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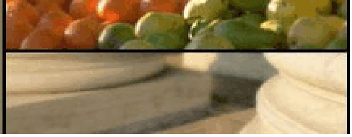

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An Agricultural Law Research Article

Interstate Transfers of Water: State Options After *Sporhase*

Part One

by

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TABLE OF CONTENTS

I. Introduction 757
II. *Sporhase v. Nebraska*: An Analysis of the Case and Nebraska's Response to It 759
A. The Law Prior to *Sporhase* 759
B. The *Sporhase* Case 763
1. The Facts 763
2. Origin of the Nebraska Groundwater Export Statute 763
3. The Litigation in Nebraska 765
4. The United States Supreme Court Opinion 766
a. Water as an Article of Commerce 767
b. An Impermissible Burden on Interstate Commerce 768
c. The Reciprocity Clause 770
d. Congressional Authorization 771
5. The Supreme Court Dissent 771
6. The Case Back in Nebraska 772
7. Conclusion 772
C. Nebraska Statutory Responses to *Sporhase* 774
III. Water, Water Rights and Water Transfers: State Power and Jurisdiction After *Sporhase* 776
A. Water Supplies and Demands 776
B. Surface and Ground Water 777
C. The Nature of Water Transfers 779

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D. Authority of the State to Oversee Interstate Transfers of Water 781
1. Water as Property of the State 781
2. Water Rights as Creatures of State Law 783
3. The Regulation of Water Use 783
4. Groundwater Rights in Nebraska 784
E. Constitutional Protection for Private Water Rights 786
F. Congressional Power to Regulate Groundwater Use in the United States 787
1. Sources of Federal Power 787
2. De Facto Allocations of Water Pursuant to Federal Law 790
a. Statutes That Impose Planning Obligations . 791
b. Statutes That Protect Critical Areas 792
c. Statutes That Allocate Water to "Noneconomic" Uses 793
d. Statutes That Allocate Water to Preferred Uses 793
G. Allocation of Water Among States 794
1. Equitable Apportionment 795
2. Interstate Compacts 795
3. Congressional Allocation 796
H. State Authority after *Sporhase*—Conclusion 797
IV. Interstate v. Intrastate Users: Constitutional Limitations on Unequal Treatment in the Aftermath of *Sporhase* 799
A. The Commerce Clause 799
1. Background 799
2. Criteria Triggering Federal Commerce Clause Scrutiny 801
3. Negative Commerce Clause and Congressional Authority 801
B. State Regulation of Interstate Commerce: What is Permitted, What Prohibited? 803
1. Intentional Discrimination Against Interstate Commerce 803
a. Facially Discriminatory Legislation 803
b. Facially Neutral Legislation 803
c. Reciprocity Clauses 804
2. Unintentional Discrimination Against Interstate Commerce 805
a. Legislation With a Discriminatory Effect 805
b. The *Bruce Church* Test for State Regulatory Policy 805

c. The *Complete Auto Transit* Test for State Tax Policy 807
C. Market Participant Theory: An Exception to the Negative Commerce Clause 808
1. Background 808
2. Applicability to Natural Resources 809
3. Legal Consequences of Market Participant Status 810
D. Privileges and Immunities and Equal Protection ... 811
1. Privileges and Immunities Clause 811
2. Equal Protection Clause 814
V. Responses by Other States to the *Sporhase* Decision 815
A. State Law at the Time of *Sporhase* 815
B. The New Mexico Litigation 817
1. *El Paso I* 817
a. Factual Background 817
b. Results of the Litigation 818
c. Key Issues Addressed by the Court 818
i. Can state regulation favor local economies? 818
ii. Does water have unique constitutional status? 819
iii. What is a "severe shortage" of water? .. 820
iv. Can a state reserve water for future needs? 821
2. *El Paso II* 822
C. Legislative Studies in New Mexico 826
D. Conclusion 828
VI. Pitfalls to Avoid in Legislative Drafting and Constitutional Litigation 830
A. Drafting Considerations 830
1. Know the Character and Dimensions of Water Use 831
2. Draft to Achieve a Constitutional Water Policy . 831
3. Provide a Comprehensive Approach 832
4. Keep Statements Consistent With Policy 833
B. Constitutional Litigation 833
VII. An Assessment of Policy Options after *Sporhase* 835
A. Findings and Implications 835
VIII. Appendix: Export Statutes of the Western States 845
A. Arizona 845
B. California 848
C. Colorado 848
D. Idaho 851
E. Kansas 852

F. Montana 856
G. Nebraska.. 856
H. Nevada.. 857
I. New Mexico 859
J. North Dakota 860
K. Oklahoma.. 861
L. Oregon.. 861
M. South Dakota 864
N. Texas 864
O. Utah 865
P. Washington 865
Q. Wyoming.. 866

I. INTRODUCTION

In November of 1988 the State of Nebraska Water Management Board completed its Report on the Water and Water Rights Transfer Study. The study was authorized by statute.[1] The Water Management Report included a chapter that briefly reviewed the current legal framework for water transfers in Nebraska and other western states.[2] The bulk of the study, however, focused on the ecological and technological underpinnings of water and water rights transfers. With that focus and within the parameters of its task, the Water Management

1. NEB. REV. STAT. §§ 25-15, 118 to 15, 120 (1987). 1987 Neb. Laws, L.B. 146.

2. State of Nebraska Water Management Board, Report on the Water and Water Rights Transfer Study 13-18 (1988). The Report contains recommendations for several changes in water transfer policy in Nebraska, including five draft statutes that would implement the recommendations of the Board. For a brief discussion of each draft bill, see Aiken, *Selling Nebraska's Water: Water Sales, Transfers and Exports*, in NEBRASKA POLICY CHOICES 89 (1988).

Among changes recommended by the Water Management Board are the following:

> 1. Broaden surface water transfer policy. Current law provides that surface water cannot be transferred to a different river basin or put to a use that differs from the use prior to the transfer. *See* NEB. REV. STAT. §§ 46-290 to 294 (1988). Under recommendations of the Board, surface water could be transferred across basin or state lines and put to any beneficial use.
>
> 2. Apply a single set of rules to all proposed transfers, whether in-basin or out-of-basin, in-state or out-of-state, and without regard to the present or future use to be made of transferred water. Normally, application for a transfer permit would have to be accompanied by an environmental assessment. Currently, separate transfer policies exist for interbasin transfers of surface water (*see* NEB. REV. STAT. § 46-288 (1988)); interbasin transfers of groundwater (*see* NEB. REV. STAT. §§ 46-638 to 650, 46-675 to 690 (1988) and R. HARNSBERGER & N. THORSON, NEBRASKA WATER LAW AND ADMINISTRATION §§ 5.17 & 5.18 (1984)); interstate transfers of surface water (*see* NEB. REV. STAT. § 46-233.01 (1988)); and interstate transfers of groundwater (*see* NEB. REV. STAT. § 46-613.01 (1988)).

Board did not address the federal constitutional dimensions of water transfer issues.

In 1989 the Nebraska Unicameral enacted LB 710:

> The Legislature acknowledges the study on water transfers prepared by the Water Management Board but finds that the statutory mandate for the study did not require a legal analysis of the United States Supreme Court's decision in Nebraska ex rel. Douglas v. Sporhase, 458 U.S. 941 (1982), or a policy analysis of the water management alternatives constitutionally available to states under that decision. The Legislature finds that a consideration of such alternatives is necessary before legislation is enacted regulating water transfers and exports.

This Article essentially reproduces the longer of two versions of a report prepared by the College of Law for the Nebraska Legislature pursuant to LB 710. Its focus is on transfers of groundwater out-of-state and the constitutional options available to Nebraska or other states to regulate such transfers in light of the decision of the United States Supreme Court in *Sporhase v. Nebraska ex rel. Douglas*.[3] In *Sporhase*, the Supreme Court held that water is an article of interstate commerce and that a Nebraska statute violated the Commerce Clause of the Constitution of the United States because its effect was to prohibit the transfer of water to other states. Put as succinctly as possible, *Sporhase* means that state laws, even regarding natural resources, generally will be invalidated if they discriminate in favor of state residents or interests.[4]

Prohibition of state discrimination against out-of-state interests is the core concept of Commerce Clause jurisprudence. It has been the prevailing interpretation of the Commerce Clause for nearly 200 years, and it is highly unlikely that this prevailing interpretation will change substantially when membership on the Supreme Court changes.[5]

The *Sporhase* Court, however, also recognized that a state retains a great degree of regulatory control over natural resources, and particularly over water. For purposes of this Article, then, the paramount question that we address is the way in which Nebraska may exercise regulatory control over decisions affecting the management, export, and transfer of its groundwater consistent with the Commerce Clause and other constitutional constraints.

This Article is neither intended nor designed to return to matters dealt with in the 1988 Water Management Report. Nor is it intended to advocate particular policy choices for legislative adoption. Rather,

3. 458 U.S. 941 (1982).
4. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). The Court's aversion to such discrimination extends to schemes that are not primarily even economic. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978).
5. Matthews, *The Supreme Court, the Commerce Clause, and Resources*, 12 ENVTL. MGMT. 413 (1988).

it is an overview of governing federal constitutional constraints on state water law and policy, an exploration of ways that a state may act consistent with those constraints, and a description of the potential benefits and burdens of particular policy options. Our purposes are to provide a clear framework within which legislatures may choose to operate, and to identify and describe a full panoply of constitutionally available policy options.

While our focus is on *interstate groundwater* transfers, the constitutional validity of a state's regulation of *interstate* transfers is in part dependent on a state's regulation of *intrastate* uses and transfers. Moreover, an interstate transfer of water may be structured in a way that does not require water to physically move across state lines. Consequently, successful and efficient regulation of groundwater transfers is related to, and in part dependent on, the regulation of surface water transfers. Therefore, we also have briefly considered the relationship between ground water and surface water and have discussed in some depth the relationship of intra- and inter-state legislative solutions.

This Article is written as a comprehensive whole. Each Part, however, is self-contained, with enough background information that a user may focus on a specific question without the need to read the entire Article. In its entirety, this Article contains a lengthy exposition of the issues to which LB 710 directed our attention as well as background research information that we hope will aid in the drafting. The background information includes, for example, a complete history of the *Sporhase* litigation and the statute that spawned it, a discussion of the legal issues surrounding water transfers, a discussion of legislation enacted in other states dealing with out-of-state water transfers, and detailed analyses of important cases decided by the Supreme Court of the United States.

II. *SPORHASE v. NEBRASKA*: AN ANALYSIS OF THE CASE AND NEBRASKA'S RESPONSE TO IT

A. The Law Prior to *Sporhase*

Historically, states assumed that they could regulate interstate commerce in natural resources because they owned those resources. The leading early Supreme Court decision was *Geer v. Connecticut*.[6] *Geer* upheld the constitutionality of a state law that prohibited interstate transfer of game birds killed within Connecticut. The *Geer* Court reasoned that wildlife was the common property of all citizens of a state and, therefore, Connecticut owned game birds "as a trust for the benefit of the people."[7] As owner of the birds, the state could validly prohibit or condition their capture. The *Geer* Court viewed the

6. 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).
7. 161 U.S. 519, 529 (1896).

Connecticut prohibition on export of game birds as a valid legislative condition on the privilege of capturing the birds, a condition that took effect *before* the birds were reduced to private possession. Thus, the Court dismissed arguments that the statute was inconsistent with the Commerce Clause by noting that no article of interstate commerce was affected by the statute.

In 1908, twelve years after *Geer*, the Supreme Court decided *Hudson County Water Co. v. McCarter*.[8] Prior to *Sporhase v. Nebraska ex rel. Douglas*,[9] *Hudson County* was the only Supreme Court opinion that directly addressed the power of a state to prevent interstate water transfers.[10]

In *Hudson County* a water company contracted to divert water from the Passaic River in New Jersey and deliver it to New York City. New Jersey, reciting its need to preserve fresh water for the health and prosperity of its citizens, enacted a statute forbidding water transfers out of state. Shortly thereafter, New Jersey's Attorney General, Robert McCarter, successfully brought an action to enjoin the proposed water transfer. The water company appealed to the United States Supreme Court. Attorney General McCarter argued that the injunction should be sustained because the proposed interstate transfer was inconsistent with the settled law of riparian water rights[11] and would cause great harm to New Jersey. Writing for the Supreme Court, Justice Holmes wrote a short and memorable opinion stating that:

> We are of the opinion . . . that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . [New Jersey] finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.[12]

Just three years after its decision in *Hudson County*, however, the

8. 209 U.S. 349 (1908).
9. 458 U.S. 941 (1982).
10. *Hudson County* involved the transfer of surface water; the *Sporhase* facts involved groundwater. Much of the reasoning of *Sporhase*, however, applies both to groundwater and surface water. *See* Comment, *Commerce Clause Scrutiny of Montana's Water Export Statutes*, 7 PUB. LAND L. REV. 97, 104-05 (1986).
11. At common law, a landowner who owned land abutting a stream acquired what are called riparian water rights. Water acquired as part of a riparian right generally could not be used on land that did not abut the stream, nor could such water be transferred out of the watershed. Annotation, *Transfer of Riparian Right to Use Water to Nonriparian Land*, 14 A.L.R. 330 (1921); R. HARNSBERGER & N. THORSON, *supra* note 2, at 35-36 (1984). In *Hudson County*, Justice Holmes noted that lower court opinions had rested on the rule that a riparian owner has no right to divert waters for more than a reasonable distance from the body of the stream, or for other than well-known ordinary purposes, or in excess of a narrowly limited amount.
12. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356-57 (1908).

