborhood" any more than it could prevent a steel mill from closing in a factory town or dictate the way of life to its rural inhabitants. On the other hand, the states cannot live with *El Paso*. *El Paso* would require a state to sit by and see other states deprive its people of future opportunities for growth and development, while preserving only "noneconomic" water for the public health and safety of stagnating communities. Without overruling *Sporhase*, but with some clarifications in regard to shortages and explanations of legitimate local interests, much water might be saved within states on a territorial-opportunity cost theory, . . . , without freezing out neighboring cities. Neighboring cities might be put to more expense either because they have to pay the opportunity costs or because they must use available, though more expensive, sources in their own state.[304]

An economic analysis would suggest that states ought to be able to capture the secondary benefits they would have received if the water had been used within the state rather than elsewhere. Unless the state of origin is able to charge the importing state the value of lost opportunities in the state of origin, all costs of the transfer are not included. This argument applies only to unappropriated water, however. Once water has passed into private hands, normal market mechanisms in conjunction with the "no injury" rule should insure that the state is adequately compensated for the transfer.[305]

The National Water Commission studied large scale water transfers in 1973.[306] According to the Commission, two conditions are nec-

303. "Hoarding has its opportunity costs too: saving water foolishly for small or speculative future benefits could cause the loss of a generous present offer." *Id.* at 371.

304. Trelease, *supra* note 199, at 321.

305. In a market system, if advocates of a transfer are willing to pay sufficient compensation to persons holding water or water rights to induce such persons to voluntarily give up their water or water rights, then the transfer should be approved unless third parties, not participating in the negotiations, would be injured. As among willing buyers and sellers, each will be better off after the transfer than before the transfer. The buyers will receive water at what they believe to be a reasonable cost, and the sellers will receive more for their water than they could earn if they put the water to beneficial use themselves. If water is unappropriated, however, no market exists to police the transaction. Consequently, unless states can charge for opportunities forgone, present out-of-state uses will have an unfair economic advantage over future in-state uses.

306. NATIONAL WATER COMMISSION, *Water Policies for the Future* (1973). The major background studies on interbasin transfers submitted to the National Water

essary before a proposed out-of-state transfer proposal is considered desirable from an economic point of view. First, it should be the least-cost alternative for supplying the necessary quantity of water to the users.[307] If lower cost and equally reliable sources of supply can be found, those should be used. Second, the benefits in the new uses must be greater than the sum of the costs of construction, operation, and maintenance, plus the net opportunity costs of foregone uses in the area of origin, all discounted to a common time basis.[308] Environmental costs also should be included in the computation.

VI. PITFALLS TO AVOID IN LEGISLATIVE DRAFTING AND CONSTITUTIONAL LITIGATION

A. Drafting Considerations

As should be clear from the preceding Parts, the Commerce Clause generally prohibits a state from regulating items of commerce in a way that discriminates against out-of-state users. No matter how a state attempts to get there, it will find its path blocked by the Supreme Court.

On the other hand, state legislative action that affects, but does not discriminate against, interstate commerce will be upheld if it meets the *Bruce Church* test. The legislation will be upheld if it furthers an important state policy; it operates even-handedly; and, of reasonably available legislative alternatives, it is the one producing the least impact on interstate commerce.

Even a legitimate policy objective, however, can fail if not drafted properly. As legislatures well know, there often are several ways to translate a policy objective into statutory language. For purposes of the Commerce Clause some statutory approaches will pass constitutional muster and others will not. What we emphasize here is the paramount importance of recognizing and avoiding doomed alternatives and language and recognizing and incorporating those approaches that predict the most chance for withstanding a Commerce Clause challenge.

A recent case involving the states of Ohio and Indiana is illustra-

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Commission were R. JOHNSON, LAW OF INTERBASIN TRANSFERS, MAJOR INTERSTATE TRANSFERS: LEGAL ASPECTS (Report No. NWC-L-71-008, *Prepared for the National Water Comm'n* Legal Study No. 7, July 26, 1971), and D. MANN, INTERBASIS WATER TRANSFERS: POLITICAL AND INSTITUTIONAL ANALYSIS (Report No. NWC-SBS-72-037, Prepared for the National Water Comm'n, March 1972). *See also* Weatherford, *Legal Aspects of Interregional Water Diversion*, 15 UCLA L. REV. 1299 (1968).

307. NATIONAL WATER COMMISSION, *supra* note 306, at 319-20.

308. *Id.* at 325, 328, 330-331. *See also* MacDonnell & Howe, *Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches*, 57 U. COLO. L. REV. 527 (1986).

tive. Each state had precisely the same policy objective—to provide an incentive for local production of ethanol. Ohio gave fuel dealers a sales tax credit for each gallon of ethanol sold—but only if the ethanol either was (1) produced in Ohio (an example of facial discrimination against interstate commerce) or (2) produced in a state that gave a similar credit for Ohio-produced ethanol (an example of a reciprocity clause). Indiana, by contrast, gave a direct subsidy to Indiana producers of ethanol. Ohio's plan was struck down as economic protectionism; Indiana's plan was constitutional because it did not regulate interstate commerce, but instead merely encouraged in-state business.

To assure the best chance that a statute will be upheld, the legislature at an absolute minimum should avoid reciprocity clauses or direct language that favors in-state uses. In addition, the following points should be kept in mind.

1. Know the Character and Dimensions of Water Use

To assure the most effective policy choices—and to assure that statutory language provides optimum implementation of a policy choice—we believe that a legislature should obtain and consider carefully the data regarding water use in the state—who?, where?, how much?, when?, how?—as well as the likely uses of water out of state—who?, where?, how much?, when?, how?, how transferred? A legislature then may determine where it perceives a problem in the use or transfer of water, if indeed it perceives a problem at all. Some concerns may be too minimal or too remote to warrant legislative consideration. Some options, although constitutional, may provide so little benefit as to not be worth the cost.

2. Draft to Achieve a Constitutional Water Policy

Once a legislature has satisfied itself as to the character and dimensions of water use, it then may evaluate how a statute drafted in neutral language nonetheless might enhance local uses. We *do not* suggest that a subterfuge will work; the Supreme Court will look past neutral language to evaluate a legislature's "true" purpose as well as whether a neutral statute nonetheless has a discriminatory effect. Given a legitimate policy objective, however, states have some flexibility in deciding how to achieve their objectives, and alternatives might vary in their effect on interstate transfers. We *do* suggest, therefore, that, while the Court will look closely to evaluate the impact on interstate transfers, it likely will uphold a particular legislative solution if it furthers a clearly legitimate purpose in a responsible way, particularly if the purpose may not be achieved as well in another fashion. There is nothing in Commerce Clause theory that requires a state to disadvantage its own citizens or, when presented with an array of choices to achieve a water policy, to affirmatively avoid a choice that

better achieves a conservation goal simply because it also discourages interstate transfers.

One example illustrates how familiarity with local patterns of water use could lead to an even-handed statute that nonetheless discouraged interstate transfers. Assume that after study a legislature determines it likely that most applications for large-scale water transfers and large-scale new water rights will come from out-of-state users. A statute that requires preparation of an environmental impact statement before any large-scale transfer is approved, or any large-scale new water right is granted, would be even-handed because it would apply to every large-scale project without regard to whether the water would stay in state or be transferred out of state. Such a statute also would further a clearly legitimate state purpose, preventing unnecessary environmental harm.

Without doubt the Supreme Court would recognize that large-scale projects impact the environment to a greater degree than smaller projects. It also appears probable that the Supreme Court would recognize as legitimate a legislative determination that the more limited benefits of formal environmental reviews of small projects would not be cost justified. Thus, while the Supreme Court would evaluate closely the discriminatory effect of a policy that requires environmental review only for large-scale projects, it would likely sustain the statute as a reasonable and efficient accommodation of legitimate state purposes.

To meet the *Bruce Church* test and demonstrate that a state does not have an illegitimate, discriminatory motive, water transfer legislation should: (1) generally not discriminate between in-state and out-of-state uses; (2) discriminate only if the state is prepared to and can establish that it faces a severe water shortage and that its regulation creates only a limited, in-state preference in use of water; (3) treat water in a comprehensive statutory fashion so as to withstand arguments that concern is focused only on situations in which a user seeks to take state water elsewhere. Moreover, where possible, state statutes governing the use of surface and groundwater and in-state and out-of-state transfers should use the same language to describe the permissible scope of use and the degree of state control. It is easiest to demonstrate evenhanded operation when the language describing the operation is parallel.

3. Provide a Comprehensive Approach

A Legislature should give serious consideration to enacting a comprehensive, all-encompassing, and consistent water code that governs water use and conservation. A comprehensive scheme is the best and most forceful demonstration of a state's serious and sincere commitment to water conservation and responsible management.

4. Keep Statements Consistent With Policy

A state's stated purpose in enacting legislation in, for example, a preamble is not conclusive as to a non-discriminatory intent because the purpose stated may not be the real one. In any event, a pure intent cannot save a statute that fails the *Bruce Church* test. Nonetheless, stating a neutral, constitutionally acceptable purpose can do no harm and may constitute one useful datum in an overall showing that no discrimination was involved. Conversely, stating an impermissible purpose in a preamble surely will harm a state's chance to have a statute upheld under the Commerce Clause.

Legislative intent outside that stated in the preamble may also be influential with a court. Testimony at hearings—and particularly comments by legislators—committee reports, and floor debates may be cited in briefs and considered by a court. Some day a judge may hold a statute unconstitutional under the Commerce Clause and cite to such statements as part of the proof that the legislative purpose was discriminatory even though the legislation was neutral on its face.

Legislators must be careful how they couch their own statements and ever-vigilant to challenge and correct testimony at hearings and statements during legislative debate that suggest that a statute represents an attempt to hide in neutral language an illicit purpose to circumvent the Commerce Clause. Imprudent statements may return to haunt the state's attorney when defending the statute in a subsequent court case.

