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## Commerce Clause Curbs State Control of Interstate Use of Ground Water: City of El Paso v. Reynolds

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# COMMERCE CLAUSE CURBS STATE CONTROL OF INTERSTATE USE OF GROUND WATER: *CITY OF EL PASO V. REYNOLDS*

## FACTS

In *City of El Paso v. Reynolds*<sup>1</sup> the federal district court of New Mexico ruled that El Paso, Texas, had a right to use New Mexico underground water. El Paso's current water supply is insufficient for its growing population and economic growth. The City applied to the New Mexico State Engineer for underground water from the portion of the Hueco and Mesilla basins underlying New Mexico. El Paso also planned to appropriate underground water from a tract of land it owned in New Mexico for use in Texas. N.M. Const. art. XVI, §§ 2, 3 declares that unappropriated water within the state is publicly owned and subject to appropriation for beneficial use according to state law. N.M. Stat. Ann. § 72-12-19 (1978) expressly prohibited the transport of underground water from any tract in New Mexico for use in another state. Because of these constitutional and statutory restrictions the State Engineer denied El Paso's applications.

El Paso asked the federal district court to determine the constitutionality of the New Mexico prohibition on exportation of underground water (hereinafter referred to as the underground water embargo). Judge Bratton, writing for the court, held that the embargo was unconstitutional because it facially discriminated against interstate commerce by treating in-state water use differently from out-of-state use and because it was not narrowly tailored to a health purpose.

The federal district court also rejected New Mexico's argument that the federal court lacked jurisdiction over the case because interstate compacts, not the water embargo statute, governed allocation of the Rio Grande between New Mexico and Texas. The federal district court said that the compact did not deprive El Paso of standing because (1) the compact didn't apportion a specific amount of water to Texas and (2) the state could administratively require Texas to offset the underground water it used so that the proportion of surface water going to each state would not change.

Subsequent to Judge Bratton's decision that N.M. Stat. Ann. § 72-12-19 (1978) was unconstitutional, the New Mexico State Legislature repealed the statute and enacted 1983 N.M. Laws 2 which allows out-of-

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1. No. 80-730 HB, slip op (D.N.M. 1983).

state transfer of water and establishes conservational guidelines for approval of applications for in-state and out-of-state use of underground water. Consequently, New Mexico asked the Tenth Circuit Court of Appeals to vacate the judgment below and to remand the case with instructions to dismiss it as moot because there is no case or controversy since the new state legislation resolves El Paso's original cause of action. Independently, El Paso asked the federal district court to modify its final judgment and to enjoin the defendant from enforcing the new law relative to out-of-state transfer of water because the act is economic protectionism. Economic protectionism results when one state protects its own economy and burdens interstate commerce. El Paso asserts that New Mexico will only consider New Mexico's welfare and the state's water needs when reviewing applications under the new law.<sup>2</sup> Judge Bratton plans to wait for the 10th Circuit Court's decision on New Mexico's motion before acting on El Paso's.

## BACKGROUND

### *Water as an Article of Commerce*

When the federal district court first heard testimony on the *El Paso* case, it was unclear whether state water regulations were subject to commerce clause analysis because of *Hudson Water Co. v. McArthur*.<sup>3</sup> In *Hudson Water Co.* the Supreme Court had held that New Jersey's water embargo statute was constitutional because the state had quasi-sovereign authority over water and the state represented the omnipresent public interest of maintaining the waters undiminished. State ownership exempted the state's water embargo statute from commerce clause scrutiny because water could not be put into commerce as privately owned items could. As authority for dismissing the commerce clause attack on the state's water embargo statute, the Court cited *Geer v. Connecticut*.<sup>4</sup> In that case the Court had concluded that state regulation of wild animals was not a burden on interstate commerce because the state owned wild animals and had a duty to protect them for its citizens. The Supreme Court did not address water as an article of commerce again in a context comparable to New Mexico law until *Sporhase v. Nebraska*.<sup>5</sup>

*Sporhase*, which was decided in the interim between the court's hearing testimony and deciding *El Paso*, rejected the *Hudson Water Co.* analysis

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2. Plaintiff's Reply Brief of May 9, 1983, at 14, *City of El Paso v. New Mexico*, No. 80-730 HB (D.N.M. 1983).