Supreme Court began to change its view regarding Commerce Clause scrutiny of state attempts to regulate interstate transfers of natural resources. In *West v. Kansas Natural Gas Co.*,[13] the Court invalidated an Oklahoma law that prohibited the interstate transport of gas produced within Oklahoma. Oklahoma argued that its interest in preserving natural resources gave it the power to prohibit all transfers of natural gas out of state. The Court disagreed. It limited *Hudson County* by stating that under a state's police power[14] only the *initial* possession of natural resources may be restricted for conservation purposes;[15] once the resource is in private hands, prohibitions on transfer need to be evaluated under the Commerce Clause to decide whether they constitute an undue burden on interstate commerce.

In 1970 the Court decided *Pike v. Bruce Church, Inc.*,[16] and announced a new balancing test to be used for evaluating the constitutionality of state legislation affecting interstate commerce. The *Bruce Church* test is as follows:

> Where the 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.[17]

Finally, in 1979 the Court decided *Hughes v. Oklahoma*,[18] making it clear that state regulation of natural resources was not exempt from Commerce Clause scrutiny. The facts in *Hughes* were simple and undisputed. Oklahoma set up a scheme to license commercial enterprises that wanted to seine, transport, or sell minnows. No limit was placed on the number of minnows a licensed person could take from state waters. However, another Oklahoma statute provided that no "person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state."[19] The

13. 221 U.S. 229 (1911). *See also* Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (Court declared unconstitutional a West Virginia Act designed to retain for the benefit of West Virginia consumers natural gas that without the statute would go to consumers in other states through channels of interstate commerce). Justice Holmes dissented in both cases; in the later case he asserted his reliance on his opinion in *Hudson County*. *Id.* at 600.

14. The police power is the inherent power of a state to enact legislation concerning the health, safety, peace, good order, morals, and general well being of the community. It is, in short, the power to regulate within the bounds established by state and federal constitutions.

15. West v. Kansas Natural Gas Co., 221 U.S. 229 (1921).

16. 397 U.S. 137 (1970).

17. *Id.* at 142.

18. 441 U.S. 322 (1979).

19. *Id.* at 323 n.1.

prohibition did not apply to persons transporting three dozen or less minnows or to the "sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."[20] The collective effect of the two statutes was to prohibit commercial quantities of non-hatchery bred Oklahoma minnows from being sold in other states. No limitation was placed on the disposition of hatchery-bred minnows, on the procurement or sale of natural minnows within Oklahoma, or on transportation of natural minnows out of state for purposes other than sale.

William Hughes, who had operated a commercial minnow business in Texas for thirty years, purchased a shipment of minnows from a minnow dealer licensed to do business in Oklahoma. He was charged with violating the Oklahoma statute by transporting minnows from Oklahoma to his place of business at Wichita Falls, Texas, near the Oklahoma state line. He defended by arguing that the Oklahoma statutes violated the Commerce Clause of the United States Constitution. At his trial, the facts were stipulated; he was found guilty and fined $200. After the Oklahoma Court of Criminal Appeals upheld the conviction, Hughes appealed to the Supreme Court of the United States.

In finding in favor of Hughes, the Supreme Court repudiated its opinion in *Geer v. Connecticut*,[21] and expressly rejected the theory of state ownership of natural resources. The Court found that the Oklahoma statute discriminated against interstate commerce. The opinion concluded by stating: "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' . . . when equally effective nondiscriminatory conservation measures are available."[22]

Justice Brennan, writing for the Court, continued:

> Far from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce. The State places no limits on the numbers of minnows that can be taken by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State. Yet it forbids the transportation of any commercially significant number of natural minnows out of the State for sale. [The Oklahoma statute] is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively.[23]

The Court in *Hughes* expressly rejected a general natural resources exception to Commerce Clause review and subjected natural resources to the *Bruce Church* test for constitutionality. The two

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20. *Id.*
21. 161 U.S. 519 (1896).
22. Hughes v. Oklahoma, 441 U.S. 332, 337 (1979).
23. *Id.* at 338.

cases—*Hughes* and *Bruce Church*—thus effectively set the stage for the United States Supreme Court to consider the arguments of Joy Sporhase and Delmar Moss.

B. The *Sporhase* Case

1. *The Facts*

In 1972, Joy Sporhase went to a farm auction near Lamar, Nebraska, with his partner and son-in-law, Delmar Moss. They intended to buy cattle, but became interested in the land when the highest bid stood at only $145 per acre. Unable to pass up a bargain, Sporhase offered $146 an acre and acquired the land. The farm covered 640 acres—140 acres in Colorado and the other 500 acres across the state line in Nebraska.[24]

The farm had a well on the Nebraska side, located fifty-five feet from the state boundary. In 1971, the former owner had registered the well with the Nebraska Department of Water Resources, writing on the registration that he intended to pump water to irrigate his land on both sides of the state line. No one questioned him about his intention, and the well was routinely assigned number G-33893 on January 8, 1971.[25]

Several years later, Sporhase and Moss built a $47,000 sprinkler system to take water from the Nebraska well to their corn and bean fields in Colorado. Sporhase first applied to Colorado for a permit to drill a well on the Colorado side, but he was turned down by Colorado officials on August 23, 1977. Colorado denied the permit because they determined that the aquifer was already overused in the area.[26] Neither Sporhase nor Moss nor any of the prior owners of the land ever complied with Nebraska law by applying for a permit to transfer groundwater across the border.[27] The Nebraska statute prohibited transfers of groundwater from Nebraska to states that did not permit their groundwater to be transferred to Nebraska. Because Colorado prohibited *all* out-of-state groundwater transfers, Sporhase could not have obtained a transfer permit from Nebraska officials.

2. *Origin of the Nebraska Groundwater Export Statute*

In 1966, the Executive Board of the Legislative Council appointed a thirteen member committee to study a number of water issues and to prepare recommendations. Three subcommittees were formed, including one on priority of use. The subcommittee on priority of use

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24. The Washington Post, Sept. 12, 1982, § A1, at 8.
25. As dry land, the 140 acre tract in Colorado was worth $56,400; as irrigated land, $168,000.
26. Colorado Groundwater Commission file No. AD-6826.
27. NEB. REV. STAT. § 46-613.01 (1978).

met in Omaha on April 21, 1966, for an informal round-the-table discussion with Frank Trelease, Dean of the University of Wyoming College of Law, and Ray Moses, a prominent Colorado water law lawyer and former attorney for the Colorado Water Conservation Board.[28] Eventually, the subcommittee recommended that Nebraska enact a groundwater export statute.[29]

The recommendations were enacted into law in 1967. The new statute made minor amendments to the well registration law so as to require all wells except domestic ones to be registered. More importantly, the statute for the first time regulated the taking of groundwater for use in an adjoining state. Prior to the statute, there was no express statutory authority for interstate groundwater transfers. The new statute authorized such transfers, but only if the state gave its specific approval. The new statute also included a reciprocity clause.

The reciprocity clause contained in the Nebraska statute responded to similar language found in a Kansas statute.[30] With a parallel reciprocity clause in Nebraska law, Nebraska municipalities and residents could continue to import water from Kansas.[31] Similarly, Nebraska groundwater could continue to be exported to Kansas—but with one important difference; groundwater exports now required explicit Nebraska approval. Thus, Nebraska could exercise a measure of control over exports of groundwater to Kansas, while at the same time affording Nebraska residents an opportunity to use Kansas groundwater. Because of the proximity of Nebraska importers to the Kansas line, the Nebraska legislature's response to the Kansas law was a prudent one.

In its entirety, the new Nebraska statute read:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so, but the Department of Water Resources shall not grant such a permit nor shall the applicant withdraw ground water from any well or pit located in the State of Nebraska without specific authorization by the Legislature, and then only in cases where the

28. Others at the meeting were Richard Harnsberger, a co-author of this Article, Vincent Dreeszen of the University's Conservation and Survey Division, an attorney representing the Metropolitan Utilities District of Omaha, the Director of Utilities for the City of Lincoln, and the Director of the State Department of Water Resources.
29. Interestingly, the proposed Nebraska statute initially was not viewed as a bar to interstate exports of water, but rather as a facilitator of interstate exports.
30. *See* Brief of Appellee at 29, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982)(No. 81-613). Before the vote on LB 415, Senator Ely stated that the amendment would allow a particular Nebraska community to obtain a water supply from a nearby Kansas source rather than having to develop a Nebraska source that was 20 miles distant. This option otherwise had been barred by the Kansas reciprocity clause.
31. *Id.* at 29-30.

> state in which the water is to be used shall grant reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.[32]

In 1969 the legislature began to reorganize more than 150 single purpose districts into what are now the state's twenty-four natural resources districts. At that time the statute governing groundwater exports[33] was amended to give the Director of Water Resources further guidance when issuing permits to withdraw and transport water across state lines:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. *If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit* if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.[34]

One of the principal reasons for specifying these additional criteria was a fear of water shortages in some areas of the state.[35] Another was to guarantee further reciprocal, beneficial uses of Nebraska and Kansas groundwater by citizens of both states.[36] The amended statute was the subject of the litigation in the *Sporhase* case.

3. *The Litigation in Nebraska*

In 1976, the Nebraska Department of Water Resources warned Sporhase that proceedings would be commenced against him and

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32. 1967 Neb. Laws 415, § 5.
33. NEB. REV. STAT. § 46-613.01 (1978).
34. 1969 Neb. Laws 1357 (emphasis added).
35. *Hearing on L.B. 1357 Before the Agriculture and Recreation Committee*, 19 (May 1, 1969)(Statement of Purpose by Senator Kremer).
36. *Floor Debate on LB 1357*, 4313-14 (August 25, 1969)(Statement by Senator Ziebarth):

> The Legislature at Kansas is willing to have this reciprocal agreement, the Governors of both states are in favor of it, but it was real difficult to get the local people involved to see eye to eye . . . Superior needs water from the Kansas area. The Kansas area has plenty of water, but we do not have the proper law to take the water from Kansas and give it to the City of Superior. Other communities in Kansas would like to withdraw water from Nebraska, so what we are asking here if the Director of the Department of Water Resources . . . finds that the withdrawal of water in Nebraska to go into Kansas is reasonable and not contrary to conservation, in other words, if it does not harm the water rights of the Nebraska people, he will grant this and also the Director of the Water Resources of Kansas will then direct the use of water in Kansas to the City of Superior, so it is a reciprocal agreement that has to be in our statutes before the Kansas conservation or the Water Resources districts will grant the use of this water to the City of Superior.

See also Brief of the Appellee, Sporhase v. Nebraska *ex rel.* Doulgas, 458 U.S. 941 (1982).

against Moss unless they stopped pumping water and using it in Colorado without a Nebraska permit. When Sporhase and Moss failed to apply for a permit, suit was brought by the Nebraska Attorney General to enjoin the transportation of groundwater across the border into Colorado. The trial judge held that even if groundwater were an article of commerce, the Nebraska statute did not impose an unreasonable burden on interstate commerce.

The Nebraska Supreme Court affirmed on other grounds.[37] It held that groundwater in the state is not an article of commerce and thus is not subject to review under the Commerce Clause of the United States Constitution.

Chief Justice Krivosha wrote a concurring and dissenting opinion. He agreed with the majority's conclusion that establishing legislative criteria to control the transfer of groundwater from Nebraska to an adjoining state did not violate the Commerce Clause.[38] He found fault, however, with the reciprocity clause of the Nebraska statute. The reciprocity clause operated as an absolute prohibition on interstate groundwater transfers—a prohibition that ignored both need and availability of supplies. Presaging the eventual opinion of the United States Supreme Court, Chief Justice Krivosha felt that such a provision could not withstand Commerce Clause scrutiny.

In due course Sporhase and Moss appealed to the United States Supreme Court. Eleven amicus curiae briefs were filed in the case.[39] All but one opposed the position of the two farmers.[40]

4. *The United States Supreme Court Opinion*

The Supreme Court's opinion, written by Justice Stevens, began by dividing the challenge to Nebraska's statute into three questions: (1) whether groundwater is an article of commerce and therefore subject to the Commerce Clause; (2) whether the Nebraska statute imposed an impermissible burden on interstate commerce; and (3) whether Congress had granted the states permission to engage in groundwater regulation that otherwise would be impermissible under the Commerce Clause.[41]

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37. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981).
38. *Id.* at 712, 305 N.W.2d at 620.
39. Amicus Curiae briefs are filed by persons who are not parties to a lawsuit but who have an interest in the legal issues to be resolved. Separate amicus briefs were filed by the state of California; the state of New Mexico; the states of Colorado, Kansas, Missouri, Nevada, North Dakota, South Dakota, Utah, and Wyoming; four New Mexico irrigation districts; the city of El Paso, Texas; the National Wildlife Federation; the National Agricultural Lands Center and Kansas City Southern Industries. (The amicus briefs are available on Lexis except for the El Paso amicus brief).
40. Only the El Paso amicus brief urged reversal.
41. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 943 (1982).

a. *Water as an Article of Commerce*

Nebraska tried to avoid Commerce Clause scrutiny by relying on the United States Supreme Court's 1908 *Hudson County*[42] opinion, an opinion that the Nebraska Supreme Court cited as controlling the *Sporhase* result. In response, Justice Stevens observed that *Hudson County* was concerned with "just compensation,"[43] not the Commerce Clause. (In fact, *Hudson County* addressed the Commerce Clause in only three sentences.) Justice Stevens added that the underpinning for *Hudson County* was *Geer v. Connecticut*[44], the case that had been expressly overruled in *Hughes v. Oklahoma*.[45]

Having determined that *Sporhase* was not controlled by *Hudson County*, Justice Stevens then considered Nebraska's reliance on a theory of state ownership of water to uphold the constitutionality of its statute. Nebraska attempted to distinguish the *Sporhase* facts from prior United States Supreme Court cases that dealt with natural resources other than water. The state argued that, under Nebraska law, water is treated differently from other natural resources. According to the state, an overlying owner who withdraws groundwater in Nebraska has a lesser ownership in the resource than the captor of birds in Connecticut, minnows in Oklahoma, or the person who withdraws groundwater in a state, like Texas, that recognizes the English, or common law, rule of absolute ownership of groundwater. In each of these latter situations, intrastate trade in natural resources is permitted upon capture of the resource, whereas in Nebraska, according to the state, there was no equivalent market for groundwater.[46] The

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42. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).
43. The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.
44. 161 U.S. 519 (1896).
45. 441 U.S. 322 (1979).
46. It should be noted that groundwater in Nebraska is not tied absolutely to overlying land. So long as other owners over an aquifer are not injured, water may be transferred away from the area. *See* Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917, 986-87 (1980). *See also* Tarlock, *So Its Not "Ours"— Why Can't We Still Keep It? A First Look at* Sporhase v. Nebraska, 18 LAND & WATER L. REV. 137, 163-65 (1983).