B. Constitutional Litigation

We wish we could say that a well-thought-out, comprehensive approach to water policy, coupled with careful selection of legislative language and a "pure" legislative record, will assure that no court challenges ever are brought. But nothing in life is certain except death, taxes—*and*, probably, court challenges. Even when the Supreme Court ultimately upholds a statute under the Commerce Clause, the holding is the result of litigation that lasted several years. We are prepared to make one guarantee and one prediction, however. What can be guaranteed is that properly drafted legislation stands the best possible chance of withstanding Commerce Clause and other constitutional challenges. This might well be considered quite a step forward, considering that legislation encompassing a legitimate policy objective often is drafted in language offering little or no chance of success in court. What can be predicted is that legislation drafted properly to withstand Commerce Clause scrutiny should result in fewer lawsuits being brought than would be brought with less carefully drafted legislation.

A major job of a lawyer is to evaluate for a client the likelihood of success of a court challenge. A statute that optimally meets all consti-

tutional arguments likely to be raised against it is a statute that should prompt from a lawyer a discouraging assessment of the likelihood of a client's success in court. As a consequence, some potential plaintiffs will choose not to sue after evaluating the litigation costs compared to the likelihood of success. These same litigants, by contrast, would have a different assessment of costs and likelihood of success if the statute, for example, contained a reciprocity clause certain to be struck down.

Some lawsuits will continue to be brought, however. First, lawyers must have a firm grip on the operative law properly to assess the likelihood of a successful court challenge. Because constitutional law, substantive water law, and technical water issues are exceedingly complex, many lawyers will not have the expertise properly to evaluate the merits of a claim. Second, a litigant may choose to proceed even with little likelihood of success if the matter is sufficiently critical to him. Third, lawyers may believe they can persuade a court to reverse itself on operating legal principles, or a shift in membership on the United States Supreme Court may open the possibility of a new direction to be taken by the Supreme Court.

A change in the membership on the United States Supreme Court is the most difficult factor to assess when predicting future development in this area of the law. What seems clear is that the Court is at the high-water level of Commerce Clause scrutiny. In other words, if a state statute meets *this* Court's interpretation of the *Bruce Church* test, it certainly will meet the interpretation of the Court 10 or 15 years hence.

Judicial hostility toward intentional discrimination against interstate commerce (particularly with regard to limited natural resources) and the Court's asserted negative Commerce Clause power seem with us for the long run. On the other hand, there may be some Commerce Clause areas where a change of one or two votes will have a dramatic impact. Of all justices, Brennan and Marshall were the most adamant and ardent supporters of a far-reaching, nationalist interpretation of the Commerce Clause. Justices Souter and Thomas are likely to be more moderate. Justice Blackmun, also adamant in support of broad Commerce Clause scrutiny, is the oldest currently sitting justice and the most likely to be the next to leave the Court. His replacement also may be more moderate in approach than he. A different majority might adjust current Commerce Clause theory to provide more opportunity for constitutional state regulation. Possible changes include (1) clearer acceptance of the possibility of asserting the market participant exception in cases involving natural resources; and (2) less stringent scrutiny of state statutes that avoid facial discrimination. Justice Scalia, in fact, presently takes the position that the only room for

Supreme Court negative Commerce Clause scrutiny is with respect to facial discrimination.

When a statute is challenged in court, the same legal acumen and careful structuring of the state's case is necessary that was accomplished in drafting the statute being challenged. There must be an assurance that pertinent evidence gets into the record, and that requires a firm grasp of what needs to be proved to prevail. Legal arguments at trial, and particularly on appeal, must be constructed with care. High stakes constitutional litigation is not an area where a state should attempt to economize in procuring legal services.[309]

VII. AN ASSESSMENT OF POLICY OPTIONS AFTER *SPORHASE*

A. Findings and Implications

1. *Finding*:

> The United States Supreme Court consistently has construed the Commerce Clause of the United States Constitution to forbid discrimination against articles in interstate commerce even when Congress has not legislated in the area. In *Sporhase*, the Supreme Court held that water is an article of commerce.

Implications:

Absent an extraordinary situation,[310] water transfer legislation that, on its face, puts out-of-state users at a disadvantage over in-state users will be held unconstitutional. Examples of unconstitutional legislative provisions include:

a. An absolute prohibition on transfer of water out-of-state while permitting in-state water transfers;

b. Discrimination against out-of-state transfers by:

(i) Charging a higher fee to transfer water out-of-state than is charged for transfers or use in-state unless such fees are cost justified;

(ii) Requiring legislative approval for transfers of water out-of-state (where no legislative approval is required for in-state transfers);

(iii) Taxing transfers of water out-of-state (where no tax is levied on in-state transfers), unless the tax is justified on a cost basis;

c. A reciprocity provision;

309. Nebraska might want to consider a consultative water law task force, similar to that of New Mexico, to suggest draft language for legislation, to review legislative proposals, and to advise or handle court challenges. This, of course, would require adequate financing. *See supra* note 295.

310. *See* Finding 5 regarding the implications for state regulation in a water short area.

d. Any other restrictive provision that applies only to interstate transfers.

In our judgment, even a statute narrowly tailored to comply with the dicta in *Sporhase* runs a substantial risk of being invalidated if restrictions applied to interstate transfers are not similarly applied to in-state transfers.

2. *Finding*:

> While states are prohibited from unduly restricting the flow of interstate commerce, the federal government is under no such burden. Actions that would be constitutionally suspect if initiated by a state can be removed from constitutional scrutiny by an act of Congress.

Implications:

If a state wants to prevent the transport of water out of state, its only completely safe option is to get approval from Congress. If Congress approves, the most egregious form of economic protectionism will escape constitutional scrutiny. Congressional approval can take the form of:

a. Approving an interstate compact. If two or more states agreed to an interstate management scheme, even one that included an absolute ban on out-of-state transfers, and if the Congress approved that interstate compact, then all states and individuals would be bound by the anti-transfers provisions, even states and residents of states that were not parties to the compact negotiations.

b. Authorizing (Or Validating) State Legislation. Congress could pass legislation that authorizes states to engage in discriminatory practices or validates state action already undertaken. For a federal statute of this kind to be effective, Congress must be very clear in its authorization to the states. Obviously, the best and safest way to assure that Congressional intent is clear is for the federal statute to state the authorization in express terms.

Additionally, Congress could legislate to preempt state water law. If it did so, it could establish as *national* policy a ban on interstate exports of water, or such other limitations on exports as Congress might determine are consistent with the national interest. Such *federal* policies would be constitutional notwithstanding their discriminatory effect.

3. *Finding*:

> While state legislation that facially discriminates against interstate commerce bears an almost per se presumption of unconstitutionality, legislation that regulates evenhandedly to effectuate a legitimate local public interest will be sustained despite incidental effects on interstate commerce if, on balance, the

local benefits outweigh the burden on interstate commerce and the state could not achieve these benefits through means that impose a lesser burden on interstate commerce.

Implications:

The most available mechanism for establishing a water transfer policy consistent with the Commerce Clause likely lies in legislation that meets the *Bruce Church* test. Under *Bruce Church*, conservation of a natural resource such as water, particularly when coupled with health or environmental concerns, clearly is a significant local interest. In fact, the Supreme Court in *Sporhase* acknowledged that the long history of sovereign prerogatives over water makes state claims of "public ownership" of water even more substantial than similar claims regarding other natural resources.

As a practical matter, the *Bruce Church* test requires valuing the nature and importance of policies designed to conserve water or insure efficient use of water against the burden that such policies impose on interstate commerce. Not only must the state interest outweigh in importance the burden on interstate commerce, but (1) its operation likely must not entail a complete exclusion of nonresidents; and (2) the Supreme Court must be persuaded that in any event the state could not have achieved its purpose through a reasonably available alternative that would have imposed a lesser burden on interstate commerce. A reasonably available alternative is one that neither requires a state to take extraordinary measures to implement it, nor obligates a state to attempt new, unproven, or extremely costly solutions to perceived problems.

The fact that even-handed regulation will be upheld despite some incidental impact on interstate commerce means that the impact of legislation need not fall with equal impact on in-state and out-of-state users. While the Court will look closely to evaluate the difference in effect, it likely will uphold legislation where the legislative scheme achieves a clearly legitimate purpose in a way that may not be achieved as well in another fashion.

Examples of "classification" strategies that would likely meet the *Bruce Church* test include:

a. Imposing more cumbersome transfer procedures on proposed large volume transfers. (Large volume transfers merit more in-depth review because they have more potential impacts than small volume transfers.)

b. Imposing more cumbersome transfer procedures on municipal transfers. (Municipal transfers merit more in-depth review because municipal demands are less seasonal than agricultural demands and the percentage of water physically consumed varies between municipal and agricultural uses.)

c. Imposing more cumbersome transfer procedures on long distance transfers, or out-of-basin transfers. (Long distance transfers and out-of-basin transfers create greater impacts than short distance transfers even if the impacts of transport are ignored, because local return flows are eliminated.)

d. Imposing more cumbersome transfer procedures on transfers out of environmentally sensitive areas. (Transfers out of environmentally sensitive areas, for example the Nebraska Sandhills with its wet meadows and perched water tables, merit special consideration to assure that a proposed withdrawal or transfer does not threaten sensitive resources.)

More cumbersome transfer procedures include (1) more stringent or formalized environmental review procedures; (2) preparation of cost/benefit analyses; (3) expanded opportunities for public input; (4) more extensive regulatory reviews; and (5) placing the burden of proof of meeting statutory requirements for transfer on an applicant seeking a permit to transfer.

Two additional considerations are worth noting:

(1) A state should exercise care in choice of statutory language, in legislative policy and purpose statements, in committee hearings, and in legislative debate to avoid explaining proposed legislation in terms of economic protectionism or in terms that suggest a purpose to discriminate against out-of-state uses.

(2) Where possible, statutes governing the use of surface and groundwater and in-state and out-of-state transfers and other uses should use the same language to describe the permissible scope of use and the degree of state control.