3. 209 U.S. 349 (1908).

4. 161 U.S. 519 (1896).

5. \_\_\_ U.S. \_\_\_, 102 S.Ct. 3456 (1982). *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd mem.*, 385 U.S. 35 (1966), which held that water was subject to commerce clause scrutiny, differed because it dealt with Texas water law, which permits private ownership.

and held that water was an article of commerce. *Sporhase* addressed the constitutionality of Nebraska's statutory restrictions on withdrawal of underground water from the state for out-of-state use. Nebraska argued that water was not subject to commerce clause analysis as other resources were; water was distinguishable from other natural resources because water is publicly owned and the surface water user had a lesser ownership interest than the captor of wild game or natural gas. However, the Court found that public ownership was a legal fiction.<sup>6</sup> They relied on *Hughes v. Oklahoma*<sup>7</sup> where the Court said that the public ownership theory was "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."<sup>8</sup>

The Supreme Court also rejected Nebraska's argument that water was exempt from commerce clause scrutiny because it was essential for survival. The state argued that the necessity of water for survival distinguished it from other natural resources and made water management a vital local interest in arid Western states. The Court said the interstate dimension of water overshadowed the state's special interest in management of water for survival. As evidence of the interstate dimension the Court cited the multistate character of the Ogallala aquifer (the source of the water sought in Nebraska) and the use of 80 percent of the country's water for agricultural purposes: They noted that agriculture is the archetypical example of commerce among the states.<sup>9</sup> The Court concluded that exempting water from commerce "goes too far" because this would preclude commerce clause analysis of state water regulation and also federal regulation of groundwater, if Congress deemed this necessary.<sup>10</sup>

### Commerce Clause Analysis

Because water is an article in commerce, the court's focus in reviewing state water regulations is not what is regulated, but how it is regulated. The Supreme Court set the standard for reviewing state regulation of interstate commerce in *Pike v. Bruce Church*.<sup>11</sup> *Pike* set out a four-part test:

1. Is the regulation "evenhanded?" Does it treat in and out of state commerce the same?<sup>12</sup>

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6. 102 S.Ct. at 3461.

7. 441 U.S. 322 (1979).

8. 102 S.Ct. at 3461 (quoting 441 U.S. at 334).

9. *Id.* at 3462-3463.

10. *Id.* at 3463.

11. 397 U.S. 137 (1970).

12. Browde & DuMars, *State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier*, 60 OR. L. REV. 7, 22 (1981).

2. Does the regulation protect a legitimate local interest? Public health is the most legitimate interest; economic well-being, the least.<sup>13</sup>
3. What is the balance between the local interest and the burden on commerce? This test is the traditional commerce clause balancing test intended to preserve the national interest in the free flow of commerce.<sup>14</sup>
4. Is there a less burdensome way to carry out a legitimate local interest? Is there an alternative that would have less impact on interstate commerce?<sup>15</sup>

However, when a state statute discriminates against out-of-state interests on its face, the Court does not follow the complete *Pike* test. Rather, the Court applies the standards outlined in *Hughes v. Oklahoma*.<sup>16</sup> The statute will be unconstitutional unless it is justified in terms of local benefits and the unavailability of nondiscriminatory alternatives.<sup>17</sup> *Hughes* concerned an Oklahoma statute prohibiting export of natural minnows from the state. Natural minnows grow wild in the waters of the State. Because the statute discriminated on its face against those who took minnows out of state, the Court subjected the act to the strictest scrutiny.<sup>18</sup> The Court reasoned that although conserving minnows may be a legitimate local purpose, the statute was not the least discriminatory alternative because it forced those who took minnows out-of-state to bear the full costs of conservation and imposed no conservation requirements on persons transporting natural minnows inside the state. Thus, for state embargoes on imports or exports, no *Pike* balancing test of local and national interests is required.

The *Pike* balancing test and *Hughes* test of discriminatory regulation further the policy objective of preserving our economic union. If states considered themselves separable economic units, then the consequences of retaliatory economic protection could cripple our economy: Michigan might control auto exports; New York, milk; and Ohio, rubber tires.<sup>19</sup> These tests assure economic union and further the principle that no state use its police power to suppress competition.<sup>20</sup> Different treatment of intrastate and interstate commerce is unacceptable because it leads to economic Balkanization and creates trade barriers between states.