Nebraska's groundwater law has developed in a piecemeal fashion over the years. By statute intrastate transfers of groundwater by municipal governments are allowed. *See* Municipal and Rural Domestic Ground Water Transfers Permit Act, NEB. REV. STAT. §§ 46-638 to 650 (1988). For Justice Stevens' discussion of Nebraska's arrangements whereby groundwater is withdrawn from rural areas and transferred to urban areas, see Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 951-52 (1982).

The state's laws are complicated further by legislation authorizing regulations by the Department of Water Resources for both control and management areas. *See* Nebraska Ground Water Management and Protection Act, NEB. REV. STAT. §§ 46-656 to 674.20 (1988).

Supreme Court recognized that Nebraska's greater ownership argument was not irrelevant to Commerce Clause analysis. The Court nevertheless held that Nebraska's legal treatment of groundwater could not absolutely remove Nebraska groundwater from close Commerce Clause scrutiny. In the final analysis, the Court determined Nebraska's argument was based on a legal fiction of state ownership.[47]

The state next argued that water is essential for human survival and therefore should be managed at the state and local levels. While Justice Stevens acknowledged the necessity of water for survival and the desirability of local control, he noted that more than eighty percent of the water supply in the United States is used for agricultural purposes and that the markets supplied by irrigated farms are worldwide. He concluded that the interstate and worldwide dimension of water use means that there is a significant federal interest under the Commerce Clause in both the use and allocation of water.[48] Justice Stevens added that a "significant federal interest in conservation as well as in fair allocation of this diminishing resource"[49] arose because Sporhase and Moss drew water from the Ogallala aquifer.[50] Justice Stevens observed that the Ogallala aquifer is multistate in character—underlying the Sporhase-Moss land in Nebraska and Colorado, as well as parts of Texas, New Mexico, Oklahoma, and Kansas.[51] Finally, Justice Stevens worried that if groundwater were held not to be an article of commerce, then Congress would be powerless to deal with a potential national problem of overdrafts.[52]

b. An Impermissible Burden on Interstate Commerce

Although the Supreme Court concluded that water is an article of commerce, it also stated clearly that this finding did not foreclose a state from all regulation of water—whether the regulation governed water use within a state's boundaries or in interstate commerce. To

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47. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 951 (1982).
48. *Id.* at 952-53. The discussion of federal power to establish a national water policy was unnecessary to the majority decision. This gratuitous discussion was particularly troubling to the dissenting judges. It is deducible that the majority wanted to signal Congress that there would be no constitutional impediment if it decided to take a leading role in managing groundwater use. The Court may also have been warning the states that, although there are political obstacles to federal control of groundwater, Congress has power under the Commerce Clause to do so.
49. *Id.* at 953.
50. *Id.*
51. *Id.* For a comprehensive study of the Ogallala aquifer, see HIGH PLAINS ASSOCIATES: CAMP DRESSER & MCKEE, BLACK & VEATCH, ARTHUR D. LITTLE INC., *Six-State High Plains-Ogallala Aquifer Regional Resources Study—A Report to the U.S. Department of Commerce and The High Plains Study Council* (March 1982).
52. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 954 (1982): "Ground water overdraft is a national problem and Congress has the power to deal with it on that scale."

the contrary, the Court stated expressly that state interests "in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry."[53] Thus, both scarcity of the water supply and conservation efforts are factors to be considered in deciding whether a state's water regulations impose an unreasonable burden on interstate commerce.[54]

The Supreme Court devoted five pages of its opinion to the question whether the Nebraska statute could survive Commerce Clause scrutiny. Although the Commerce Clause grants Congress the power to legislate, the United States Supreme Court has long recognized a negative implication of that grant of power. According to the Court, failure of Congress to exercise its regulatory power implies a purposeful Congressional design to leave interstate commerce unregulated, both by itself *and* by the states. Thus, the pivotal question in *Sporhase* was whether, and to what extent, Nebraska had authority to regulate the movement of water across its borders when Congress had not exercised its own regulatory power. Stated more precisely, did dormant congressional power under the Commerce Clause, even if not used, preclude Nebraska from enforcing a reciprocal groundwater export statute? To answer this question, Justice Stevens, in the second part of the *Sporhase* opinion, turned to the formulation of Commerce Clause principles first articulated in *Bruce Church*.[55]

To pass constitutional muster under the *Bruce Church* test, a statute that burdens interstate commerce must serve a legitimate local interest and operate even-handedly on both interstate and intrastate commerce. If it does, the Court then weighs the beneficial local effects to be produced against the burden imposed on interstate commerce. State legislation will be upheld only when it incidentally burdens or discriminates against interstate commerce; state legislation that imposes burdens on commerce that are clearly excessive in relation to local benefits is invalid. Where burdens are not clearly excessive in relation to the local benefits, the constitutionality of a statute then depends on the character of the local interest and whether it could be promoted equally well by means having a lesser impact on interstate activities.

Justice Stevens decided that the first three conditions of the Nebraska statute—"that the withdrawal of the groundwater requested is reasonable, is not contrary to the conservation and use of groundwater, and is not otherwise detrimental to the public interest," advance "[t]he State's interest in conservation and preservation of ground water"—and thus pass muster under the *Bruce Church* test. He gave four reasons for his conclusion that a "facial examination of

53. *Id.* at 953.
54. *Id.*
55. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

the first three conditions . . . does not, therefore, indicate that they impermissibly burden interstate commerce."[56] First, a state's power to regulate water in times of shortage is at the core of its police power.[57] Second, a "legal expectation" had arisen from actions by Congress and by the Court in deferring to the states in the allocation of water.[58] Third, Nebraska's claim of public ownership supported a limited preference for its own citizens even though the claim did not remove groundwater entirely from the reach of the Commerce Clause.[59] Fourth, because of Nebraska's conservation efforts, the state's groundwater has some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage.[60]

However, the final statutory provision, the reciprocity clause, failed under *Bruce Church*.[61]

c. *The Reciprocity Clause*

Justice Stevens held that the reciprocity clause "operates as an explicit barrier to commerce."[62] In view of this finding, the state had the burden to prove that there was a "close fit" between the clause and its asserted purpose.[63] As there was no evidence that the means chosen, a reciprocity requirement, was narrowly tailored to achieve justifiable state ends, namely, conservation and preservation,[64] the state failed to meet its burden.

Interestingly, the *Sporhase* opinion goes on to explain in some detail under what circumstances a reciprocity provision (or other state restriction) might be upheld.

> If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.[65]

But Nebraska did not claim any evidence of that nature existed; and as the reciprocity requirement was not narrowly tailored, it could not

56. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957 (1982).
57. *Id.* at 956.
58. *Id.*
59. *Id.*
60. *Id.* at 957.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 957-58.
65. *Id.* at 958.

survive the test of "strictest scrutiny" that is reserved for facially discriminatory legislation.[66]

d. Congressional Authorization

The last question faced by the *Sporhase* Court was whether Congress had granted the states permission to enact groundwater legislation, legislation that otherwise would be impermissible under the negative Commerce Clause. Nebraska had argued that Congress had authorized such statutes in the past by deferring to state water law in thirty-seven federal statutes and by acquiescing to numerous state compacts that allocated water. Justice Stevens answered that the negative implications of the Commerce Clause remain in effect unless Congress expressly states an "intent and policy" that state legislation should be free from attack under the Commerce Clause. As there was no evidence in the case indicating such express congressional consent, the reciprocity clause could not be saved on a theory of congressional authorization.[67]

5. The Supreme Court Dissent

Justices Rehnquist and O'Connor, the two members of the Court from the West, dissented from the majority opinion in *Sporhase*.[68] They were especially upset with the majority's dictum regarding the power of Congress to legislate with respect to withdrawal of the nation's groundwater, and their concerns were correct ones. Although both the dissenting justices agreed that Congress can regulate groundwater withdrawals on a showing that overdrafts have a substantial economic effect on interstate commerce, they felt that such a conclusion was wholly unnecessary in order to decide the case. Congress had not acted, the extent of its power was not in issue, and the entire discussion of the matter was gratuitous.

On the merits, the dissenters first recognized the traditional authority of states over resources found within their borders. They then concluded that, while a state may not discriminate in the application of its law, a state does have the power as a quasi-sovereign to preclude water from attaining the status of an article of commerce. They went to great lengths to show that Nebraska did not permit either an intrastate or interstate market to operate in water. Rather, they argued, Nebraska recognized only a usufructuary[69] right in the landowners,

66. *Id.*
67. *Id.* at 960.
68. *Id.* at 961.
69. A usufructuary right is a right defined by *use* rather than *possession*. Nebraska groundwater is not susceptible to absolute ownership as specific tangible property. In other words, a groundwater property right in Nebraska is a right to use water only; there is no private ownership of water in place beneath the soil.

and, with the single exception of municipal water systems, prohibited the removal of groundwater from the overlying land. The pivotal point of the dissent was that "[c]ommerce cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*."[70]

In connection with Commerce Clause analysis, the majority and the dissenting justices agreed that a state may not discriminate against interstate commerce if it permits water to be reduced to private possession, permits an *intrastate* market to exist in that resource, and then either bars *interstate* commerce completely or grants a commercial preference to its own citizens. The difference between the majority and dissent was that the majority decided water was an item of commerce and then went on to consider whether even nondiscriminatory restrictions on water transfers burden commerce. The dissenters, by contrast, found there was no item of commerce involved. They therefore never reached the questions relating to burdens on commerce under the *Bruce Church* test.

6. *The Case Back in Nebraska.*

On remand, the Nebraska Supreme Court held that the reciprocity provision was severable from the rest of the statute and that the remaining provisions were valid.[71] The Director of Water Resources subsequently found that the Sporhase-Moss application complied with Nebraska's out-of-state diversion law because the withdrawal was reasonable, it accorded with the conservation and use of groundwater, and it was not detrimental to the public interest. On May 10, 1983, the Director issued an export permit that was conditioned on Sporhase and Moss complying with all control area regulations of the Upper Republican Natural Resources District.[72] In granting the permit, the Director rejected a proposed regulation submitted by the district that would have restricted use of groundwater to the control area. Had the proposal been approved, an interesting issue would have arisen—the restriction would have applied evenhandedly to both intrastate and interstate groundwater and thus would arguably be consistent with the Supreme Court's *Sporhase* ruling.

7. *Conclusion*

A number of conclusions can be drawn from the *Sporhase* decisions.

70. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 963 (1982).
71. State *ex rel.* Douglas v. Sporhase, 213 Neb. 484, 329 N.W.2d 855 (1983).
72. Order, In the Matter of Application TA-1, filed by Joy Sporhase and Delmar Moss for a Permit to Transport Ground Water from Nebraska to Colorado, under the provisions of NEB. REV. STAT. § 46-613.01 (1978)(*statute amended* 1988).

First, at the state level, the position of the Nebraska Supreme Court is clear. Groundwater is publicly owned and:

> [t]he public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but . . . the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.[73]

As a matter of state property law, groundwater in Nebraska is not the exclusive property of overlying land owners. Rather, it is public property that can be extensively regulated, probably even to the point of prohibiting all new well installations or other uses.

Second, the United States Supreme Court *Sporhase* holding is exceedingly narrow because only the reciprocity provision in the Nebraska statute was found to be unconstitutional under the Commerce Clause.

Third, even though the United States Supreme Court had before it in *Sporhase* only the question of groundwater regulation, the Court's reasoning undoubtedly applies to surface water as well.[74]

Fourth, the United States Supreme Court *Sporhase* decision has had a negligible effect on Nebraska water law. On February 11, 1983, the Nebraska Supreme Court held that the reciprocity provision was severable from the remainder of the statute. Thus, the remainder of the statute continued in effect and governed groundwater transfers until the statute was amended by the legislature in 1984.[75]

Fifth, in important dictum, the United States Supreme Court reaffirmed leadership of the states in the area of water resources administration while going out of its way to make clear that no constitutional obstacles prevent the Congress from exercising exclusive control of groundwater management.

Sixth, the Court made it clear that the *Bruce Church* test allows a state to prefer its own citizens in times of severe water shortage. Even a total ban on exports might be sustained, but the evidence to sustain such action would have to establish a close means-end relationship between the ban and the purpose to conserve and preserve water resources.[76]

More attacks on statutes prohibiting water transfers may be expected in the federal courts,[77] and the states would do well to keep in mind that the starting point for Commerce Clause analysis by the United States Supreme Court is the principle that our economic unit is

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73. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 707-08, 305 N.W.2d 614, 618 (1981).
74. *See supra* note 10.
75. 1984 Neb. Laws 1060.
76. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982).
77. *See, e.g.*, City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983); City of El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984).

the nation, "a federal free trade unit."[78] As Justice Cardozo said in *Baldwin v. G.A.F. Seelig, Inc.*,[79] "[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[80]

C. Nebraska Statutory Responses to *Sporhase*

In 1984, the Unicameral amended the groundwater export statute to respond to the dicta in *Sporhase*. The section now provides:

> 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.[81]

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78. Hood & Sons v. DuMond, 333 U.S. 525, 538 (1949).