4. *Finding*:

Sporhase put to rest the notion that western states' claims of public ownership of water could defeat Commerce Clause scrutiny. Thus, it appears that state control over water found within its borders normally will be evaluated in the context of sovereignty, not property. While a state may enter the market as a participant, holding water as a private landowner, it likely faces a heavy burden to show that it has done so.

Implications:

Generally a state acting as a market participant can announce the terms on which it is willing to do business with others. A state that owned water, for instance, could announce that it would entertain offers to purchase water only from residents of the state. As long as the residents were not prohibited from reselling water to out-of-state interests, the state's policy would not offend the Commerce Clause. *Sporhase*, however, seems to establish a presumption that a state acts in its governmental capacity when regulating water resources. Thus, a

state will not automatically have available to it the market participant exception to the Commerce Clause. A state seeking to avail itself of market participant status must demonstrate that it holds water as a private landowner, not a governmental regulator.

With respect to limited amounts of water, such a demonstration is possible. The state as owner of the fee interest in certain lands would have the same overlying rights to pump groundwater as a private landowner. Even if groundwater was freely transferrable, however, landowners would be under no compunction to enter into voluntary exchanges. Consequently, any fee owner, including the state, could refuse to sell water or could refuse to sell water to out-of-state interests.

Apart from the above limited circumstances, however, the only way a state could insure that it could act as a market participant would be to purchase or condemn outstanding water rights. In theory, a state could acquire all water rights in a state and then reallocate them as it saw fit. When acting in a proprietary capacity, however, the state would be subject to antitrust laws. Any attempt to acquire ownership of substantially all of the water in the state would be subject to attack as an illegal attempt to monopolize. Moreover, even if a state succeeded in acquiring property rights to virtually all of the water in a state, caselaw suggests that the market participant exception would be unavailing to the extent that a state sought to hoard water for its own residents.

The market participant exception does offer states greater options with respect to water not already allocated to private use. Unallocated water could be allocated to the state for specific purposes much as it is allocated to private parties for specific purposes. With respect to its share of water, the state would be empowered to act as a market participant. As holder of an instream appropriation, for instance, the state would possess a right that it could hold or market as it saw fit. Similarly, with a facilitating groundwater property rights system in place, a state might acquire a right to water in place beneath the soil to support wetlands designated as critical habitat. As a private water right holder the state would be a market participant. Sometimes a state can accomplish a particular purpose by becoming a market participant or by exercising governmental power. Instream flow protection is an example. A state can act as a proprietor and seek an appropriation for instream flows, or a state can exercise governmental power to preclude granting any additional private appropriation permits on a particular reach or stream. Although both procedures effectively allocate water to instream uses, the former approach gives the state market participant status while the latter approach does not.

Even in the limited circumstances described above, however, the market participant exception is not likely to be of great significance

absent significant changes in Nebraska's water rights system. Very little unappropriated surface water remains in the state and groundwater rights are, for the most part, tied to land ownership.

5. *Finding*:

> *Sporhase* did not, however, suggest that a state was powerless to influence the movement of water across state lines. In fact, the Court suggested that a state in a water short area could effectuate a limited preference for its own citizens.

Implications:

The obvious implication from this finding is that a state may be able to implement some level of protectionist legislation if it is regulating with regard to a demonstrably water short area. Certainly transfer procedures may be more cumbersome in water short areas, such as Nebraska's groundwater control areas, than in areas of relative abundance. Consequently, even small-scale, short-distance transfers could merit in-depth review if the proposed transfer was out of a control area. This is particularly true if the proposed transfer would threaten the management strategy or aquifer life that had been set for the area. For example, although the matter is not without constitutional risk, it may be that Nebraska could require even more, and more detailed, justification for *interstate* transfers out of groundwater control areas than for *intrastate* transfers because, after an *interstate* transfer, return flows at the surface and deep percolation into underground aquifers would no longer be subject to Nebraska law and Nebraska management strategies. Although the loss of jurisdiction over return flows would not justify a prohibition on interstate transfers, it might well permit Nebraska to subject such transfers to special scrutiny.

6. *Finding*:

> To be able to establish a limited preference for Nebraska's citizens in a water short area it is required, of course, that Nebraska establish that in fact the area is water short. It will be difficult for Nebraska to prove an area is water short unless it explicitly recognizes the legitimacy and importance of all uses of water, public and private. The more uses that are recognized, the more the need to regulate uses to assure conservation of the water supply. All else being equal, states with sophisticated, comprehensive planning efforts will be in a better position to resist the water claims of outside users than states that adopt a laissez faire attitude toward water use.

Implication:

A state's interest in water resources generally depends in part on the number of uses that a state recognizes as legitimate and acts to protect. The more uses that are recognized by Nebraska, therefore, the greater the likelihood that another state's use of water from an

interstate resource will result in legally cognizable injuries to Nebraska interests. In other words, if a state's legal and institutional system demonstrates that excess water is available, that water will undoubtedly be fair game for thirsty states. The best way to demonstrate Nebraska's interest in seemingly available water supplies is to engage in sophisticated and comprehensive water planning that recognizes the interrelationship of various sources and uses of water—domestic, agricultural, municipal, industrial, recreational, aesthetic, habitat, and environmental. While Nebraska would not be foreclosed from establishing a hierarchy of uses, it nonetheless should also seek to enhance all legitimate uses of water. In close cases, comprehensive planning could tip the balance in favor of the legitimacy of state regulation in the face of a Commerce Clause challenge.

7. *Finding*:

> States long have exercised sovereign prerogatives with respect to allocation of water among potential users and after *Sporhase* likely will continue to have great latitude to modify existing property rights systems and to reallocate water if necessary. Similarly, when a state chooses to create a new private right in water—as compared to regulating an existing right—it has great power to announce the conditions under which it will provide the private right.

Implications:

Whether because of historical accident, recognition of public trust duties, or the fact that water rights are mere usufructs, states have extraordinary and unprecedented constitutional latitude to adjust the allocation of water among uses and users as supply and demand conditions change over time. As caselaw has developed, for instance, it appears that only in the most unusual circumstances would a state face serious constitutional impediments if it sought to modify an existing system of water rights to respond to modern exigencies.

8. *Finding*:

> Absent reallocation of existing private water rights, a state's regulatory opportunity regarding water already in private hands probably is limited to policing a "no injury" rule.

Implications:

Once a state allows the private use of water, whether by permit or common law, under *Sporhase* it places water into the stream of commerce. For water in the stream of commerce, a state likely may regulate only to the extent that it polices a "no injury" requirement. Thus if state groundwater law gave an irrigator the right to pump 200 acre feet of groundwater per year, this right could be transferred to an out-

of-state user as long as the transferror was willing to give up all rights to pump additional water for his own use. While the state could not prohibit the transfer, it could limit the amount of the transfer to the amount historically consumed by the transferring party, say 100 acre feet per year, so that the net impact on the aquifer would be no greater after the transfer than before. The state also could assess fees covering the costs of administering the "no injury" rule. Finally, of course, there is no reason why the state could not compete for the water by offering a better price, or by instituting a statutory right of first refusal.

Similarly, when a state creates a new private water right and grants the water right to its own citizens, it is afforded great constitutional latitude to impose conditions by which it will grant the new right. When it provides a water right to its citizens *at no cost* (either by state permit or by common law decree), it does so with the understanding that the state will benefit from the economic activity that use of the water generates. By contrast, if an out-of-state entity were also to acquire a water right at no cost, the state would receive no compensating benefit. At a minimum, then, it seems that a state could constitutionally charge an out-of-state user a fee measured by the value of instate benefits foregone as a consequence of using the water out-of-state. Such a fee would recognize that there is no requirement that a state exercise its sovereign powers for the benefit of noncitizens. In fact, a state that had established a reasonable aquifer life as a conservation measure would be under no obligation to issue a new right that would interfere with its conservation goals. Reasonable conservation efforts need not be upset. A disappointed out-of-state user would be left with the option of pursuing purchases of vested water rights from private users or, in the case of an interstate resource, seeking an equitable apportionment of the resource.

9. *Finding*:

> Sophisticated legislation to facilitate transfers probably offers Nebraska the maximum protection against large transfers out of state. This seeming paradox is explained by the fact that transfer legislation is the most constitutionally supportable way of insuring that the state does not inadvertently subsidize out-of-state water uses. At the same time, it appears that significant changes would be needed in the underlying structure of Nebraska water law to maximize Nebraska's ability to capitalize on the water resources found within its borders, changes that may or may not be cost effective or politically palatable.

Implications:

Water transfers and water markets are now important and well accepted features of the law of most western states. Water transfers are seen as a way to reallocate water to more valuable uses without

constructing expensive, and often environmentally objectionable, new water projects. In interstate litigation, Nebraska regularly urges upstream states to use water more efficiently rather than to construct projects that would deplete the flow of water into Nebraska. Unless Nebraska is willing to permit market driven reallocations of water, however, it runs a substantial risk that arguments for upper state efficiencies will fall on deaf ears.

Moreover, Nebraska can better position itself to resist out-of-state water grabs if it legislatively authorizes water transfers. The emphasis in any transfer is on assuring that all costs associated with the transfer are defrayed. In legislation, Nebraska can assure that the full costs of a transfer are borne by an applicant. Policies that facilitate transfers, but which appropriately insure that the full costs of such transfers will be borne by the transferee, may well discourage an applicant from pursuing a transfer. They nonetheless are legitimate, evenhanded conditions on transfer that should survive scrutiny under the Commerce Clause.