The Court used the *Pike* and *Hughes* tests in *Sporhase*<sup>21</sup> to determine whether the Nebraska statute governing interstate use of water was con-

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13. *Id.* at 24.

14. *Id.* at 26-27.

15. *Id.* at 28-29.

16. 441 U.S. 322.

17. *Id.* at 336.

18. *Id.* at 337.

19. *Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949).

20. *Id.* at 537.

21. 102 S.Ct. 3456.

stitutional. The statute required that the withdrawal of groundwater be (1) reasonable, (2) not contrary to conservation, (3) not detrimental to the public welfare, and (4) the user state must have a water reciprocity agreement with Nebraska.<sup>22</sup> Under the *Pike* test, the Court found the first three conditions reasonable because: (1) they were evenhanded since in-state and out-of-state users had to conserve; (2) they served the legitimate purpose of water conservation in an area of "critical" water shortage, and (3) they did not impermissibly burden interstate commerce.<sup>23</sup>

The Court applied the *Hughes* tests to the reciprocity requirement because it was an explicit barrier to commerce. The requirement did not pass the initial hurdle of demonstrating a close fit between the requirement and its asserted local purpose.<sup>24</sup> The Court said that only in a demonstrably arid state might there be a close means-end relationship between a total ban on the exportation of water and a conservation purpose. The Court held that the reciprocity requirement was unconstitutional because it was facially discriminatory.

#### ANALYSIS

*Sporhase* resolved many of the issues raised in *El Paso*. The Court decided *Sporhase* between the federal district court's first hearing and its final decision on *El Paso*. The district court felt compelled to follow *Sporhase*. The cases are similar because (1) both Nebraska and New Mexico have adopted a public ownership, prior appropriation water doctrine; and (2) Nebraska's reciprocity requirement in effect embargoed water unless there was an agreement with a state. The cases differ, however, in that (1) New Mexico had a groundwater embargo, not a reciprocity requirement, and (2) New Mexico might be a "demonstrably arid state" for which the Court said a total ban on exportation might be appropriate.

As the Court did in *Sporhase*, the court in *El Paso* applied the *Hughes* test (that the regulation must be narrowly tailored to a legitimate local purpose) to New Mexico's facially discriminatory water embargo. Citing *Sporhase*, the court in *El Paso* distinguished the legitimate local purpose of health and safety regulation from economic protectionism. Narrowly interpreting *Sporhase*, the court defined public health needs as survival needs and said that only survival needs are a legitimate local purpose that justifies discriminatory regulation.<sup>25</sup> The court suggested that an imminent water shortage jeopardizing public health would be a survival need, and that otherwise, water is an economic resource. They classified water for municipalities, industry, irrigated agriculture, energy produc-

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

23. 102 S.Ct. at 3464-3465.

24. *Id.* at 3465.

25. No. 80-730 HB, slip op. at 28.

tion, fish and wildlife, and recreation as public welfare needs, not as survival needs.<sup>26</sup>

The court's narrow definition of legitimate local purpose as survival needs creates a double standard for in- and out-of-state water users. To the court, New Mexico's future needs for water for economic productivity are irrelevant. But El Paso's municipal and industrial needs must be satisfied because this is ". . . the most economically productive use of this excess water."<sup>27</sup> The New Mexico State Engineer predicted that by 2020 New Mexico would have a shortage of 626,000 acre-feet of water for industry, municipalities and other public welfare needs.<sup>28</sup> The court found the State Engineer's prediction insufficient evidence of a legitimate local purpose. But the court agreed to El Paso's right to use New Mexico water now for the same purposes as New Mexico proposed using it in the future simply because this would promote current economic prosperity and apply the constitutional principle that "the peoples of the several states . . . sink or swim together."<sup>29</sup> The court approved El Paso's right to New Mexico water without reviewing El Paso's water need projections.