79. 294 U.S. 511 (1935).

80. *Id.* at 523. Before adoption of the Constitution, the united states was a plural common noun with an exaggerating adjective. Afterwards and henceforth it would be declared The United States, composite proper noun, capitalized and singular. HENKIN, *The Constitution and Foreign Affairs*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 115 (M. Harmon ed. 1978). It is this concept of a country, rather than a group of separate states divided into different trade areas, that the Court invokes to nullify state laws that are basically protectionist measures.

81. 1984 Neb. Laws 1060 (codified at NEB. REV. STAT. § 46-613.01 (1988)). The amendment probably was unnecessary as, under *Sporhase*, the statute absent the reciprocity clause likely was constitutional.

In 1989 Senators Dierks, Lamb and Scofield introduced LB 715.[82] LB 715, if enacted, would specify additional criteria for the Director of Water Resources to consider before granting permission for out of state transfers of water. Among the additional criteria would be a mandate to consider *future* beneficial uses within Nebraska. In addition, the Director would be required to consider whether the proposed use is in the public interest. Under the statute, the application is "deemed in the public interest if the overall benefits to Nebraska are greater than the adverse impacts to Nebraska and if the granting of the application will result in positive net economic benefits to Nebraska."[83]

Using potential *future* uses as a factor to be considered before permitting transfers of water out of state is of doubtful constitutionality. In 1984, the United States Supreme Court considered when future uses of water can justify restrictions on transfers out of state. In *Colorado v. New Mexico*[84], Colorado asserted its future need for the waters of Vermejo River, a small tributary of the Rio Grande, as reason for restricting water use by downstream New Mexico residents.

In rejecting Colorado's argument, Justice O'Connor, writing for the majority, commented on what a state needs to show if it wants the Court to recognize rights based on future uses. While the Court's analysis was in the context of an equitable apportionment, it seems that its reasoning will apply similarly in cases involving a *Bruce Church* balancing of interests under the Commerce Clause.

First, the state must prove by clear and convincing evidence that it has settled on a definite, or at least a tentative, plan or design for future use. Elaborating, the Court stated that:

> [it] may be impracticable to ask the State proposing a diversion to provide unerring proof of future uses and concomitant conservation measures that would be taken. But it would be irresponsible of us to apportion water to uses that have not been, at a minimum, carefully studied and objectively evaluated, not to mention decided upon. Financially and physically feasible conservation efforts include careful study of future, as well as prudent implementation of current, water uses.[85]

Thus, Nebraska likely could not hold water for future use absent hard facts, not suppositions or opinions, about future water needs and supplies. It is our opinion this would require a comprehensive *state* plan plus definite policy directives at the *state* level. In connection with groundwater, as distinguished from surface waters, Nebraska exercises too little authority over well users to come even close to proving by clear and convincing evidence that there is a comprehensive state plan in place for the use and conservation of groundwater.

82. LB 715, 91st Leg., 1st Sess. (1989).
83. *Id.* at § 2(4)(g).
84. 467 U.S. 310 (1984).
85. *Id.* at 320.

In future cases, the Supreme Court likely will ask far harder questions that it did several decades ago in evaluating state statutes that restrict interstate water transfers. Moreover, burdensome state legislation will not be saved by neutral expressions of legislative purpose. Although state legislation often contains self-serving recitations of legislative purposes, courts have no obligation to accept those stated purposes. On the contrary, the position of the Supreme Court is that it "must determine for itself the practical impact of the law."[86]

III. WATER, WATER RIGHTS AND WATER TRANSFERS: STATE POWER AND JURISDICTION AFTER *SPORHASE*

A. Water Supplies and Demands

Nebraska is blessed with abundant supplies of fresh water. As reported in the Water and Water Rights Transfer Study,[87] Nebraska reservoirs have a storage capacity of over 3.4 million acre feet, average annual streamflow discharge from the state exceeds seven million acre feet, and groundwater in storage exceeds two *billion* acre feet.[88] An additional eighty-six million acre feet of water fall on the state each year as precipitation.[89]

To put these figures into perspective, at current consumption rates, Nebraska groundwater in storage could supply the supplemental water needs of the Metropolitan Water District of Southern California for 2000 years. Average annual streamflow discharge from Nebraska is approximately equal to the amount of water that the upper basin states on the Colorado River must supply annually to the thirsty states of California, Nevada, and Arizona in the lower basin. Enough water can be stored in Nebraska reservoirs to meet the public water supply needs of Arizona for seven years. Nebraska is clearly the envy of the West when it comes to the availability of water. It is not unreasonable to expect that less fortunate states will cast longing glances at Nebraska when it comes time to augment their own local supplies. In border areas, this has already occurred.[90] Abundant water supplies alone, however, are not enough to encourage interstate water transfers. Often, water can only be transferred at great cost, particularly if the transfer is to a higher elevation. Costs of water transfers were

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86. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
87. STATE OF NEBRASKA WATER MANAGEMENT BOARD, REPORT ON THE WATER AND WATER RIGHTS TRANSFER STUDY 13-18 (1988).
88. *Id.* at 13-18.
89. *Id.* at 13.
90. Eleven interstate transfer permits have been issued by the Nebraska Department of Water Resources.

studied in the Water and Water Rights Transfer Study.[91] The study demonstrated that economic barriers likely will be a significant deterrent to many who might otherwise seek to develop Nebraska water resources to meet interstate demands.

Although cost is often a significant deterrent to large scale water transfers, the value of water in use in Nebraska is not a significant deterrent. Most water used in Nebraska is used for agriculture. National studies indicate that for eighty percent of agricultural uses, the value of water in use does not exceed $40 per acre foot.[92] By contrast, water for household use has been valued at $200 per acre foot and water for hydroelectric generation has been valued at $600 per acre foot.[93] In water scarce areas, water for recreation has been estimated to yield benefits of from $700 to $1100 per acre foot.[94] Clearly these values indicate a potential to transfer water out of agriculture and into more highly valued uses elsewhere if transfer costs are not prohibitive. Even if transfers were costless, however, agriculture would continue as the most significant user of water in the West, because a ten percent reduction in agricultural water use could accommodate a one-hundred percent increase in all other uses.[95]

B. Surface and Ground Water

All water is part of the hydrologic[96] cycle, in which the sun's energy causes moisture to move from the oceans to the atmosphere, to the land, and back to the oceans. All water, therefore, is interrelated and interdependent.[97] Its physical state (liquid, solid, or gaseous), as

91. STATE OF NEBRASKA WATER MANAGEMENT BOARD, REPORT ON THE WATER AND WATER RIGHTS TRANSFER STUDY 30-37 (1988).
92. Young, *Local and Regional Economic Impacts*, in WATER SCARCITY: IMPACTS ON WESTERN AGRICULTURE 244 (E. Engelbert with A. Scheuring eds. 1984). An "acre foot" is the quantity of water required to cover one acre to a depth of one foot; it is equivalent to 43,560 cubic feet or 325,851 gallons.
93. D. GIBBONS, THE ECONOMIC VALUE OF WATER (1986).
94. Ward, *Economics of Water Allocation to Instream Uses in a Fully Appropriated River Basin: Evidence From a New Mexico Wild River*, 23 WATER RESOURCES RES. 381 (1987).
95. Agriculture accounts for over 90% of the consumptive water use in the western states, a percentage that has remained fairly constant over time. While urban users attach a higher value to a small quantity of water than do any other users, they don't take much water. *See* M. KELSO, W. MARTIN & L. MACK, WATER SUPPLIES AND ECONOMIC GROWTH IN AN ARID ENVIRONMENT: AN ARIZONA CASE STUDY 30-32 (1973).
96. In Greek, "hydro" means "water" and "loge" means "knowledge of." Hydrology, therefore, is the study of water. L. LEOPOLD & W. LANGBEIN, A PRIMER ON WATER 3 (1960).
97. For a more detailed and comprehensive treatment of the interrelated nature of all water, and the legal consequences that logically should flow from that interrelatedness, see R. HARNSBERGER & N. THORSON, NEBRASKA WATER LAW AND ADMINISTRATION (1984); H. THOMAS, THE CONSERVATION OF GROUND WATER 247-48

well as its location, changes as it moves through the cycle.[98]

Water is found above, on, or beneath every point on the surface of the earth. Surface water is all water that is visible on the land—including lakes, ponds, and rivers; groundwater, put most simply, is all water in the land that cannot be seen.

In the early nineteenth century, at the time water law as we still know it today developed, there was little understanding or information regarding the composition and behavior of ground and surface water. Different rules developed for the legal treatment of ground as compared to surface water. These different rules make little sense today, create anomalies in legal results, and hinder efforts for comprehensive and concerted water planning and conservation policies.[99]

A discussion of substantive water law issues and policy is obviously

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(1951); Clark, *Groundwater Management: Law and Local Response*, 6 ARIZ. L. REV. 178, 188 (1965); Piper & Thomas, *Hydrology and Water Law: What Is Their Future Common Ground?*, in WATER RESOURCES AND THE LAW 10-11 (1958). For a discussion of water classifications, see W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 1 (1942); W. HUTCHINS, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 21-101 (1971); Clark, *Plan and Scope of the Work*, in 1 WATERS AND WATER RIGHTS § 3 (R. Clark ed. 1967); Davis, *Introduction to Water Law of the Eastern States*, in 7 WATERS AND WATER RIGHTS §§ 602, 603 (R. Clark ed. 1976); MISSOURI RIVER BASIN COMM'N, PLATTE RIVER BASIN—NEBRASKA LEVEL B. STUDY, LEGAL AND INSTITUTIONAL 7 (March 1975) (technical paper).

98. In many locations in Nebraska, if groundwater were red, streams would be pink. Similarly, if groundwater were poisoned, the streams would also be poisoned. Groundwater in Nebraska, however, percolates slowly, generally moving only about 300 feet annually. Even in areas of greater groundwater movement, such as the Frenchman's Creek/Enders Reservoir area near Imperial, groundwater moves no more than 1300 feet per year and averages only 900 feet per year. In contrast streamflow down the Platte River moves approximately 25 miles per day. As a result, when junior headgates are closed at the western border of the state, water reaches senior users west of Kearney in about ten days. The negligible movement of groundwater, however, means that it would seldom be feasible to close junior wells to get water to senior wells, or to a stream, even if Nebraska adopted a prior appropriation system for groundwater. In contrast to surface water management which regulates juniors for the benefit of seniors, effective groundwater reservoir management usually requires that all withdrawals be regulated to minimize well interference. While lawyers may shut down wells completely, hydrologists realize it is rarely optimum to do so.

99. R. HARNSBERGER & N. THORSON, NEBRASKA WATER LAW AND ADMINISTRATION 9 (1984):

> The scientists' principal point was that because almost all water supplies are interrelated and interdependent, no one's rights could be adequately protected when judges pigeonholed water into separate compartments for decision-making purposes. For instance, vertical withdrawals from well installations and the interception of runoff by reservoir storage frequently have a seriously detrimental effect on stream flows. Likewise, horizontal diversions from surface watercourses often result in a slowdown of natural recharge to groundwater reservoirs. On a larger scale, weather modification and other interferences with the atmosphere affect the entire water cycle over vast areas.

beyond the scope of this Article. We mention the interrelated nature of water simply to alert policy makers to the parameters of the water law question that should be kept in mind when devising policy. We now turn to the situation in Nebraska with regard to groundwater.[100]

C. The Nature of Water Transfers

In most states, including Nebraska, any change in the place of use or purpose of use of a water right will be considered a transfer. A transfer can be temporary or permanent. Water rights from two different sources may be exchanged in whole or in part. The right to use all or some portion of groundwater may be sold outright or leased. Major, long distance physical transfers of water are quite likely to involve significant exchanges of water or water rights.

Conceptually, the simplest form of water transfer is to physically collect water at one point and move it by pipe or canal to another point. Short-term, seasonal adjustments within an irrigation district are often of this type.

As an example of a physical transfer of water—and ignoring, for purposes of the example, legal and institutional barriers to transfers—suppose the City of Los Angeles wanted to purchase Nebraska groundwater. Los Angeles could purchase land in the Sandhills, install a well field, withdraw groundwater, and pump the water uphill and over the front range of the Rocky Mountains. Once water reached the western slope, it could be transported by gravity through the extensive system of reservoirs and canals that are built on the Colorado River system. Eventually, some fraction of the water pumped from the Sandhills wells would reach the diversion works of the Metropolitan Water District of Southern California located on the Arizona-California border. Sandhills water, significantly diminished in volume by evaporation and seepage, would eventually reach Southern California communities through a system of canals and aqueducts.

As the above example illustrates, simple transfers by pipe or canal can be prohibitively expensive. Obviously, the greater the distance the water is to be transferred, the greater the costs to transfer the water—especially if the place to which the water is transferred is located at a higher elevation than the place of origin. Although there are notable examples of water being pumped uphill,[101] projects involv-

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100. The *Sporhase* decision provides one clear, and certainly pertinent, example of a case where the interrelated nature of water must be remembered. The facts in the case related to groundwater; the holding, however, also applies to transfers of surface water.