In formulating the parameters of a "no injury" rule, the state has many defensible options available to it. Many statutes contain amorphous language to the effect that any proposed transfer must be in the public interest. A generalized public interest standard, however, is no standard at all. Far more effective are detailed criteria that must be evaluated before a transfer can be approved. Examples of such criteria include:

a. Benefits to the applicant if the transfer is approved;
b. Benefits to the state if the transfer is approved;
c. Benefits to the state by the use of water within the state that will be foregone by the proposed transfer;
d. Benefits presently and prospectively derived from the return flow of water in intrastate use which will be eliminated by the proposed use;
e. Direct harm to other water users if the transfer is approved;
f. The effect on public health and the local availability of drinking water supplies;
g. The effect on environmentally sensitive areas and state conservation goals;
h. The effect on fish and game resources;
i. The effect on public recreational opportunities;
j. External costs and benefits to the local community if the transfer is approved;
k. The supply and alternative sources of water available to the applicant in the state where the water is to be used;
l. The demands on the applicant's supply in the state where the water is to be used;

m. Whether the water to be transferred feasibly could be transported to alleviate water shortages in Nebraska;
n. Whether the proposed use is a beneficial use of water;
o. The extent to which a proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying water from the point of proposed diversion is sufficiently detailed to enable all persons to understand the impacts of the proposed transfer; and
p. Whether the proposed use will be detrimental to the public welfare of the citizens of Nebraska.

To avoid constitutional difficulties, any public interest or public welfare inquiry as part of a "no injury" proceeding cannot be a thinly disguised effort to prevent an interstate transfer from taking place. Instead, its focus should be on insuring that all costs of the proposed transfer are, in fact, offset by benefits from the transfer.

10. *Finding*:

> Critical area designation and other land use planning tools offer attractive possibilities for indirectly influencing the location and type of water use.

Implications:

A number of areas in Nebraska merit consideration for special protection because they have unique characteristics or because they are particularly sensitive to developmental interests. The Sandhills region, which overlies Nebraska's most abundant water supplies, is a region unique in all the world. Moreover, the Sandhills environment is particularly sensitive to development. Other environmentally sensitive areas that are highly dependent on local water supplies include the Central Platte River Valley, the Niobrara River Valley, the Rainwater Basin, and Nebraska's conjunctive use zones in the Central Nebraska Public Power and Irrigation District's irrigation use area. Many of Nebraska's environmentally sensitive areas are also areas of significant national interest. Given the national significance, a statute that restricted water transfers out of sensitive areas, or required special procedures for securing the right to transfer water out of sensitive areas, would likely be sustained if challenged under the Commerce Clause—at least so long as Nebraska established a close link between the need to restrict transfers and the environmental or other values that were the subject of special interest.

VIII. APPENDIX: EXPORT STATUTES OF THE WESTERN STATES

A. *Arizona*

ARIZ. REV. STAT. ANN. §§ 45-291 to 45-294 (1989).

Prior to the *Sporhase* decision, the Arizona Director of Water Resources had discretion to decline issuance of a permit if the point of diversion was in Arizona and the place of beneficial use was in another state. ARIZ. REV. STAT. ANN. § 45-165 (1987).

In 1989, Arizona amended its laws regarding the export of water. The new legislation makes transport of water out of the state subject to approval by the Director of the Department of Water Resources unless an out-of-state transfer is required by interstate compact, federal law, or international treaty. 1989 Ariz. Sess. Laws Ch. 168, § 3. *See* ARIZ. REV. STAT. ANN. § 45-292(a) (1989). Under the new law, in considering whether to approve an application for water export, the Director shall consider the water conservation goals of the state, the potential harm to public welfare, the amount of water existing at the source, supply and demand within the state in general, the feasibility of using the same water to alleviate water shortages within the state, the availability of alternative sources of water in the other state, the demands placed on the applicant's supply in the other state, and whether the proposed use is consistent with certain other provisions of Arizona law relating to the transport and use of water.

The extant applicable statutes include the following:

ARTICLE 11. EXPORTATION OF WATER FROM THIS STATE

Article 11, consisting of §§ 45-291 to 45-294, was added by Laws 1989, Ch. 168, § 3, effective Sept. 15, 1989.

Historical Note

"Laws 1989, Ch. 168. § 1, provides:

The legislature finds that there is a chronic shortage of water in this state, that maintaining an adequate and reliable supply of water is critically important and essential to social stability and to the public health, safety and welfare and that reasonable controls on the transportation of water from this state are a proper exercise of the police power of this state. The legislature also finds that under appropriate conditions the out-of-state transportation and use of water from this state does not conflict with the public welfare of citizens of this state or conserving waters of this state."

§ 45-291. Definition of person

In this article, unless the context otherwise requires, "person" means an individual, public or private corporation, company, partnership, firm, association, society, estate, trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivision or municipal corporation organized under or subject to the constitution and laws of the United States, this state or any other state.
Added by Laws 1989, Ch. 168, § 3.

§ 45-292. Approval required to transport water out of state; application; criteria; hearing

A. A person may withdraw, or divert, and transport water from this state for a reasonable and beneficial use in another state if approved by the director pursuant to this article. A person shall not transport water from this state unless approved by the director, but this article does not apply to or prohibit transporting water from this state as required by interstate compact, federal law or international treaty.

B. An application to transport water from this state for use in another state shall be filed with the director and shall include:

1. The name and address of the applicant's statutory agent in this state for service of process and other legal notices.

2. The legal basis for acquiring the water to be transported.

3. The purpose for which the water will be used.

4. The annual amount of water in acre-feet for which the application is made.

5. The proposed duration of the permit, not to exceed fifty years with an option to renew.

6. Studies satisfactory to the director of the probable hydrologic impact on the area from which the water is proposed to be transported.

7. Any other information which the director may require.

C. The director shall approve or reject the application. If the director approves the application, he may prescribe terms and conditions for the approval. In determining whether to approve the application the director shall consider:

1. Whether the proposed action would be consistent with conservation of water, including any applicable management goals and plans.

2. Potential harm to the public welfare of the citizens of this state.

3. The supply of water to this state and current and future

water demands in this state in general and the proposed source area in particular.

4. The feasibility of intrastate transportation of the water that is the subject of the application to alleviate water shortages in this state.

5. The availability of alternative sources of water in the other state.

6. The demands placed on the applicant's supply in the other state.

7. Whether the proposed action is prohibited or affected by other law, including §§ 45-165 and 45-172 and chapter 2 of this title.

D. This article does not authorize and the director shall not approve transporting from this state water allocated to this state by federal law or interstate compact.

E. The director shall fix a time and place for a hearing on the application and shall give notice of the hearing by publication once a week for three consecutive weeks in a newspaper of general circulation in the county or counties from which the applicant proposes to transport the water. The hearing shall be conducted by the director or his designee in the area from which water is proposed to be transported. Any interested person, including the department, may appear and give oral or written testimony on all issues involved.

Added by Laws 1989, Ch. 168, § 3.

§ 45-293. Compliance monitoring,[311] reports and notices; jurisdiction

A. The director shall monitor compliance with the terms and conditions prescribed for transporting and using the water out of this state and shall revoke his approval for any material violation of the prescribed terms and conditions.

B. A person transporting water under this article shall provide:

1. Written continuing consent for the director or the director's agent to perform on-site inspections of the transportation facilities and the use of the water.

2. Written periodic reports as required by the director.

3. Written notification of any changes in use of water transported from this state.

C. By applying for approval to transport water from this state under this article, a person submits to the jurisdiction of this state

311. Section 45-401 et seq.

for that purpose and shall comply with all relevant provisions of the law of this state.
Added by Laws 1989, Ch. 168, § 3.

§ 45-294. Limited nonapplicability

Nothing in this article is intended to prescribe nor shall it be interpreted to prescribe the terms, conditions or rules for the transportation of water where the point of diversion or withdrawal and the point of use are both within the state of Arizona.
Added by Laws 1989, Ch. 168, § 3.

B. *California*

CALIF. WATER CODE §§ 1230 to 1232 (West 1971).

In 1911 California enacted an absolute prohibition on out-of-state water transfers. The statute was repealed in 1917.

California's present laws regulate out-of-state appropriations of water in interstate streams. *See* CALIF. WATER CODE §§ 1230 to 1232 (West 1971). The subject is outside the scope of this study.

C. *Colorado*

COLO. REV. STAT. §§ 37-81-101 to 37-81-104 (1990).

At the time of the *Sporhase* litigation, Colorado prohibited export of its groundwater. COLO. REV. STAT. § 37-90-136 (1973)(repealed, L. 83, p. 1413, § 5, effective June 3, 1983), provided as follows:

> For the purposes 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.

After *Sporhase* was decided by the United State Supreme Court, Colorado amended its statutes governing out-of-state transfers. The extant applicable Colorado statutes are:

37-81-101. Diversion of water outside state - application required - special conditions - penalty.(1)(a) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that the state as a whole suffers a shortage of water. The general assembly further recognizes that, because of Colorado's unique location at the headwaters of four of the nation's major western rivers and because all the major river systems in Colorado flow out of the state, and that, in order to insure the availability of these scarce water resources for

the use of citizens of the state of Colorado, compacts have been entered into with the downstream states on all the major rivers originating in Colorado.

(b) It is also recognized that it has been the continuing historical policy of the state of Colorado to conserve and prevent waste of its water resources to provide adequate supplies of water necessary to insure the continued health, welfare, and safety of all of its citizens. Accordingly, the general assembly hereby determines that, for the purpose of conserving the scarce water resources of this state and to thereby insure the continuing health, welfare, and safety of the citizens of this state, it is unlawful for any person, including a corporation, association, or other entity, to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, watercourses, or any other means any of the water resources found in this state into any other state for use therein without first complying with this section and section 37-81-104.

(2) To effectuate the purposes of subsection (1) of this section and section 37-81-104, no person may divert, carry, or transport any surface or ground water from this state by ditches, canals, pipes, conduits, natural streams, watercourses, or other means without meeting the requirements for obtaining a permit to construct a well if the source of water is to be ground water or if a well permit is not required without first obtaining an adjudication from the water court for the right to use water outside the state. In the case of a well for which a permit has been issued for a use of ground water within Colorado, a change of use for a use outside the state must be approved by the water court or, if it is designated ground water, the change must be approved by the Colorado ground water commission. A person desiring to divert, carry, or transport any water outside Colorado shall file an appropriate application therefor and comply with the requirements of this section in addition to any other requirements, terms, and conditions provided or authorized by law pertaining to such application.