In addition to finding that the water embargo did not serve a legitimate public purpose, the court also decided the embargo was not narrowly tailored to the state's conservation/preservation rationale. The court found that the New Mexico statute did not ensure an adequate water supply in event of shortage because it didn't require conservation in-state.<sup>30</sup> Also, the court said the state did not show the economic feasibility of transporting the water which El Paso wanted to parts of New Mexico that might be experiencing shortages.<sup>31</sup> Interpreting *Sporhase*, the court found that a demonstrably arid state would have to face an imminent water shortage and enact conservation provisions for any water embargo to be constitutional.<sup>32</sup>

In effect, *Sporhase* and *El Paso* change the allocation of sovereign power between federal and state governments. Because of these cases, states may no longer exercise authority over resources which are considered essential to the survival of their citizens. Before *Sporhase*, federal regulation of water was limited to federally approved interstate water compacts and equitable apportionment and did not extend to a state's allocation of water.<sup>33</sup> In *Sporhase* the Court required that water statutes meet commerce clause tests and not burden interstate commerce. Only

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26. *Id.* at 30.

27. *Id.* at 34.

28. *Id.* at 30.

29. *Id.* at 31 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

30. *Id.* at 33.

31. *Id.* at 35.

32. *Id.*

33. 102 S.Ct. at 3464.

when the state showed the federal court that its regulation of in-state and out-of-state users was equivalently conservational would the Court uphold state regulation.

*El Paso* suggests a new area of intergovernmental relations when the Court says, "Interstate usage of water can be restricted and controlled to the same extent as intrastate usage."<sup>34</sup> The state has the power to define beneficial use and to control water allocations within its boundaries. The *El Paso* opinion assumes extraterritorial authority to do this as well. Such extraterritorial authority conflicts with the traditional limitation on state sovereignty: that states only control natural resources within their borders.

### *Developments*

In *El Paso* the court countered New Mexico's argument that it was creating a double standard giving New Mexico only sufficient water for its survival needs while allowing El Paso to blossom<sup>35</sup> by saying that New Mexico still could undertake reasonable water planning. The court suggested the mechanism of establishing the same restrictions and controls on interstate and intrastate water usage. The New Mexico State Legislature has taken this approach. The Legislature repealed the embargo and enacted 1983 N.M. Laws 2 which allows transfer of water out-of-state. The Law requires that use of underground water in-state and out-of-state (1) not impair existing water rights, (2) not be contrary to water conservation in-state, nor (3) be detrimental to New Mexicans' public welfare.

The newly enacted New Mexico statute is similar to the Nebraska statute governing out-of-state water transfers which the Court upheld in *Sporhase*. New Mexico's statute differs from Nebraska's in (1) establishing as criteria the conservation of water within New Mexico and the public welfare of the citizens of New Mexico instead of the general public welfare as Nebraska did, and (2) exempting in-state use of underground water from undesignated basins from the permit process. El Paso finds these provisions facially discriminatory.<sup>36</sup> New Mexico says they are consistent with territorial limits on state sovereignty and the courts should allow the state to implement them before judging.<sup>37</sup>

*Sporhase* suggests that a key to the constitutionality of New Mexico's new statute is regulation of in-state water users so that in-state as well as out-of-state water conservation is promoted. The Court found that Nebraska was not discriminating against out-of-state users because its departmental regulations imposed limitations on in-state users comparable

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34. No. 80-730 HB at 31.

35. *Id.* at 30, 31.

36. Plaintiff's Memorandum of May 9, 1983, *City of El Paso v. New Mexico*, No. 80-730 HB (D.N.M. 1983).

37. Defendants' Response to Plaintiff's Memorandum of May 9, 1983.



to those on out-of-state users. Satisfying the *Pike* test prong of even-handedness (comparable treatment of in- and out-of-state users) weighed heavily in the Court's finding Nebraska's statute constitutional.

#### CONCLUSION

Since the court held in *Sporhase* that water was an article of commerce and subject to commerce clause analysis, the federal district court felt compelled to find New Mexico's underground water embargo unconstitutional. The underground water embargo is facially discriminatory against out-of-state users. The embargo is unconstitutional because New Mexico failed to show that it was narrowly tailored to a public health purpose. The court's decision erodes New Mexico's control over its water resources, but does not preclude the state's shaping its economic future through rational planning. Since the federal district court decision, New Mexico has acted to regain control through legislation that allows export of groundwater and establishes conservation guidelines for approval of in-state and out-of-state use of underground water.

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