101. The Central Arizona Project, for instance, takes water from the Colorado River and pumps it uphill at extraordinary expense to Phoenix and Tucson. Mega-river transfers and their effects are considered at some length in HIGH PLAINS ASSOCIATES: CAMP DRESSER & MCKEE, BLACK & VEATCH, ARTHUR D. LITTLE INC., *Six-*

ing major uphill or long distance transfers are unlikely to be undertaken without significant public subsidies.

The same Nebraska-Los Angeles water transfer that was described above also could be accomplished through a system of exchanges that would involve only minimal physical transport of water. For example, the Metropolitan Water District of Southern California might agree to construct a dam on the South Platte River to provide a new source of drinking water for Denver. In exchange, Denver might agree to reduce its transmountain water diversions from the western slope and transfer unused western slope water rights to Metropolitan. Western slope water could then flow naturally down the Colorado River System to the California diversion works. Meanwhile, to offset injury that would otherwise occur to users of Platte River water in Nebraska as a consequence of Denver's increased use of Platte River water, Metropolitan could install a well field in the Sandhills and pump water back into the Platte. The effect of such a scheme would be to transfer Nebraska groundwater to southern California, but the transfer would be accomplished without any water physically being transported across the Nebraska state line.

As the ability to accurately model hydrologic systems increases, transfers by means of such exchanges become technically, if not economically, feasible. A legislature seeking to regulate interstate water transfers therefore must look beyond the regulation of the actual, physical transfer of water across a state line. Before one can determine the options that such a legislature might have, however, it is necessary to examine briefly the source of state authority to oversee water transfers.

In Nebraska, water rights are appurtenant to the land.[102] A change in land ownership automatically results in a transfer of the water right to the new landowner. Only limited transfers are permitted apart from a sale of land.[103] In other states, by contrast, water rights are granted by permit and the water right transfers when the permit is transferred.[104] In those states, a sale of land without a sale of the water right transfers only the land, not the right to use the water.

Most states favor voluntary reallocation of water and water rights through a *market mechanism*, and have statutes in place to regulate such transfers.[105] All western water transfer statutes (regardless

State High Plains-Ogallala Aquifer Regional Resources Study—A Report to the U.S. Department of Commerce and the High Plains Study Council (March 1982).

102. NEB. REV. STAT. § 46-122 (1988).

103. *See id.* §§ 46-290 to 294.

104. Colorado, for instance, treats water rights as vested property rights which may be transferred and conveyed in the same manner as other property rights.

105. For example, CAL. WATER CODE § 109(a)(West 1971) states that it is "the estab-

whether the particular state transfers water by permit or with the land) contain similar, though not identical, provisions.[106] Transfers are subject to review by a state agency. An applicant for a transfer must demonstrate that the amount of water use after transfer will be no greater than the amount that has been used historically, that the transfer will not harm existing users, and that the transfer is in the public interest. Notice of a proposed transfer must be given to the public so that interested parties can appear and protest the application for transfer.[107]

D. Authority of the State to Oversee Interstate Transfers of Water

Whether interstate water transfers are viewed as a threat or as an opportunity, nearly everyone would agree that such transfers should not occur without state oversight. But what is the source of the state's authority to regulate or oversee water transfers? In *Sporhase v. Nebraska ex rel. Douglas*,[108] the United States Supreme Court rejected the contention that Nebraska held groundwater in trust for the public as reason to exclude groundwater exports from Commerce Clause scrutiny. For the Court, state ownership was a legal fiction that reflected the importance of water to public welfare. At the same time, however, the Court acknowledged that Nebraska's assertion of public trust values gave it a heightened police power, or regulatory interest, in water resources. One effect of *Sporhase*, then, is to raise again the question of who "owns" or "controls" water in Nebraska. That is an extraordinarily complex question.

1. *Water as Property of the State*

Was the Supreme Court in *Sporhase* correct in concluding that public ownership of water is a legal fiction? Or does the state of Nebraska "own" water found within its borders in the same manner that a landowner "owns" land? The question can be answered best by attempting to trace title to water from the time that the geographical area that is now Nebraska came under the jurisdiction of the United States.

The land that became Nebraska was part of the Louisiana

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lished policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import." *See also* Gray, *California Water Transfers Law*, 31 ARIZ. L. REV. 745 (1989).

106. *See generally* Colby, McGinnis & Rait, *Procedural Aspects of State Water Law: Transferring Water Rights in the Western States*, 31 ARIZ. L. REV. 697 (1989).

107. In most states, protesters, who must themselves hold water rights, bear the burden of proving that they will be harmed by the transfer. If the applicant and the protesters cannot reach a mutually acceptable agreement, a hearing is held and a state administrator issues a ruling. The ruling is subject to judicial review.

108. 458 U.S. 941 (1982).

Purchase. When the treaty with France was signed in 1803,[109] the federal government acquired title to all of the Louisiana territory, subject to prior grants made by France and Spain,[110] and subject to Indian rights of occupancy.[111] When Nebraska was admitted to the Union in 1867, most land and water found within the state remained part of the public domain and subject to the land disposition laws of the United States. The state of Nebraska received only certain enumerated sections of land described in the Nebraska Enabling Act,[112] and those sections of land were dedicated to particular purposes. Under the equal footing doctrine,[113] the state also received title to the bed and banks of streams that were navigable in fact in 1867.[114] But the vast bulk of land and water found within the borders of Nebraska remained property of the United States to be disposed of under a variety of federal disposition laws, most notably the Homestead Act of 1862.[115] Quite clearly, the source of Nebraska's power to define and delimit water rights cannot be derived from its title to water because, for the most

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109. The United States Constitution does not authorize the acquisition of land, but it does authorize the making of treaties. U.S. CONST. art. II, § 2, cl. 2. Consequently, in an attempt to avoid questions of constitutional authority to purchase land, President Jefferson entered into a treaty with France on April 30, 1803. The treaty was approved by the Senate on Oct. 17, 1803, and the United States took possession of the vast Louisiana territory on December 20 of the same year.

110. The Louisiana territory was claimed by Spain until 1801 when it was transferred to France in the secret Treaty of San Ildefonso. As a matter of international law, a change in sovereigns has no affect on title to land that is held in private hands. Thus, private land transfers that occurred prior to 1803 were respected by the United States.

111. The right of native peoples to occupy acquired territory was recognized by the United States Supreme Court in Johnson v. M'Intosh, 21 U.S. 543 (1823), giving rise to a unique form of property known as Indian title. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (1982). Consequently, Indian claims of occupancy had to be extinguished by treaty or conquest before the United States acquired clear title to the land that was part of the Louisiana purchase.

112. Enabling Act of Congress, 13 Stat. 47 (1864). Sections 16 and 36 in every Nebraska township were granted to the state for support of the common schools. The Act also granted Nebraska 20 sections of land for the purpose of erecting public buildings in the state capital, 50 sections to support a penitentiary, and 80 sections to support a state university.

113. Article IV, section 3, clause 1 of the Constitution gives Congress power to admit new states into the union. Most acts of admission declare that new states are admitted "on an equal footing with the original States in all respects whatsoever." In Coyle v. Oklahoma, 221 U.S. 559 (1911), the Supreme Court explained that each new state was to be equal in power, dignity and authority with the original thirteen states.

114. Pollard v. Hagan, 44 U.S. 212 (1845). The original 13 colonies held title to the bed and banks of navigable waters as successors to the Crown of England. The English Crown, from the time of Magna Carta, had held such lands not in proprietary capacity, but in trust for its subjects.

115. 43 U.S.C. § 161 (repealed 1976).

part, Nebraska never received "title" to water from the federal government.

2. *Water Rights as Creatures of State Law*

Although states do not "own" water in a conventional sense, they regularly invoke their police powers[116] to define the nature of private water rights. They also use their police powers to regulate water use by individuals who possess valid water rights. In developing state water law, courts and legislatures have long struggled to reconcile the fact that water is private property with the fact that water serves many public uses. Whether because it is necessary for survival, or perhaps because it serves so many diverse uses, water has always received unique treatment in the law. This unique treatment results from state use of the police power to strike the balance between public and private rights to use water. That power remains even if the *Sporhase* court was correct in describing "public ownership" as a legal fiction.

As described above, when Nebraska became a state, most of the water and land found within the new state was retained as federal public land. A series of federal statutes[117] and a definitive Supreme Court ruling,[118] however, eventually established that by 1877, if not before, water rights had been severed from land ownership on the public domain.[119] In other words, landowners who acquired federal land patents after 1877 (or possibly earlier) acquired land only. They did not acquire any federal water rights. As individuals began to use water in the western states, they did so at the sufferance of the federal government which retained a residual proprietary interest in the waters. As states acted to control water use by individuals, they also acted at federal sufferance. The end result, however, was that private individuals looked to state law, not to federal law, to determine the scope of their water rights. For our purposes, a potential interstate transporter of water also must look to state law to determine what it is that potentially is subject to transfer.

3. *The Regulation of Water Use*

In addition to the power to create private water rights, a power derived from Congressional acquiescence, states have the power to regulate the use of water by private individuals who possess water

116. The police power is the inherent power of a state to enact legislation concerning the health, safety, peace, good order, morals, and general well being of the community. It is, in short, the power to regulate within the bounds established by state and federal constitutions.

117. Act of July 26, 1866 (codified at 43 U.S.C. § 661); Act of July 9, 1870 (codified at 43 U.S.C. § 661); Desert Land Act of March 3, 1877 (codified at 43 U.S.C. §§ 321-29).

118. *See* California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

119. The principal case and the relevant statutes are discussed in the context of Nebraska law in R. HARNSBERGER & N. THORSON, *supra* note 2, at § 3.25 (1984).

rights. Rights to use surface water and groundwater have long been regulated. Common law courts in England and America, in accord with civil law precedents, consistently held that water could not be monopolized.[120] Riparian landowners[121] were entitled to use a reasonable share of the flow and, except for permitted diversions to meet domestic uses, were to leave the stream undiminished in quantity or quality;[122] groundwater users were subject to a prohibition against malicious use.[123]

Another characteristic of water rights is that they are subject to redefinition as the state exercises its regulatory powers to respond to increasing demands for the resource.[124] As a consequence, the study of water rights is the study of change.[125]

4. Groundwater Rights in Nebraska

Groundwater is a common pool resource. Except in unusual circumstances, no single person is in a position to monopolize and control a distinct source of groundwater supply.[126] Consequently, when one person withdraws water from the common pool, the amount of water available for others whose land overlies the pool is diminished.[127] Be-

120. *See, e.g.*, Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827)(No. 14,312); Mason v. Hill, 110 Eng. Rep. 692 (1833). *See also* Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133 (1919). *But see* Maass & Zobel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?*, 10 PUB. POL. 109 (1960).

121. At common law, a landowner who owned land abutting a stream acquired what are called riparian water rights. Water acquired as part of a riparian right generally could not be used on land that did not abut the stream, nor could such water be transferred out of the watershed. Annotation, *Transfer of Riparian Rights to Use Water to Nonriparian Land*, 14 A.L.R. 330 (1921); R. HARNSBERGER & N. THORSON, *supra* note 2, at 35-36 (1984). In Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), Justice Holmes noted that lower court opinions had rested on the rule that a riparian owner has no right to divert waters for more than a reasonable distance from the body of the stream, or for other than well-known ordinary purposes, or in excess of a narrowly limited amount.

122. *See generally* R. HARNSBERGER & N. THORSON, *supra* note 2, at § 2.01 (historical background of the riparian doctrine in the United States).

123. *See, e.g.*, Greenleaf v. Francis, 35 Mass. 117 (1836).

124. For example, the riparian "natural flow" doctrine gave way to the doctrine of "reasonable use," riparianism in the West gave way to prior appropriation, and state constitutional diversion requirements were ignored to facilitate instream flow appropriations. More recently, states have asserted the right to reallocate water rights pursuant to public trust servitudes. *E.g.*, National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, *cert. denied*, 464 U.S. 977 (1983).

125. As a corollary matter, states have great latitude to modify existing water rights law without offending state and federal constitutional provisions that protect private property. Thus, for example, states likely can restrict the amount of water that can be pumped from a groundwater well, or the amount of surface water that can be applied to an acre of land, without raising constitutional objections.

126. Nebraska's principal aquifer, the Ogallala, underlies parts of six states.

127. Groundwater pumping impacts other users in two distinct ways. In a highly lo-

cause all withdrawals from a common pool are interconnected, it is difficult to establish legal rules that govern such withdrawals. It is even more difficult to derive a "groundwater property right" from the rules that have been established.

As noted above, landowners in Nebraska acquire rights to use groundwater by virtue of their ownership of land overlying an aquifer. The right to withdraw groundwater is not absolute but is subject to reasonable regulation under the state's police power. In areas of declining groundwater tables, groundwater use can be significantly restricted by state regulation under the Nebraska Groundwater Management and Protection Act.[128]

To illustrate what rights a landowner currently has to the use of groundwater, consider the following examples. First, most obviously, a landowner may use groundwater as necessary for beneficial purposes on his land. Second, less obviously, a landowner may use that same amount of groundwater on land other than his overlying land so long as no one is injured by the use. Third, although not specifically authorized by statute,[129] a landowner might transfer his right to use groundwater to another. In most states, statutes specifically authorize sale or lease of groundwater. In the absence of statutory authority a Nebraska landowner who wanted to sell groundwater would likely give the buyer easements to install new wells and a covenant not to sue for any loss of water withdrawn from under his land. If the buyer got similar covenants from all those claiming an interest in the underground reservoir, an effective transfer would occur, albeit without a direct sale of water.