(3) Prior to approving an application, the state engineer, ground water commission, or water judge, as the case may be, must find that:

(a) The proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states;

(b) The proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state; and

(c) The proposed use of water will not deprive the citizens of

this state of the beneficial use of waters apportioned to Colorado by interstate compact or judicial decree.

(4) Any diversion of water from this state which is not in compliance with this section shall not be recognized as a beneficial use for purposes of perfecting a water right to the extent of such unlawful diversion or use.

37-81-102. Officials charged with enforcement. It is the duty of the state engineer, the division engineers, and the water commissioners of this state to see that the waters of the state are available for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity, and general welfare, and it is the further duty of said officials to prevent the waters thereof from being diverted, carried, conveyed, or transported by ditches, canals, pipes, conduits, natural streams, watercourses, or other means into other states for use therein unless there is specific authorization therefor, as provided in section 37-81-1001. Upon its being brought to the knowledge of the state engineer of Colorado that any person, corporation, or association is unlawfully carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it is his duty to immediately call the matter to the attention of the attorney general, in behalf of and in the name of the state, who shall apply to any district court or to the supreme court of the state of colorado for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provisions of this section and section 37-81-101, and jurisdiction is conferred upon said courts for such purposes.

37-81-103. Effect of apportionment credits upon diversions of water from state. (1) For the purpose of evaluating applications made pursuant to section 37-81-101, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be or claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) the burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) This article shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

37-81-104. Fee for diversion - fund created. (1) to effectuate the purposes of this article, the general assembly hereby authorizes a fee of fifty dollars per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in this state for beneficial use outside this state measured at the point of release from storage or at the point of diversion.

(2) All moneys collected pursuant to subsection (1) of this section shall be credited to the water diversion fund, which fund is hereby created. The general assembly shall annually appropriate all moneys in said fund for water projects for the state. Said appropriation shall be consistent with part 13 of article 3 of title 2, C.R.S.

D. *Idaho*

IDAHO CODE § 42-401 (1990).

42-401. Applications for use of public waters outside the state.

(1) The state of Idaho is dedicated to the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of Idaho also recognizes that under appropriate conditions the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.

(2) Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho and transport it for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code.

(3) In order to approve an application under this chapter, the director must find that the applicant's use of water outside the state is consistent with the provisions of section 42-203A(5), Idaho Code. In addition, the director shall consider the following factors:

(a) The supply of water available to the state of Idaho;

(b) The current and reasonably anticipated water demands of the state of Idaho;

(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;

(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;

(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

(5) By filling an application to use waters outside the state, the applicant shall submit to and comply with the laws of the state of Idaho governing the appropriation and use of water and any future changes to the water right.

(6) The director is empowered to condition the permit to insure that the use of water in another state is subject to the same regulations and restrictions that may be imposed upon water use in the state of Idaho.

(7) Upon submittal of the application, the applicant shall designate an agent in the state of Idaho for reception of service of process and other legal notices.

(8) The director may, as a condition to the approval of an application under this chapter, require that the applicant shall file a certificate from the proper officer or official of the state where the water shall be used, showing to the satisfaction of the director that the intended use would be beneficial, and that the intended appropriation is feasible.

[I.C., s 42-401, as added by 1990, ch. 141, s 3, p. 316.]

HISTORICAL NOTES

Legislative Intent. Section 1 of S.L. 1990, ch. 141 read: "It is the intent of the legislature that passage of this act shall not affect existing appropriations of water that are used outside the state of Idaho nor affect the provisions of any interstate compact."

E. *Kansas*

KAN. STAT. ANN. §§ 82a-726, 820.-1502 to 82a-1504 (1989).

82a-726. Diversion and transportation of water for use in another state; approval by chief engineer; conditions. Any person intending to divert and transport water produced from a point or points of diversion located in this state for use in another state,

shall make application to the chief engineer of the division of water resources of the state board of agriculture for a permit to appropriate water for beneficial use or file an application for change in point of diversion, place of use, type of use or any combination thereof. If the chief engineer of the division of water resources finds that the diversion and transportation of such water complies with the Kansas water appropriation act, and amendments thereto, the provisions of K.S.A. 82a-1501 to 82a-1506, inclusive, and amendments thereto, and any other state law pertaining to such diversion, transportation and use of water, the chief engineer shall approve such application upon such terms, conditions and limitations that the chief engineer shall deem necessary for the protection of public interest, including an express condition that should any such water be necessary to protect the public health and safety of the citizens of this state, such approved application may be suspended, modified or revoked by the chief engineer for such necessity.

History: L. 1976, ch. 435, § 1; L. 1984, ch. 380, § 1; July 1.

82a-1502. Same; approval considerations; emergency transfers, conditions; no approval, when. (a) No person shall make a water transfer in this state unless and until the transfer is approved pursuant to the provisions of this act. No water transfer shall be approved which would reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken for transfer, unless (1) the panel determines that the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer; (2) the chief engineer recommends to the authority and the authority concurs that an emergency exists which affects the public health, safety or welfare; or (3) the governor has declared that an emergency exists which affects the public health, safety or welfare. Whenever an emergency exists a water transfer may be approved on a temporary basis for a period of time not to exceed one year under rules and regulations adopted by the chief engineer. The emergency approval shall be subject to the terms, conditions and limitations specified by the chief engineer.

(b) No water transfer shall be approved under the provisions of this act if such transfer would impair water reservation rights, vested rights, appropriation rights or prior applications for permit to appropriate water.

History: L. 1983, ch. 341, § 2, May 12.

82a-1503. Same: applications for transfer, contents, hearing, conduct; hearing panel, composition; matters considered. (a) Any person desiring to make a water transfer shall file, with the chief

engineer, an application in the form required by rules and regulations adopted by the chief engineer. If the application is found to be insufficient to enable the panel to determine the source, nature and amount of the proposed transfer, it shall be returned for correction or completion or for any other necessary information. This act shall not be construed as to exempt the applicant from complying with the provisions of the Kansas water appropriation act or the state water plan storage act, whichever is applicable.

(b) No water transfer shall be approved unless the applicant has adopted and implemented conservation plans and practices. Such plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to subsection (c) of K.S.A. 74-2608, and amendments thereto. Prior to approval of an application for a water transfer, the panel shall determine whether such plans and practices are consistent with the guidelines adopted by the Kansas water office.

(c) Within 60 days of receipt of a sufficient application for a water transfer pursuant to this act, the chief engineer shall convene and conduct a hearing thereon. At such hearing, the panel shall consider the application and determine whether to approve the proposed water transfer in accordance with the provisions of the Kansas administrative procedure act.

If it is determined to be in the best interest of the state, the chief engineer may convene and conduct such a hearing within 60 days of receipt of (1) an application to appropriate water pursuant to the Kansas water appropriation act or (2) a proposed contract for the sale of water from the state's conservation storage water supply capacity even though such diversion and transportation of water is not a water transfer as defined by K.S.A. 82a-1501, and amendments thereto.

(d) The panel shall consist of the chief engineer, the director and the secretary or the director of the division of environment of the department of health and environment if designated by the secretary. The chief engineer shall serve as the chairperson of the panel. All actions of the panel shall be taken by a majority of the members thereof. The panel shall have all powers necessary to conduct the hearings, make its findings and implement the provisions of this act. The hearing shall be conducted in a prudent and timely manner.

(e) To determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer, the panel shall consider all matters pertaining thereto, including specifically:

(1) Any current beneficial use being made of the water pro-

posed to be diverted, including minimum desirable streamflow requirements;

(2) any reasonably foreseeable future beneficial use of the water;

(3) the economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water;

(4) alternative sources of water available to the applicant and present or future users for any beneficial use;

(5) the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion. The plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer; and

(6) conservation plans and practices or the need for such plans and practices of persons protesting or potentially affected by the proposed transfer. Such plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to subsection (c) of K.S.A. 74-2608, and amendments thereto.

(f) Any person shall be permitted to appear and testify at any such hearing upon the terms and conditions determined by the chief engineer.

(g) In addition to notice to the parties, notice of any such hearing shall be published in the Kansas register. Such notice shall be published at least 15 days prior to the date of the hearing.

(h) The record of the hearing and findings of fact shall be public records and open for inspection at the office of the chief engineer. Certified transcripts of the hearing shall be provided at the expense of those requesting same. A transcript shall be provided to the chairperson of the authority.

History: L. 1983, ch. 341, § 3; L. 1986, ch. 392, § 6; L. 1988, ch. 356, § 351; July 1, 1989.

82a-1504. Same; decision of panel; review of legislature. (a) The panel shall render an order either approving or disapproving the proposed water transfer. The panel's order shall include findings of fact relating to each of the factors set forth in subsection (d) of K.S.A. 82a-1503 and amendments thereto. The panel may order approval of a transfer of a smaller amount of water than requested upon such terms, conditions and limitations as it deems necessary for the protection of the public interest of the state as a whole.

(b) An order of the panel disapproving the transfer shall be deemed a final order. An order of the panel approving a transfer

shall be deemed an initial order. The authority shall be deemed the agency head for the purpose of reviewing an initial order of the panel and shall review all such initial orders.

(c) If the authority approves the water transfer and if there is no judicial review pending therefrom, the chief engineer shall submit the same to the legislature for review as provided for in K.S.A. 82a-1301 et seq., and amendments thereto. Absent legislative disapproval, the chief engineer shall issue the order approving the transfer.

History: L. 1983, ch. 341, § 4; L. 1988, ch. 356, § 352; July 1, 1989.

F. *Montana*

MONT. CODE. ANN. §§ 85-2-311 (1989), 85-2-316 (1991).

The Montana statutes, in brief, provide as follows:

MONT. CODE ANN. § 85-2-311 (1989). Criteria for issuance of a permit.