The evolution of groundwater property rights in Nebraska has been extensively documented previously and will not be repeated here.[130] Three points, however, should be emphasized. First, an overlying landowner's right to withdraw water is limited to the amount of water that can be applied to reasonable and beneficial use on land that he owns.[131] Second, if the supply of available water is insufficient for all users, each is entitled to a reasonable share of the whole.[132] Third,

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calized setting, the cone of depression of two wells may intersect, causing at least one of the wells to lose pumping capacity. This is known as a well interference problem. Long term impacts of pumping, felt over a larger area, take the form of reduced lift as the groundwater table is lowered. Water, while it may be physically present, can be withdrawn only at higher cost. Since early pumpers get maximum lift advantage, an economic incentive exists to overpump the aquifer.

128. NEB. REV. STAT. §§ 46-656 to 674 (1988).

129. *Compare with* NEB. REV. STAT. §§ 46-290 to 294 (authorizing limited transfers of surface water rights).

130. *See* R. HARNSBERGER & N. THORSON, *supra* note 2, at §§ 5.01-5.10 and authorities cited therein.

131. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933).

132. *Id.*

given Congressional acquiescence in state water law, Nebraska groundwater *prior to capture* is subject to complete plenary control of the state.[133]

E. Constitutional Protection for Private Water Rights

The United States Constitution limits the extent to which a state can interfere with private property rights. This limitation may take the form of requiring that property not be taken without due process of law,[134] requiring that just compensation be paid for any property that is properly taken,[135] or prohibiting a state from discriminating against the movement of items of property in interstate commerce.[136] At the same time, the state has a strong interest in regulating the use of property. From a constitutional perspective, all property rights—in water, corn, or automobiles, for example—have the same status. In fact, however, rights to natural resources, and especially rights to water, may appear to be given less constitutional protection than other property rights. Not only does language in judicial opinions frequently wax eloquent regarding a state's interest in controlling the disposition of water,[137] but courts have regularly approved major modifications to water rights allocation schemes, only rarely sustaining

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133. According to case law, prior to capture, landowners in Nebraska have no private property interest in underlying groundwater. NEB. REV. STAT. § 46-656 (1988), however, provides that "[e]very landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the groundwater supply is insufficient for all users." Although it could be argued that the statute vests a groundwater property right in overlying landowners, a better reading of the provision is that it merely expresses current legislative policy, a policy that is subject to change as conditions merit. Consequently, the legislature probably could prohibit new wells from being drilled if conditions warranted.

134. "No person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, cl. 3, "nor shall any State deprive any person of life, liberty, or property, without due process of law", U.S. CONST. amend. XIV, § 1, cl. 3.

135. "[N]or shall private property be taken for public use, without just compensation," U.S. CONST. amend. V, cl. 4.

136. *See generally* Part IV, *infra.*

137. In *Hudson County,* Justice Holmes said:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

209 U.S. 349, 356 (1908).

constitutional challenges.[138]

On close observation, however, judicial acquiescence in changed water allocations is not evidence of a unique constitutional status for water as property, but merely a reflection of the unique way in which water rights are defined. Water rights normally are usufructuary[139] and subject to some notion of "public trust."[140] Moreover, many water rights are conferred by permit, and hence, are subject to permit conditions.[141] Whether or not water has a unique constitutional status, one thing is clear: states have great latitude in regulating water use and redefining water rights.

F. Congressional Power to Regulate Groundwater Use in the United States

1. *Sources of Federal Power*

As a matter of constitutional power, Congress has clear authority to regulate groundwater use in the United States. In fact, the constitutional scope of federal power probably allows Congress to allocate groundwater supplies among states or even among individuals within states.[142] The source of federal power to regulate or allocate groundwater resources is derived by implication from several sections of the United States Constitution,[143] including, among others, the Commerce Clause,[144] the Treaty Clause,[145] the Taxing and Spending Clause,[146]

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138. For example, the abolition of riparian rights in favor of appropriative rights has regularly been sustained. *E.g.*, Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324, *appeal dismissed*, 457 U.S. 1101 (1982); *In re* Waters of Long Valley Creek Stream System, 25 Cal.3d 339, 158 Cal. Rptr. 350, 599 P.2d 656 (1979). *See also* R. HARNSBERGER & N. THORSON, *supra* note 2, at §§ 3.29-3.30 (1984).

139. Describing a water right as usufructuary means that normally a water right gives its holder only a right to use water, not a right to possess water without use. *See also* note 69, *supra*.

140. Public trust literature is extensive. The seminal article is Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). The origins of the doctrine are discussed and its application to Nebraska law is assessed in R. HARNSBERGER & N. THORSON, *supra* note 2, at §§ 6.09 to 6.11. *See also* J. SAX, DEFENDING THE ENVIRONMENT at 158-74 (1971).

141. Rights to appropriate surface waters in Nebraska are granted by permit. *See generally* NEB. REV. STAT. §§ 46-201 to 46-2,119 (1988). In most western states, permits are also required to withdraw groundwater.

142. In important dictum in *Sporhase*, the Supreme Court of the United States reaffirmed leadership of the states in the area of water resources administration while going out of its way to make clear that no constitutional obstacles prevent federal preemption of groundwater management.

143. These grants of federal power are expanded by the Necessary and Proper Clause: "The Congress shall have Power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

144. "The Congress shall have power to . . . regulate commerce with foreign nations,

the Property Clause,[147] and the Jurisdiction Clause.[148] Moreover, to the extent that Congress exercises one of its enumerated powers, federal law preempts any inconsistent state law under the Supremacy Clause.[149]

Although Congress has the power to regulate the use of water resources, this power has little to do with the question of "ownership" of the water. The real question is what governmental entity, if any, has the authority to regulate water use. The answer to that question is deceptively simple. With the following two caveats, a state may regulate use (and hence allocation) of water in any manner that it sees fit:

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and among the several States, and with the Indian tribes . . . ." U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause is the basic source of federal authority over navigable waters. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940). Commerce Clause jurisprudence extends federal power far beyond traditional notions of navigability, however. In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Supreme Court sustained a Corps of Engineers regulation that gave the Corps jurisdiction over any land that supports plant life adapted to saturated soil conditions.

145. "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2. The treaty power has been cited as authority for the United States to authorize improvements on international waterways. Arizona v. California, 283 U.S. 423 (1931). The federal government has full power to act to prevent a state from interfering with a treaty obligation. Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

146. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1. The Central Valley Project in California was sustained under this power. United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

147. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2. The Property Clause underlies the system of federal reserved water rights, Arizona v. California, 373 U.S. 546, 597-98 (1963), *decree entered*, 376 U.S. 340 (1964), and has been cited as the source of authority for the federal government to produce and market hydroelectric power at federal dams. Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

148. "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock Yards, and other needful Buildings . . . ." U.S. CONST. art. I, § 8, cl. 17. Although the federal government can acquire exclusive jurisdiction over an area by complying with the Jurisdiction Clause, negotiated adjustments in jurisdiction are more common. *See, e.g.*, Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

149. "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

> (1) A state may not, in the guise of regulation, destroy constitutionally vested rights without paying just compensation for the rights destroyed; and
>
> (2) If a state pursues policies that are inconsistent with federal law or policies, federal law will prevail.[150]

Of course the mere existence of federal legislative power does not mean that Congress will decide to exercise that power. With respect to the direct allocation of water generally, and particularly with respect to the allocation of groundwater, Congress has traditionally deferred to the states. In fact, in *Sporhase v. Nebraska ex rel. Douglas*[151] the United States Supreme Court referenced some thirty-seven statutes and interstate compacts that stood as examples of instances in which Congress had explicitly deferred to state water law.[152]

Congressional reluctance to exercise its power with respect to groundwater allocation decisions appears to be the result of a general notion that groundwater is a resource of highly localized value. Although most groundwater in storage moves through the soil, the rate of movement typically is measured in feet per year. Thus, a supply of groundwater has some intrinsic linkage to the soil. Similarly, high costs of transportation have meant that groundwater is most likely to be used in the area where it is found, another factor favoring local decisionmaking.

Congressional reluctance to act might change with the growing awareness that the wider impacts of groundwater use may have been underestimated. Only recently, for example, has the hydrologic linkage between groundwater and surface water been fully appreciated. In many instances, groundwater use in one location may affect the long-term yield of an aquifer in another location or may affect the flow of surface water in hydrologically linked streams. Similarly, pollution of an aquifer over time may result in pollution of groundwater in a relatively widespread area—a matter of particular concern given the important contribution that groundwater makes to the nation's drinking water supplies.[153] Moreover, as transfers of water and water

150. The ultimate criterion for determining whether a particular state law has been preempted is the intent of Congress. Congress may, of course, preempt state authority by saying so in express terms. Jones v. Rath Packing Co., 430 U.S. 519 (1977). Even where state law has not been totally displaced by federal law, state law will be preempted to the extent that it actually conflicts with federal law. Such conflicts arise when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

151. 458 U.S. 941 (1982).

152. *Id.* at 958-59.

153. All but five of Nebraska's municipal and rural water delivery systems rely on groundwater as the source of water supply. NEBRASKA NATURAL RESOURCES COMMISSION, MUNICIPAL WATER NEEDS at 4-1 (1983).

rights become more common, groundwater supplies increasingly may be viewed as ways of augmenting depleted downstream surface water supplies.[154]

Surface water allocation and use decisions are already influenced significantly by a wide range of federal laws. Growing recognition that groundwater use decisions also have effects that extend beyond the immediate vicinity of the use undoubtedly increases the likelihood of future federal actions that will similarly affect groundwater allocations and uses. To a limited extent federal activity already has commenced.[155]

While Congress has the power to establish a national water resource policy, it also has the power to authorize certain kinds of state regulation that, absent Congressional approval, would fall before a Commerce Clause challenge. Congress could, for instance, give states the power to prohibit transfers of water out of state. Or, stopping short of permitting such outright prohibition, Congress might authorize states to adopt water transfer policies that are suspect under *Sporhase*. As long as Congressional intent to authorize the state conduct is clear, such statutes would be effective to circumvent the prohibitions of the Commerce Clause.

2. *De Facto Allocations of Water Pursuant to Federal Law*

While Congress generally has not acted directly to allocate water resources among states or individuals,[156] a number of federal statutes result in de facto allocations, particularly of surface water supplies. Among the most important of these statutes are the Endangered Species Act,[157] the Federal Power Act,[158] the National Environmental Policy Act,[159] the Clean Water Act,[160] the Wild and Scenic Rivers Act,[161] the Wilderness Act,[162] and the conservation features of federal

154. *See, e.g.*, Templeton v. Pecos Valley Artesian Conservancy Dist., 65 N.M. 59, 332 P.2d 465 (1958).
155. The Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (codified at 42 U.S.C. §§ 300f to 300j-10 (1988)), was passed in response to a growing awareness of health problems associated with drinking water contamination. The Act applies to almost all of the nation's public water systems and provides special protection for groundwater quality. Among other things, the Act authorizes the Environmental Protection Agency to set end-of-pipe standards for public drinking water systems, to set standards for state underground waste injection control programs, and to designate "sole source aquifers."
156. The single exception is the congressional allocation of Colorado River water among Colorado River basin states pursuant to the Boulder Canyon Project Act, Pub. L. No. 642, 45 Stat. 1057 (1928)(codified at 43 U.S.C. §§ 617-617t (1988)).
157. 16 U.S.C. §§ 1531 to 1544 (1988).
158. 16 U.S.C. §§ 791 to 828 (1988).
159. 42 U.S.C. §§ 4321 to 4370a (1988).
160. 33 U.S.C. §§ 1251 to 1387 (1988).
161. 16 U.S.C. §§ 1271 to 1287 (1988).

farm programs.[163] Each of these statutes affects water use decisions in a way that limits the freedom that a state otherwise would have to dispose of water resources found within its borders. These statutes affect water allocation decisions indirectly by (1) imposing planning obligations; (2) establishing special obligations with respect to "critical areas"; (3) mandating the allocation of water to "noneconomic" uses as a condition to receiving a required permit or license; or (4) requiring that water supplies be set aside to insure that preferred uses always are satisfied. In all cases these statutes operate to increase the cost of allocating water to new uses that are not favored uses within the particular statutory scheme.[164]

a. *Statutes That Impose Planning Obligations*

The archetypal federal planning statute is the National Environmental Policy Act (NEPA).[165] NEPA is at heart a federal environmental full disclosure act. It is designed not to dictate any particular course of action but to ensure that federal decisionmakers will acknowledge and consider the environmental impacts of their actions. NEPA's procedural requirements do not apply to all actions, or even to all federal actions, but only to major federal actions that have a significant impact on the quality of the human environment.[166] On their face, planning statutes like NEPA have nothing to do with the allocation of water. On the other hand, many major water resource use projects use federal financing or require federal permits or licenses that trigger review under NEPA. Similarly, in states that have their own NEPA-type statutes, review can be triggered by state funding or permitting.

Once a NEPA review is triggered, the action agency must prepare a detailed statement, known as an environmental impact statement (EIS), that considers the impacts of the proposed actions, alternatives to the proposed action, and the impacts of alternatives. The goal of an EIS is to give the decisionmaker the information that he or she needs to weigh the environmental costs of a proposed action against the

162. 16 U.S.C. §§ 1131 to 1136 (1988).

163. In 1985, Congress attempted to reduce the economic incentives to convert environmentally sensitive lands into cropland by denying certain USDA farm program benefits to farmers who produce crops on highly erodible land or on wetlands. Food Security Act of 1985, 16 U.S.C. § 3801.

164. The federal statutes also suggest how states might indirectly impact intrastate *and interstate* water use decisions and transfers in a way that minimizes the chances of constitutional infirmities.

165. 42 U.S.C. §§ 4321 to 4370a (1988).