Appropriations for use outside of Montana require clear and convincing evidence that:

1. The applicant has complied with the applicable in-state criteria and procedures.

2. The proposed use is not contrary to water conservation in Montana.

3. The proposed use is not detrimental to the public welfare of Montana citizens.

In making its determination of whether the proof regarding items 2 and 3 is clear and convincing, the department of natural resources and conservation is to consider the following:

a. Whether there are present or projected water shortages within Montana,

b. Whether the water to be taken could feasibly be transported to alleviate water shortages in Montana,

c. The supply and sources available to the applicant in state where the water is to be used.

d. The demands on the applicant's supply in the state where the water is to be used.

MONT. CODE ANN. § 85-2-316 (1991) specifies the same conditions for reservations of water. MONT. CODE ANN. § 85-2-402 (1991) specifies the same conditions for making changes in an appropriation right.

G. *Nebraska*

NEB. REV. STAT. § 46-613.01 (1988).

46-613.01. Ground water; transfer to another state; permit; De-

partment of Water Resources; conditions. The Legislature recognizes and declares that the maintenance of an adequate source of ground water within this state is essential to the social stability of the state and the health, safety, and welfare of its citizens and that reasonable restrictions on the transportation of ground water from this state are a proper exercise of the police powers of the state. The need for such restrictions, which protect the health, safety, and general welfare of the citizens of this state, is hereby declared a matter of legislative determination.

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 another state shall apply to the Department of Water Resources for a permit to do so. In determining whether to grant such permit, the Director of Water Resources shall consider:

(1) Whether the proposed use is a beneficial use of ground water;

(2) The availability to the applicant of alternative sources of surface or ground water;

(3) Any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal; and

(4) Any other factors consistent with the purposes of this section that the director deems relevant to protect the interests of the state and its citizens.

Issuance of a permit shall be conditioned on the applicant's compliance with the rules and regulations of the natural resources district from which the water is to be withdrawn. The applicant shall be required to provide access to his or her property at reasonable times for purposes of inspection by officials of the local natural resources district or the Department of Water Resources.

The director may include such reasonable conditions on the proposed use as he or she deems necessary to carry out the purposes of this section.

Source: Laws 1967, c. 281, § 5, p. 761; Laws 1969, c. 9, § 69, p. 144; Laws 1984, LB 1060, § 1.

H. *Nevada*

NEV. REV. STAT. ANN. §§ 533.515 to 533.524 (Michie 1991).

533.515 Permits for appropriation if point of diversion or place of intended use is outside state.

1. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application

described and to be constructed for the purpose of storing, conserving, diverting, or distributing such water, or because the place of intended use, or the lands to be irrigated by such water, or any part thereof, may be situated in any other state, when such state authorizes the diversion of water from such state for use in Nevada; but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands to be irrigated by means of such water, are situated within the State of Nevada, the permit shall issue as in other cases.

2. The permit shall not purport to authorize the doing or refraining from any act or thing, in connection with the system of appropriation, not properly within the scope of the jurisdiction of the State of Nevada, and the state engineer thereof, to grant.

533.520 No permit to be issued for change of use or transfer of water or water rights beyond borders of state; applicability of section.

1. It is hereby declared to be contrary to the economic welfare and against the public policy of the State of Nevada to change the place of use or transfer, or to permit a change of the place of use or transfer, of water or water rights for use beyond the borders of the State of Nevada, as to any water appropriated and beneficially used in the State of Nevada for irrigation or other purposes prior to or after March 23, 1951, and no permit or authorization shall be issued or given for such change of use or transfer.

2. This section shall not apply to nor is it intended to affect waters or water rights as to such waters as shall have been prior to March 23, 1951, and which now are diverted in Nevada and which were prior to March 23, 1951, and now are used for domestic or industrial purposes beyond the borders of the State of Nevada.

533.522 Appropriation from interstate steams: Appropriation in this state for beneficial use in another state. Upon any stream flowing across the state boundary, an appropriation of water in this state for beneficial use in another state may be made only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in this state.

533.524 Appropriation from interstate streams: Right of appropriation having point of diversion and place of use in another state. Upon any stream flowing across the state boundary, a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this state if the laws of that state give like force and effect to similar rights acquired in this state.

I. *New Mexico*

N.M. STAT. ANN. § 72-12B-1 (1985).

New Mexico banned the export of groundwater for many years. N.M. STAT. ANN. § 72-12-19 (1978). After the prohibition was declared invalid in *City of El Paso v. Reynolds*, 563 F. Supp. 379, 392 (D. N.M. 1983), the New Mexico legislature enacted the following statutes:

72-12B-1. Applications for the transportation and use of public waters outside the state.

A. The state of New Mexico has long recognized the importance of the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of New Mexico also recognizes that under appropriate conditions the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.

B. Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of New Mexico and transport it for use outside the state or to change the place or purpose of use of a water right from a place in New Mexico to a place out of that state shall apply to the state engineer for a permit to do so. Upon the filing of an application, the state engineer shall cause to be published in a newspaper of general circulation in the county in which the well will be located or the stream system from which surface water will be taken, at least once a week for three consecutive weeks, a notice that the application has been filed and that objections to the granting of the application may be filed within ten days after the last publication of the notice. Any person, firm or corporation or other entity objecting that the granting of the application would impair or be detrimental to the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation or water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests. Provided, however, that the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions shall have standing to file objections or protests. The state engineer shall accept for filing and act upon all applications filed under this section in accordance with the provisions of this section. The state engineer shall require notice of the

application and shall thereafter proceed to consider the application in accordance with existing administrative law and procedure governing the appropriation of surface or ground water.

C. In order to approve an application under this act, the state engineer must find that the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico.

D. In acting upon an application under this act, the state engineer shall consider, but not be limited to, the following factors:

(1) the supply of water available to the state of New Mexico;

(2) water demands of the state of New Mexico;

(3) whether there are water shortages within the state of New Mexico;

(4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the state of New Mexico;

(5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

E. By filing an application to withdraw and transport waters for use outside the state, the applicant shall submit to and comply with the laws of the state of New Mexico governing the appropriation and use of water.

F. The state engineer is empowered to condition the permit to insure that the use of water in another state is subject to the same regulations and restrictions that my be imposed upon water use in the state of New Mexico.

G. Upon approval of the application, the applicant shall designate an agent in New Mexico for reception of service of process and other legal notices.

J. *North Dakota*

N.D. CENT. CODE § 61-04-06 (1985).

North Dakota has no explicit prohibition against transferring water outside the state. It does however have statutes that, although not directed on their face at the interstate export, would pertain to the issue. For instance, before issuing a permit to appropriate water in North Dakota the state engineer must find the proposed use is beneficial. N.D. CENT. CODE § 61-04-06 (1985). "Beneficial use" is defined to mean "a use of water for a purpose

consistent with the best interests of the people of the state." *Id.* § 64-04-01.1

See generally Grant, *The Future of Interstate Allocation of Water*, 29 ROCKY MTN. MIN. L. INST. 977, 1002-04 (1983).

K. *Oklahoma*

OKLA. STAT. ANN. tit. 82, § 1085.2 (West 1990).

§ 1085.2 Authority of Oklahoma Water Resources Board

In addition to any and all other authority conferred upon it by law, the Oklahoma Water Resources Board shall also have authority:

1. Generally to do all such things as in its judgment may be necessary, proper or expedient in the accomplishment of its duties.

2. To make such contracts and execute such instruments as in the judgment of the Board are necessary or convenient to the exercise of any of the powers conferred upon it by law. Provided, however, no contract shall be made conveying the title or use of any waters of the State of Oklahoma to any person, firm, corporation or other state or subdivision of government, for sale or use in any other state, unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

L. *Oregon*

OR. REV. STAT. § 537.810 to 537.870 (1989).

In Oregon consent of the legislature is necessary for out-of-state transfers of water. The legislature may attach any conditions it desires in order to protect Oregon natural resources.

The extant applicable Oregon statutes are:

537.810 Diversion or appropriation of waters from basin of origin without legislative consent prohibited; terms of consent; exceptions. (1) No waters located or arising within a basin shall be diverted, impounded or in any manner appropriated for diversion or use beyond the boundaries of that basin except upon the express consent of the Legislative Assembly. In the event the Legislative Assembly shall give its consent to any such request it may attach thereto such terms, conditions, exceptions, reservations, restrictions and provisions as it may care to make in the protection of the natural resources of the basin and the health and welfare of the present and future inhabitants of the basin within which the water arises or is located.

(2) Subsection (1) of this section shall not apply to appropriations or diversions of less than 50 cubic feet per second out of the basin of origin.

(3) Subsection (1) of this section shall not apply to appropria-

tions or diversions within the Klamath River Basin as defined in ORS 542.620 or within the Goose Lake Basin as defined in ORS 542-520, so long as those statutes remain in effect.

(4) This section shall not apply to an appropriation or diversion by a city to facilitate regional municipal water service if the city has historically transported water between the basin of origin and proposed receiving basins identified in the application. [Amended by 1989 c.936 § 7]

537.820 Application of provisions to waters forming common boundary between states. ORS 537.801 to 537.860 shall also apply to the waters located within the boundaries of this state of any river, stream, lake or other body of water serving as part of the common boundary of this state and any other state and over which this state has concurrent jurisdiction, except that said sections shall not apply to the diversion, impoundment or appropriation of waters for the development of hydroelectric energy, flood control, irrigation or other uses in waters forming a boundary of the state in cases where such waters are not to be diverted from the drainage basin wherein such waters are located.

537.830 Filing upon or condemnation of waters without legislative permission prohibited. No person, or agency of any state or of the United States, shall attempt to condemn any waters within the boundaries of this state for use outside the basin of origin without first complying with the requirements of ORS 537.801 to 537.810 and this section [Amended by 1989, c.936 § 8]

537.835 City of Walla Walla, Washington, may appropriate, impound and divert certain waters from Mill Creek. (1) Pursuant to the provisions of ORS 537.810, consent is hereby given to the City of Walla Walla, a municipal corporation of the State of Washington, to appropriate, impound and divert certain waters from Mill Creek, a tributary of the Walla Walla River, located in Township 6 North, Range 38, E.W.M., Umatilla County, Oregon, for the beneficial use of both the State of Oregon and within the City of Walla Walla, State of Washington, subject to the following terms and conditions:

(a) The City of Walla Walla shall pay the entire cost of constructing and maintaining this project; and

(b) The City of Walla Walla shall employ only residents and inhabitants of the State of Oregon in the construction and maintenance of the project.