166. National Environmental Policy Act § 102(2)(C), 42 U.S.C. § 4332(2)(C)(1988). Many states have similar statutes that impose planning obligations on state decisionmakers. *E.g.*, California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 to 21176 (West 1986).

traditional economic benefits of a proposed action. In addition to providing additional information to decisionmakers and members of the public, NEPA-type planning statutes increase the cost, often significantly, of actions whose scope triggers planning review.

b. *Statutes That Protect Critical Areas*

Federal statutory provisions designed to protect environmentally sensitive or "critical" areas include the application of "dredge and fill" permit requirements to jurisdictional wetlands under section 404 of the Clean Water Act,[167] "sodbuster" and "swampbuster" provisions of the federal farm programs,[168] and the "wellhead protection area" provisions of the Safe Drinking Water Act.[169] These statutes are aimed directly at regulating land use, not water use decisions, but they necessarily affect water use decisions. Each of the statutes contains criteria for identifying critical areas that are the object of special protection.[170]

Critical area statutes operate to discourage land uses, and attendant water uses, that are inconsistent with preserving the areas.[171] Extreme forms of critical area statutes include the Wilderness Act[172] and the "wild river" provisions of the Wild and Scenic Rivers Act.[173] These statutes go beyond discouraging activities that affect critical areas and instead prohibit any actions that are inconsistent with the preservation goals of the statutes.

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167. Clean Water Act § 404, 33 U.S.C. § 1344 (1988).
168. 16 U.S.C. § 3801 (1988).
169. 42 U.S.C. § 300h-7 (1988).
170. Examples of such criteria include:

> (1) "Wetlands" defined to include all lands that support "vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (1991).
>
> (2) "Highly erodible land," defined in relation to soil type and slope of a land parcel. 7 C.F.R. § 12.21 (1991).
>
> (3) "Wellhead protection area," the surface and subsurface area surrounding a public water supply wellfield through which contaminants could move toward and reach the wells, defined in relation to the radius of influence around the wellfield, the depth of drawdown of the water table, the travel time of various contaminants through the soil, and other factors. *See* 42 U.S.C. § 300h-7(e)(1988).

171. By discouraging intensive land use in environmentally sensitive areas, such statutes often reduce local demands for water. Occasionally, such statutes operate to effectively reserve some minimum supply of water in support of the desired land use.
172. 16 U.S.C. §§ 1131 to 1136 (1988).
173. Pristine wild rivers, defined at 16 U.S.C. § 1273(b)(1)(1988), are given maximum protection under the Act. *See id.* § 1280(a)(iii). Any designation under the Act, however, operates to forbid any federal activities that would threaten the free flowing condition of the river. *Id.* § 1278(a).

c. *Statutes That Allocate Water to "Noneconomic" Uses*

The Federal Power Act[174] gives the Federal Energy Regulatory Commission (FERC) broad authority to license and regulate hydropower facilities constructed on navigable waters of the United States. Although section 27 of the Act contains a savings clause that preserves state water rights law,[175] Congress in 1986 significantly curtailed the effect of the savings clause and elevated consideration of environmental values in licensing and relicensing decisions.[176] FERC now requires its licensees to provide water to meet instream flow needs based on the recommendations of state and federal fish and wildlife agencies. Releases are required as a license condition even if state water rights are adversely affected by the releases.[177] Thus, traditional users now are required to provide water for public uses if they wish to continue their private use.

d. *Statutes That Allocate Water to Preferred Uses*

The federal statute with the greatest potential to directly affect water use and allocation decisions is the Endangered Species Act (ESA).[178] The ESA prohibits federal agencies from doing anything that might jeopardize the continued existence of an endangered or threatened species.[179] In fact, federal agencies are under an affirma-

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174. 16 U.S.C. §§ 791 to 828c (1988).

175. 16 U.S.C. § 821 (1988) provides that "[n]othing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

176. Federal Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1243 (1986). Most Federal Energy Regulatory Commission licenses expire after 50 years and must be renewed. Hundreds of projects licensed during the early days of the Federal Power Act are now facing relicensing.

177. Recently, the United States Supreme Court seemingly reaffirmed federal preemption of inconsistent state law under the Federal Power Act without clearly resolving the question of the degree to which state water rights could be affected without triggering a constitutional compensation requirement. California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490 (1990).

178. 16 U.S.C. §§ 1531 to 1544 (1988). Nebraska has a state counterpart to the federal Endangered Species Act. *See* Nebraska Nongame and Endangered Species Conservation Act, NEB. REV. STAT. §§ 37-430 to 438 (1988). For a discussion of the application of the Nebraska Act to a proposed interbasin water transfer, see Little Blue N.R.D. v. Lower Platte North N.R.D., 210 Neb. 862, 317 N.W.2d 726 (1982). *See also* R. HARNSBERGER & N. THORSON, *supra* note 2, at § 7.14 (1984).

179.
> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . .' . . . This language admits of no exceptions.

tive duty to do all that they can to insure the continued existence of the species[180]. Section 7 of the ESA can be invoked to thwart any activity that adversely affects an endangered species, provided the federal government has control of the activity.

Section 9 of the ESA potentially has even broader impact. It prohibits any person[181] from "taking" an endangered species. "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[182] Large scale groundwater withdrawals as might be contemplated in major interstate water transfer schemes have the potential to affect surface water flows and reduce groundwater levels to the point where significant habitat changes might occur. If the changed habitat adversely affects an endangered species, the project normally cannot go forward unless the adverse impact is avoided.[183] Often, a potential adverse impact on an endangered species might be discovered because of studies required by planning statutes such as NEPA. Once an adverse impact is demonstrated, the Endangered Species Act requires substantive alterations or revisions to the proposal.

G. Allocation of Water Among States

A state's police power is a fundamental part of a state's sovereignty. States invoke their police powers when they adopt rules governing the use and allocation of water.[184] When an interstate resource is subject to the regulatory authority of several states, however, unavoidable conflicts arise. Historically, three means have been used to resolve water disputes that arise among states: interstate compacts; congressional allocation; and equitable apportionment. While each method of resolving interstate disputes will be briefly reviewed below, it is important to note that interstate allocations have very little to do with interstate transfers by private users. A Supreme Court equitable

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Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978)(emphasis in original).

180. "It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." Endangered Species Act § 2(c)(1), 16 U.S.C. § 1531(c)(1)(1988).

181. The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a state; or any other entity subject to the jurisdiction of the United States.

Endangered Species Act § 3, 16 U.S.C. § 1532(13)(1988).

182. *Id.* § 3, 16 U.S.C. § 1532(19)(1988).

183. Limited exemptions are authorized under the Act. *See* 16 U.S.C. §§ 1536(e)-(p) (1988).

184. Congressional acquiescence is a condition of a state's exercise of its police power over water; to date the Congress has acquiesced.

apportionment decree, for instance, might restrain an upstream state from exercising its regulatory powers in a manner that would deny a downstream state some specified flow of water in an interstate stream. While the decree would effectively allocate to a state a share of the use of the stream, it normally would not address how a state might further divide use of its particular allocation. Once a state transfers a portion of the state allocation to individual users, additional state regulation of transfers is subject to Commerce Clause scrutiny.

1. Equitable Apportionment

The doctrine of equitable apportionment is used by the United States Supreme Court to allocate interstate streams among states when the flow of water is insufficient to satisfy all prospective uses.[185] An equitable apportionment action is filed by one state against another state in the United States Supreme Court. The case normally will be assigned to a "special master" to build a factual record and recommend disposition of the case.

The governing principle of equitable apportionment is equality of right, not equality of amounts apportioned. Factors considered include the date water uses were initiated in each state, physical and climatic conditions, consumptive use of water in various sections of the river, character and rate of return flows, extent of established uses and the economies built on them, the availability of storage water, the efficiency of water use in the various states, and a comparison of benefits to downstream users versus the damage to upstream users if restrictions are imposed on the upstream state.[186]

Although no examples exist, there is no reason conceptually why an interstate aquifer could not be the subject of an equitable apportionment action, particularly if one state's prolific use of groundwater threatened another state's groundwater conservation efforts. An equitable apportionment, however, is not an absolute allocation to a state; rather it is an initial allocation that is subject to modification if private users seek to transfer their right of use across state lines.

2. Interstate Compacts

If states can reach an agreement on use of an interstate resource without resort to litigation, they can use an interstate compact to cement the terms of that agreement. Interstate compacts are in the nature of treaties between or among states. Under the United States Constitution, states may not enter into such arrangements unless Congress consents.[187] With Congressional consent, terms of a compact are

185. The doctrine was announced in Kansas v. Colorado, 206 U.S 46 (1907).

186. *See* Nebraska v. Wyoming, 325 U.S. 589, 618 (1945), *modified*, 345 U.S. 981 (1953).

187. "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3. The framers of

federal law and override inconsistent state law in each of the compact states.[188] Moreover, apportionments of water by interstate compact are binding on individual water users, whether or not they were parties to the negotiations.[189]

Compacts thus are very potent tools for implementing interstate water policy. States might, for instance, negotiate an interstate compact that banned interstate transfers of water. If approved by Congress, the compact likely would be immune from attack under the Commerce Clause.[190] Compacts may be a particularly attractive vehicle for managing interstate aquifers if the affected states can agree to a management strategy and if they are willing to vest a compact commission with sufficient management powers.

3. *Congressional Allocation*

Congress has the power to directly allocate interstate resources among states. It has only exercised this power in one instance, however, and that is the allocation of the Colorado River pursuant to the Boulder Canyon Project Act.[191] In allocating an interstate resource, Congress is free to require or prohibit interstate transfers. If Congress is silent as to transfers, however, it is likely that courts would view the Congressional allocation as merely an initial allocation, one that could be subsequently modified by private transfers.

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the Constitution were concerned that without such an approval mechanism, groups of states might join together and amass political power at the expense of the federal government. *See generally* Virginia v. Tennessee, 148 U.S. 503 (1893).

Although the Compact Clause seems to include all agreements between states, some past agreements have been held valid without Congressional consent on the theory that they did not affect the political power of the parties to the compact. Of course interstate agreements about water resources affect federal interests in navigation, power, reclamation, environment, and flood control, and it would indeed be foolhardy for a state to make a compact over interstate waters without the express consent of the Congress. The consent either can precede or follow the making of the compact. Even though the Compact Clause speaks only about Congress, it generally is conceded that approval of the President is also required. *See* King, *Interstate Water Compacts* 355, in WATER RESOURCES AND THE LAW (1958). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 300-03 (1986).

The seminal article on compacts is Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

188. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951).

189. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

190. Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983), *affirmed*, 769 F.2d 568 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

191. Pub. L. No. 642, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617 to 617t (1988), as interpreted in Arizona v. California, 373 U.S. 546 (1963)). The extensive history of the Colorado River litigation is documented in Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966).

H. State Authority After *Sporhase*—Conclusion

The United States Supreme Court in *Sporhase v. Nebraska ex rel. Douglas*[192] rejected Nebraska's argument that, under Nebraska law, water was not an article of commerce. Narrowly read, however, the opinion applied only to water that was subject to private rights of capture. In the case of Mr. Sporhase, the private right of capture was equal to the amount of water that he could legally use on the Nebraska portion of his farm. Under Nebraska common law, groundwater in place beneath the surface of the land remains part of what the civil law refers to as the "negative community." As such, it is "owned" arguably by the public, or more correctly, by no one at all.

What are the implications of nonownership? First, a state has great constitutional latitude to modify the rules under which capture is permitted to take place. Although a landowner's groundwater property right cannot be taken by a state unless just compensation is paid, in the case of Nebraska groundwater there may be no "right" requiring compensation. As the Nebraska Supreme Court said in its *Sporhase* opinion, "[n]ot being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property."[193] State restrictions on capture may also escape strict Commerce Clause scrutiny. Professor Frank Trelease, long regarded as the foremost scholar in Western water law, distinguished between 1) appropriated waters that had been distributed by a state agency to water users to be held as water rights, and 2) unappropriated waters that remained under the complete control of the state or federal government.[194]

> When a state is doling out unappropriated water, it may place restraints upon itself; it may limit its grants of rights to develop its natural resources in such a way as to ensure that at least the primary benefits of the first use are realized within the state. But further economic activity by the water user in the processing, sale, or transportation of goods or crops, or in the sale or transportation of water itself as a product, may not be regulated to keep the benefits of that activity within the state.[195]

Second, to the extent that Nebraska's regulations (1) are designed to control the rate of groundwater exploitation, and (2) evenhandedly apply to in-state and interstate uses or users, the regulations will probably survive scrutiny under negative Commerce Clause jurisprudence. *Commonwealth Edison Co. v. Montana*[196] is instructive. In *Common-*

192. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).
193. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 710, 305 N.W.2d 614, 619 (1981), *rev'd on other grounds*, 458 U.S. 941 (1982).
194. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347 (1985).
195. *Id.* at 351.
196. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).

wealth Edison, the United States Supreme Court upheld a coal severance tax levied at as much as thirty percent of the contract sales price, despite a showing that as much as ninety percent of the coal mined in Montana was exported to other states and a Congressional finding that Montana severance tax revenues were far in excess of the direct and indirect costs to Montana that were attributable to coal production. The majority found the tax facially neutral and concluded that the level of taxation was not normally a matter for the courts. "Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests".[197] Justice White, concurring, questioned whether the Montana tax might not prove in the long-run to be an intolerable and unacceptable burden on commerce. Nevertheless, he voted with the majority, reasoning that:

> Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs, of the Montana tax, and of the trend in the energy-rich States to aggrandize their position and perhaps lessen the tax burdens on their own citizens by imposing unusually high taxes on mineral extraction. Yet, Congress is so far content to let the matter rest.[198]

The long-run effect of Montana's high severance tax should be to reduce demand for Montana coal. In that regard it is similar to a conservation measure. By analogy, one can argue that rules that define the nature of the right to withdraw water will likely face less constitutional scrutiny than rules that attempt to regulate the nature or location of use once a withdrawal has been authorized. Similarly, greater constitutional deference might be given to rules that attempt to restrict the transfer of water rights than to rules that attempt to restrict the transfer of water.[199] Thus, any attempt to prevent interstate leasing of water would likely fail to pass constitutional muster. By contrast, attempts to restrict interstate transfer of water rights might, under some circumstances, be sustained under the Commerce Clause. Finally, a ban on new withdrawals, if implemented to control the rate of resource extraction, would likely pass constitutional muster, even if the primary impact of such a rule was on prospective interstate users.