(2) The Water Resources Commission may from time to time direct that a designated portion of the impounded waters shall be held in the State of Oregon for fire protection, for use by Oregon residents, for wildlife habitat needs, and to maintain proper stream flow during the summer months.

(3) Prior to commencing construction, the City of Walla Walla shall make application for such appropriation, impoundment and diversion to the Water Resources Commission and such appropriation, impoundment and diversion shall be allowed upon such additional terms, conditions, reservations, restrictions and provisions, including minimum stream flow, as the Water Resources Commission shall impose for the protection and benefit of the State of Oregon. [1975 c.732 § 2, 1985 c.673 § 76]

537.840 Legislative consent; filing of certified copy; appropriation rights and procedure. Upon receiving legislative permission to appropriate waters under ORS 537.801 to 537.860, the permittee, upon filing in the Water Resources Department a certified copy of the Act, certified to by the Secretary of State, may proceed to obtain an appropriation of waters in the manner provided by the laws of this state for the appropriation of waters for beneficial use, subject to all existing rights and valid prior appropriations and subject to the terms, conditions, exceptions, reservations, restrictions and provisions of such legislative consent. [Amended by 1985 c.673 § 77]

537.850 Suits to protect state interests; right of redress to private persons. In the event of any violation or attempt to violate any of the provisions of ORS 537.801 to 537.860, the Governor shall cause to be instituted such suits and actions as may be necessary to protect and defend the sovereign rights and interests of the state in the premises. Persons are given right of redress against such violator at private suit or action under any appropriate remedy at law or in equity.

537.855 Domestic water supply district permitted to divert water out of state; conditions. (1) Pursuant to the provisions of ORS 573.810, consent is hereby given to any domestic water supply district formed under ORS chapter 264 to permit the diversion of water for use on property a portion of which is within a state adjoining Oregon, subject to the following conditions:

(a) The majority of the property is within Oregon.

(b) The property is developed with economic benefit to Oregon as well as to the adjoining state, in the judgment of the domestic water supply district.

(c) The costs of the diversion are borne by the developer or owner of the property.

(d) The developer employs only residents of Oregon in the construction necessary for the diversion of water.

(2) The diversion of water under this section shall be subject to additional terms, conditions, reservations, restrictions and provisions as the Water Resources Commission shall impose for the pro-

tection and benefit of the State of Oregon. [1985 c.572 § 2; 1987 c.15 § 1151]

537.860 Vested rights protected. ORS 573.810 to 537.850 shall not affect any valid prior appropriation or water right existing on May 12, 1951.

537.870 Out-of-state municipalities; acquisition of land and water rights in Oregon. Subject to the limitations imposed by ORS 573.801 to 537.860, any municipal corporation of any state adjoining Oregon may acquire title to any land or water right within Oregon, by purchase or condemnation, which lies within any watershed from which the municipal corporation obtains or desires to obtain its water supply.

M. *South Dakota*

S.D. CODIFIED LAWS ANN. §§ 46-1-13 and 46-5-20.1 (1987).

S.D. CODIFIED LAWS ANN. § 46-1-13 (1987) provides, in pertinent part, that "[a] water right may be granted . . . to persons for use of water within this state, subject to the principle of beneficial use . . . ."

S.D. CODIFIED LAWS ANN. § 46-5-20.1 (1987) provides:

Legislative approval required for large-scale appropriation - Eminent domain powers denied for unauthorized appropriation. Any application for appropriation of water, pursuant to this chapter, in excess of ten thousand acre feet annually shall be presented by the water management board to the Legislature for approval prior to the board's acting upon the application and all powers of eminent domain shall be denied any common carrier appropriating over ten thousand acre feet of water per annum which has not obtained such prior legislative approval. Legislative approval does not mandate approval by the water management board and does not constitute an issuance of a water permit. This section does not apply to applications by the South Dakota conservancy district or applications for the approval of water permits for energy industry use.

Legislative approval does not mandate commission approval. *See* 77 Op. Att'y Gen. 10 (1977).

N. *Texas*

1965 Tex. Gen.Laws 1245, *repealed by* Act of April 2, 1971, ch. 58, 1971 Tex. Gen. Laws 658.

In *Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curium*, 385 U.S. 35 (1966), a three-judge district court held Texas' absolute embargo statute unconstitutional. After the decision the Texas legislature repealed the law.

O. *Utah*

UTAH CODE ANN. § 73-3a-108 (Supp. 1991).

73-3a-108. The state engineer shall approve an application for an out-of-state transfer if he finds that the proposed appropriation is consistent with Utah's reasonable water conservation policies or objectives, is not contrary to the public interest, and does not impair the ability of the state to comply with its obligation under any interstate compact or judicial decree that apportions water between Utah and other states. In reviewing the first two criteria, the state engineer shall consider the following factors:

(a) the supply and quality of water available to the state of Utah;

(b) the current and reasonably anticipated water demands of the state of Utah;

(c) whether there are current or reasonably anticipated water shortages within Utah;

(d) whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within Utah;

(e) the alternative supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(f) the demands placed on the applicant's alternate water supply in the state where the applicant intends to use the water.

P. *Washington*

WASH. REV. CODE ANN. § 90.03.300 (Cum. Supp. 1991).

Diversion of water for out-of-state use—reciprocity. Reciprocity is required, but the 1990 Cumulative Annual Pocket Part to the Washington statutes notes the *Sporhase* decision and states that in 1982 the Supreme Court of the United States held that Nebraska's reciprocity provision imposed an impermissible burden on interstate commerce.

WASH. REV. CODE ANN. § 90.16.110 (1987).

Water for use outside the state. Municipalities that straddle the state line are governed by the same appropriation procedures as a municipality totally within the state.

WASH. REV. CODE ANN. § 90.16.120 (1987).

Reciprocity. Reciprocity is required for all provisions of the Washington Act. The 1990 Cumulative Annual Pocket Part again cites *Sporhase.*

Q. *Wyoming*

WYO. STAT. § 41-3-115 (SUPP. 1991).

§ 41-3-115. Applications for use of water outside the state.

(a) The legislature finds, recognizes and declares that the transfer of water outside the boundaries of the state may have a significant impact on the water and other resources of the state. Further, this impact may differ substantially from that caused by uses of the water within the state. Therefore, all water being the property of the state and part of the natural resources of the state, it shall be controlled and managed by the state for the purposes of protecting, conserving and preserving to the state the maximum permanent beneficial use of the state's waters.

(b) None of the water of the state either surface or underground may be appropriated, stored or diverted for use outside of the state or for use as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature. Provided, however, neither approval by the legislature nor compliance with the application procedures under subsection (m) through (r) of this section shall be required for appropriations that will transfer or use outside the state less than one thousand (1,000) acre-feet of water per year.

(c) No holder of either a permit to appropriate water or a certificate to appropriate water, nor any applicant for a right to appropriate the unappropriated water of this state, may transfer or use the water so appropriated, certificated or applied outside the state of Wyoming without prior approval of the legislature of Wyoming.

(d) through (k) Repealed by Laws 1985, ch. 4, § 1.

(m) Notwithstanding subsection (d) through (k) of this section, applications for the appropriation of water for use out of state shall be submitted to the state engineer. The application shall contain sufficient information to enable the state engineer to fully analyze the proposed appropriation. Within sixty (60) days of receipt of the application, the state engineer shall determine if the application is complete and acceptable. If the application is unacceptable, the state engineer shall notify the applicant as to what is needed so an acceptable application may be submitted.

(n) Upon determination that the application is acceptable, the state engineer shall cause to be made, at the applicant's expense, a comprehensive review of the application. The state engineer shall have no more than one hundred twenty (120) days to complete this review.

(o) Upon completion of the state engineer's review, the state engineer shall issue a preliminary analysis of the application. The analysis shall address the factors set forth in subsection (r) of this

section, contain a summary of the application and any other information the state engineer deems relevant. The preliminary opinion, or a reasonable summary, shall be published, at the applicant's expense, for three (3) consecutive weeks in a newspaper of general circulation in the county where the proposed appropriation of water is located. At the conclusion of the publication period, the state engineer shall hold a public hearing, at the applicant's expense, in the county where the proposed appropriation is located.

(p) In rendering a final opinion, the state engineer shall consider all comments received at the public hearing and those received in writing within twenty (20) days of the public hearing.

(q) The state engineer shall render a final opinion and submit it to the legislature within one hundred twenty (120) days of the public hearing. The final opinion shall address all factors set forth in subsection (r) of this section and shall contain a recommendation that the legislature grant or deny the proposed out-of-state use.

(r) The legislature shall consider the proposed appropriation following receipt of the state engineer's opinion and recommendation. Notwithstanding subsections (d) through (k) of this section, legislative consent for the proposed appropriation of water for use out of the state shall be based upon consideration of the factors necessary to assure meeting the state's interests in conserving and preserving its water resources for the maximum beneficial use. Factors to be considered by the legislature shall include the following:

(i) The amount of water proposed to be appropriated and the proposed uses;

(ii) The amount of water available for appropriation from the proposed source, and the natural characteristics of the source;

(iii) The economic, social, environmental and other benefits to be derived by the state from the proposed appropriation;

(iv) The benefits to the state by the use of the water within the state that will be foregone by the proposed appropriation;

(v) The benefits presently and prospectively derived from the return flow of water in intrastate use which will be eliminated by the proposed out-of-state use;

(vi) The injury to existing water rights of other appropriators that may result from the proposed use;

(vii) Whether the use formulated and carried out promotes or enhances the purposes and policies of the state's water development plans and water resources policy, and that the use will not unreasonably interfere with other planned uses or developments for which a permit has been or may be issued;

(viii) Whether the proposed use will significantly impair the state's interest and ability to preserve and conserve sufficient quan-

tities of water for reasonably foreseeable consumptive uses and other beneficial uses recognized by law to include but not limited to domestic, livestock, agricultural, municipal and industrial purposes;

(ix) Whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use;

(x) Whether, to the greatest extent possible, the correlation between surface water and groundwater has been determined, to avoid possible harmful effects of the proposed use on the supply of either.

(s) Nothing in this act shall be construed to interfere with compacts, court decrees and treaty obligations.

R. *Commentary on the statutes of Montana, New Mexico, Nebraska, Oregon, Utah, Wyoming*

The statutes reproduced in this Appendix illustrate the wide variation in state oversight of interstate water transfers.

We briefly discuss the laws of Montana, New Mexico, Nebraska, Oregon, Utah and Wyoming to illustrate the diversity of statutory solutions and also to point out some provisions that are unconstitutional because they discriminate on their face against applicants for out-of-state transfer permits.

Oregon, for example, requires legislative approval for out-of-state ground water transfers,[312] but provides that municipalities in an adjoining state may acquire water rights within Oregon by purchase or condemnation.[313] The necessary legislative approval may be conditioned upon whatever terms, restrictions and reservations the legislature may care to make to protect the present and future welfare of the state and its citizens.[314] Legislative approval statutes are not necessarily per se invalid absent an automatic ban on out-of-state transportation of groundwater and provided that legislative restrictions are tailored to legitimate conservation purposes under the doctrine of the *Sporhase* case. As a general proposition, a legislative body probably should not expend the time and energies of its members on complex matters of water law and hydrology, but there may be a point at which a legislature itself decides that the volumes of water involved are so large and the long range implications so vast that it wants to act on the application itself after consultation with various state officials.

If a legislature takes an even handed approach and meets the requirements set out by the Supreme Court in *Bruce Church*, legislative approvals of out-of-state water transfers have a chance of sur-

312. OR. REV. STAT. §§ 537.810 to 537.870 (1989).
313. OR. REV. STAT. § 537.870 (1989).
314. OR. REV. STAT. § 537.810 (1989).

viving a constitutional challenge. Of course, to pass Supreme Court review a state would be on firmer ground if its statute provide that the legislature approve both intrastate and interstate diversions.

After *Sporhase*, Wyoming and New Mexico enacted new statutes. The Wyoming law requires that the legislature approve all proposals to obtain a new appropriation or to transfer an existing right for use outside of the state, unless the amount requested is less than 1,000 acre-feet per year.[315] Applications for out-of-state use are submitted to the State Engineer who makes, at the applicant's expense, a comprehensive review within 120 days and then issues a preliminary analysis. Public hearings are held and a final opinion submitted by the engineer to the legislature which renders its decision "based upon consideration of the factors necessary to assure meeting the state's interests in conserving and preserving its water resources for maximum beneficial use."[316]

The statute then enumerates ten such factors. These include a balancing of the economic, social and environmental effects derived from the export against the benefits foregone by use of the water elsewhere; whether the out-of-state use promotes Wyoming water development purposes and policies without unreasonably interfering with other planned uses or developments that have or will have use permits; and whether the use will significantly impair the state's ability to conserve and preserve sufficient quantities of water for its own consumptive uses.[317]

All the factors look inward only and appear to be drafted more for the purpose of protecting the economic health of the state's economy than toward protecting the physical health of Wyoming citizens. Thus, the problem faced by the New Mexico statute in *El Paso II*[318] is likely to arise if the Wyoming statute is challenged. On the other hand, it has been argued that "[t]he evidence does not show that the Wyoming statute discriminates against interstate commerce by forbidding or placing an undue burden on out-of-state transfers. Rather, the Wyoming approval statute appears to show a demonstrable, legitimate state interest which only incidentally interferes with interstate commerce."[319]

New Mexico's post-*Sporhase* statute was tailored to Justice Stevens' observations in *Sporhase* regarding the constitutionality of legislative criteria that restrict out-of-state transportation of a

315. WYO. STAT. § 41-3-115(b) (Supp. 1991).
316. WYO. STAT. § 41-3-115(r) (Supp. 1991).
317. *Id.*
318. City of El Paso v. Reynolds (*El Paso II*), 597 F. Supp. 694 (D. N.M. 1984).
319. Comment, *Sporhase v. Nebraska ex rel. Douglas: State Control of Water under the Constraints Of the Commerce Clause*, 18 LAND & WATER L. REV. 513, 533 (1983).

state's groundwater. Any person wanting to export water for use outside New Mexico must apply to the State Engineer for a permit approving the withdrawal.[320] The State Engineer publishes notice of the permit application and considers any objections that may be filed; he must find, before granting a permit, that the withdrawal and transportation of water for use outside New Mexico will not impair existing rights and is neither contrary to the conservation of water or detrimental to the public welfare of the state's citizens.[321] In making his decision, the State Engineer shall consider, but is not limited to, the following factors:

1. the supply of water available to New Mexico;
2. water demands of New Mexico;
3. whether there are water shortages within New Mexico;
4. whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in New Mexico;
5. the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
6. the demands placed on the applicant's supply in the state where the applicant intends to use the water.[322]

The statute provides that by filing an application to transport New Mexico water out of the state, the applicant agrees to submit to the New Mexico laws governing the appropriation and use of water.[323] The State Engineer is empowered to condition the permit to guarantee that the water, once in the other state, is used according to the same rules and regulations imposed on in-state users.[324]

As held in *El Paso II*, the defect in the New Mexico statutory scheme was that New Mexico demanded that out-of-state transfers not be contrary to the state's conservation standards or detrimental to the public interest while placing no similar restrictions on in-state transfer applicants.[325]

Before 1985 the Montana statutes prohibited export of water from the state without consent of the legislature. Its 1985 statute provides that no person may appropriate water in Montana without receiving a permit from the Department of Natural Resources and

320. N.M. STAT. ANN. § 72-12B-1(B) (1985).
321. N.M. STAT. ANN. § 72-12B-1(C)(1985).
322. N.M. STAT. ANN. § 72-12B-1(D)(1985).
323. N.M. STAT. ANN. § 72-12B-1(E)(1985).
324. N.M. STAT. ANN. § 72-12B-1(F)(1985).
325. City of El Paso v. Reynolds (*El Paso II*), 597 F. Supp. 694, 703-04 (D. N.M. 1984) ("By requiring the State Engineer to consider the interests of conservation of water and the public welfare of the citizens of New Mexico when acting on applications to export water from domestic and transfer wells but not when acting on applications for in-state transfers and domestic wells, S.B. 295 discriminates on its face against interstate commerce.").

Conservation.[326] The new statute is unconstitutional because 1) additional and more onerous substantive criteria are applied to applicants requesting out-of-state groundwater permits than to applicants requesting in-state permits;[327] and 2) a greater burden is imposed on applicants for out-of-state use than on applicants for in-state use.[328]

Nebraska's statutes also impose more onerous substantive criteria on out-of-state transfers than on in-state transfers. The Director of Water Resources is required to consider the following criteria when acting on an application to export ground water from the state:

1) whether the proposed use is beneficial;

2) the availability to the applicant of alternative sources of surface or ground water;

3) any negative effect of the proposed withdrawal on surface or ground water supplies to meet reasonable future demands for water in the area of the proposed withdrawal; and

4) any other factors necessary to protect the interests of the state and its citizens.

If a permit is issued, the exporter is required to comply with the rules and regulations established by the natural resources district from which the water is withdrawn.

Neb. Rev. Stat § 46-233.01 governs applications to appropriate Nebraska surface waters for use in another state. The criteria that the Director of Water Resources must consider are much more extensive than the criteria used when acting on applications to export groundwater. The surface water standards are:

1) whether there is unappropriated water in the source of supply;

2) whether the appropriation would be detrimental to the public interest;

3) whether denial is demanded by the public interest; and

4) whether the proposed use is beneficial.

In deciding whether the application is demanded by the public interest, the Director must consider five factors: The economic, environmental and other benefits of the proposed use; any adverse economic, environmental and other impacts of the proposed use; any current beneficial uses being made of the unappropriated

326. MONT. CODE ANN. § 85-2-302 (1991). For an excellent discussion of the Montana law, see Eaton, *Commerce Clause Scrutiny of Montana's Water Export Statutes*, 7 PUB. LAND L. REV. 97 (1986).

327. MONT. CODE ANN. § 85-2-311(3)(b)(ii)(1991). This defect is the same Achilees heel that was the downfall of the New Mexico statutes in *El Paso II*.

328. MONT. CODE ANN. § 85-2-311(3)(b)(1991).

water; the economic, environmental and other benefits of not allowing the appropriation and preserving the water supply for beneficial uses within the state; and alternative sources of supply. In addition the Director can consider other factors that are deemed relevant to protecting the interests of the state and its citizens. The application shall be deemed in the public interest if the overall benefits to Nebraska are greater than the adverse impacts to Nebraska.

Under *Sporhase* and *El Paso I and II*, the constitutional question is whether applicants for out-of-state use must fulfill standards that in-state applicants need not meet. The standards for interbasin transfers specified in Neb. Rev. Stat. § 46-289 and for intrabasin transfers set forth in Neb. Rev. Stat. § 46-294 do not require the Director to consider, as in the case of ground water transfers to another state, "any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal." Nor is such a standard required under the Municipal and Rural Domestic Ground Water Transfers Permit Act. Neb. Rev. Stats. §§ 46-638 to 650. For example, a municipality such as Lincoln or Omaha can transport water from anywhere in the state if the Director of Water Resources finds that the withdrawal and transportation of the groundwater is reasonable, not contrary to the conservation and beneficial use of ground water, and not detrimental to the public interest. Neb. Rev. Stat. § 46-642. But a municipality in Colorado or Kansas seeking to use Nebraska water would have to show the availability of alternative supplies and any negative effect of the proposed withdrawal on water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal. This would appear to conflict with the ratio decidendi of the *Sporhase* decision and of *El Paso II*.