A state should be free to adopt rules that control the rate of resource extraction within a state, so long as those rules do not overtly discriminate against interstate commerce. In controlling the rate of resource extraction, a state gives up present growth in favor of future security. Such policies do not smack of the economic protectionism that is the essence of Commerce Clause scrutiny. To the extent that

197. *Id.* at 628.

198. *Id.* at 637 (White, J., concurring).

199. *See generally* Trelease, *Interstate Use of Water* - "Sporhase v. El Paso, Pike & Vermejo," 22 LAND AND WATER L. REV. 315 (1987).

the effect of a state policy is to hoard a resource that is critical to the health of the nation as a whole, Congress possesses the power to free the resource from state control. In the absence of congressional action it is unlikely that the United States Supreme Court would invalidate nondiscriminatory state conservation policies under the Commerce Clause. Once a state has made a decision to permit water use, however, any attempt to prevent the flow of water across state lines does raise the evil of economic protectionism that the Commerce Clause guards against. This does not mean, however, that the state cannot adopt rules that insure that the full costs of interstate transfers will be born by the transferor, at least to the extent that intrastate transfers are subject to the same or similar reviews.[200]

IV. INTERSTATE V. INTRASTATE USERS: CONSTITUTIONAL LIMITATIONS ON UNEQUAL TREATMENT IN THE AFTERMATH OF *SPORHASE*

A. The Commerce Clause

1. *Background*

> *Congress shall have Power . . . To regulate Commerce* with foreign Nations, and *among the several States*, and with the Indian Tribes . . . .
> U.S. CONST. art. I, § 8, cl. 3.

Prior to the Revolutionary War, each of the thirteen colonies had a formal relationship with Great Britain and a quite informal relationship with each other. A major undertaking prior to and during the Revolutionary War was to get the colonies to bind themselves together to achieve a common objective—independence from Great Britain.[201]

After independence was achieved, citizens in the thirteen states continued to offer their primary allegiance to the state in which they lived and not to the nation of which all states were a part.[202] The major political question facing the new states was the extent to which they were willing to cede some of their power to a newly created federal government. Their first try at a federalist system, under the Articles of Confederation, was a dismal failure. The federal government had too little power to operate for the common good. It lacked the

200. Virtually all states impose a "no injury" rule on water transfers. The definition of injury varies greatly, however, from state to state. As a matter of economics, the no injury rule is the vehicle for insuring that all external costs associated with water transfers are internalized into the transfer process, so that if a transfer occurs, it will be a transfer that enhances economic efficiency.

201. Recall the exhortation of Benjamin Franklin in displaying a picture of a snake cut up in 13 pieces: "We must all hang together or most assuredly we will all hang separately."

202. Hence, when Patrick Henry talked about allegiance to his "country," he was talking about the Commonwealth of Virginia, not the United States of America.

ability to speak for all the states in foreign affairs and the ability to act as arbiter in commercial disputes and competition between and among the states.

The next try at organizing a federal system resulted in the adoption of the Constitution of the United States. Under the Constitution, the federal government had broader and more far-reaching powers than were given the federal government under the Articles of Confederation. In the Constitution, the founding fathers attempted to enumerate specific powers to be exercised by the federal government while reserving all other governmental powers to the states.

The states recognized that on some matters, notably foreign affairs, they could function efficiently only by speaking with one voice. For these matters, they ceded total power to the new federal government. On other matters (domestic relations, criminal law, real property) the states saw no likely conflict between and among themselves and, therefore, no reason for a federal government to intrude. For these, the states planned and expected that they would exercise exclusive governmental power. Still other matters, governance of commercial activity chief among them, were thought to require a division of responsibility between the states and the federal government. The Commerce Clause was intended to allocate the authority to regulate and tax commercial activity between the federal government and the states.

In the first century and more of constitutional interpretation two things were true regarding the exercise of federal power under the Commerce Clause. First, the Commerce Clause was read to permit the exercise of federal power only with regard to what clearly was *commercial* activity. Within commercial activity, states could tax and regulate local activities such as farming, mining, and management of natural resources; the federal government had the power to tax and regulate activities that crossed state lines as, for example, operation of a ferry between two states.

For the founding fathers, the Commerce Clause was the constitutional authority for Congress to enact laws regulating interstate commercial activity. But from earliest times, the Commerce Clause also has been used by the Supreme Court to strike down state statutes that operate to usurp power that the Constitution reserves to the Congress.[203] This use of the Commerce Clause to limit state activity is

203. In Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), it was first argued that the grant of power to Congress under the Commerce Clause was exclusive, and therefore, impliedly excluded states from regulating in the same area. Although the Court decided the case on narrower grounds, Chief Justice Marshall replied to the argument in dictum. "There is great force in this argument, and the Court is not satisfied that it has been refuted." *Id.* at 209.

"The court must defer to a congressional finding that a regulated activity af-

known as the negative, or dormant, Commerce Clause.

2. *Criteria Triggering Federal Commerce Clause Scrutiny*

The Commerce Clause potentially limits state action only when a state acts to tax or regulate private activity that is in interstate commerce. Several points deserve to be highlighted.

First, the Commerce Clause does not limit private commercial or noncommercial activity. Consequently, a state may avoid scrutiny under the Commerce Clause to the extent it acts as a market participant in a proprietary capacity. Second, the Commerce Clause in no way limits the power of Congress to legislate in a way that discriminates against interstate commerce. Third, although the reach of the Commerce Clause was at first limited to state regulation or taxing of commercial activity in interstate commerce, today review is triggered even when a state attempts to tax or regulate noncommercial activity. Finally, the required nexus with interstate activity has been eroded almost to the point of irrelevance. A succession of Supreme Court cases has upheld Congressional power to regulate where the regulated activity merely affects or depends on interstate commerce.[204] Given modern readings of the Commerce Clause, it is difficult to imagine any activity that arguably could not satisfy the interstate nexus.

3. *Negative Commerce Clause and Congressional Authority*

Congress, not the states, has the ultimate power both to regulate commerce between and among the states and to decide what type of regulation, if any, is necessary or permissible. While states are prohibited from unduly restricting the flow of interstate commerce, the federal government is not so prohibited. It can restrict the flow of interstate commerce either directly by enacting federal regulatory legislation or indirectly by authorizing state regulatory legislation.

In the first 100 years of our federal government, Congress rarely

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fects interstate commerce, if there is any rational basis for such a finding." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975).

204. *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942)(wheat produced by a farmer for use on the farm in excess of a federal production quota affects interstate commerce because the excess production allows the farmer to sell more product, thereby affecting national prices); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)(refusal of a local motel to rent rooms to blacks affects interstate commerce because the action potentially limits the interstate travel opportunities of blacks); Katzenbach v. McClung, 379 U.S. 294 (1964)(a restaurant that refuses to seat blacks operates in interstate commerce even if none of its customers are interstate travellers because it depends upon food supplies that travel in interstate commerce).

enacted legislation regulating interstate commerce. Arguably, the absence of federal regulation might have left states free to regulate interstate commerce as they pleased. Instead, the United States Supreme Court, from the earliest decided Commerce Clause cases, read the Commerce Clause to limit state regulation of interstate commerce. The Supreme Court interprets the Commerce Clause as reserving the area of interstate commerce for the exercise of Congressional power; that area remains reserved unless and until Congress acts either to regulate or to authorize state regulation. In a sense, then, the Supreme Court acts to preserve federal power and federal legislative prerogatives not yet exercised. The reserved area protected by the negative Commerce Clause may be ceded to the states—but only by Congress.

A consequence of negative Commerce Clause theory is that the Commerce Clause really encompasses two federal powers in the same language—one an affirmative grant of power to Congress to regulate commerce and the other a restraint on the power of the states to regulate commerce. When the Supreme Court invokes the negative Commerce Clause to invalidate a state statute (such as the reciprocity provision in the Nebraska statute at issue in *Sporhase*), the Court simply says that the state statute is unconstitutional, and will continue to be unconstitutional, *unless and until* Congress authorizes states to legislate in that way. As the Court itself has described negative Commerce Clause analysis:

> It would turn dormant [negative] commerce clause analysis entirely upside down to apply it where the federal government has acted, and to apply it is such a way as to *reverse* the policy that the federal government has elected to follow. For the dormant commerce clause . . . only operates where the federal government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by states acting as independent economic actors. However, the federal government is entitled in its wisdom to act to permit the states varying degrees of regulatory authority.[205]

In acting pursuant to its Commerce Clause powers, Congress constitutionally may exercise the following prerogatives:

(1) Congress itself may enact legislation to regulate interstate commerce.

(2) Congress may prohibit state regulation of an area in interstate commerce even if the Supreme Court decides that the particular state regulation does not offend the negative Commerce Clause.

(3) Congress may permit state regulation of interstate commerce, regulation that otherwise would be prohibited by the Supreme Court of the United States as violative of the Commerce Clause. In permitting such regulation Congress may either:

(a) grant the power outright with no strings attached;

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205. Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 12 (1986).

(b) grant the power but provide guidelines for the operation of state regulation.

Normally, congressional approval will take the form of a federal authorizing statute. It also may take the form of congressional approval of a compact among several states.

B. State Regulation of Interstate Commerce: What is Permitted, What Prohibited?

1. Intentional Discrimination Against Interstate Commerce

a. Facially Discriminatory Legislation

Frequently state legislation involves intentional attempts to regulate or tax commerce in a way that insulates in-state activity from out-of-state competition. When state legislation affecting commerce discriminates on its face between local and out-of-state citizens or activity, that legislation almost automatically fails to pass Commerce Clause scrutiny by the Supreme Court. Nothing the Supreme Court recently has said suggests a retreat from this position. At best, a state bears an extraordinary burden in seeking to uphold such a regulation or tax policy against a Commerce Clause challenge.

Intentional discrimination evident on the face of a statute is demonstrated by the facts of *City of Philadelphia v. New Jersey*.[206] To conserve landfill space, arguably a natural resource, New Jersey passed a law prohibiting other states from sending their waste products to private landfills in New Jersey. This ban on import of waste was unconstitutional on its face. The prohibition on transportation could not be sustained on health and safety grounds because New Jersey did not restrict the transport of waste generated within the state. Nor was it constitutionally permissible for the state to discriminate against out-of-state users when acting to conserve a natural resource.

b. Facially Neutral Legislation

Intentional discrimination also can occur with a statute that is neutral on its face. The Supreme Court does not end its Commerce Clause scrutiny once it finds no facial discrimination. Nor does it sim-

206. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Laws that discriminate on their face are subject to "a virtually *per se* rule of invalidity." *Id.* at 624. *See also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)(statute which bans sale of milk in non-returnable plastic containers does not violate the Commerce Clause because the burden on the out-of-state plastics industry is not excessive in light of state interest of conservation). "At a minimum [facially discriminatory statutes are subject to] the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

ply accept at face value a state's assertion of nondiscriminatory local purposes to be served by a statute. Instead, the Court will evaluate whether the stated local benefit is bona fide, or merely an attempt to disguise a discriminatory economic protectionism purpose in neutral language.[207]

c. *Reciprocity Clauses*

State legislation that denies benefits to citizens of a second state unless the second state confers similar benefits on citizens of the first state is known as reciprocal legislation. Unless authorized by Congress, reciprocal legislation—I'll let citizens of your state do that here if your state lets my citizens do the same thing there—consistently has been found to violate the Commerce Clause. In effect, a reciprocity clause forces sister states to implement the policy choices of another state or suffer discrimination against their citizens. The Supreme Court routinely rejects any attempt by one state to use a reciprocity clause to force its public policy choices on another state.[208]

Sporhase[209] is a prime example of the ready ease with which the United States Supreme Court invalidates reciprocity clauses. The Nebraska groundwater export statute[210] provided that a permit would not be issued unless certain specified statutory conditions were met, and "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska." On the *Sporhase* facts, the reciprocity clause operated as an absolute ban on exports of water to Colorado because Colorado did not grant reciprocal rights to Nebraska users. The *Sporhase* reciprocity clause readily was struck down. In fact, it was the only

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207. *See* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976), involving a Mississippi statute which provided that milk produced out-of-state could be shipped into Mississippi only if the producing state participated with Mississippi in a reciprocal inspection standards agreement. According to Mississippi, the reciprocity clause was intended to guarantee safe milk for Mississippi consumers. The statute, however, permitted out-of-state milk to be shipped into Mississippi even though the production standards in the state of origin were lower than Mississippi's. The Supreme Court noted that "[t]he reciprocity clause thus disserves rather than promotes any higher Mississippi milk quality standards." *Id.* at 375-76. The Court concluded, therefore, that the real reason for the state's regulatory scheme was to protect the opportunity of Mississippi milk producers to sell in other states.

208. *E.g.*, Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976)(striking down a reciprocity clause in a milk inspection statute). If Mississippi were allowed "to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi, [the rule] would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' " *Id.* at 380 (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

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

210. NEB. REV. STAT. § 46-613.01 (1978).