



Summer 1981

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Recommended Citation

Catherine B. Stetson, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause - or Will New Mexico's Embargo Law Hold Water*, 21 Nat. Resources J. 617 (1981).

Available at: <https://digitalrepository.unm.edu/nrj/vol21/iss3/13>

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COMMENTS

DO STATE WATER ANTI-EXPORTATION STATUTES VIOLATE THE COMMERCE CLAUSE? or WILL NEW MEXICO'S EMBARGO LAW HOLD WATER?

INTRODUCTION

In September 1980, the city of El Paso, Texas, filed suit in federal court against New Mexico State Engineer Steve Reynolds, seeking a declaration that a New Mexico statute which prohibits exportation of groundwater is unconstitutional. As grounds for its complaint, El Paso stated that the embargo law imposes an undue burden on interstate commerce, denies Texas citizens the privileges and immunities of New Mexico citizens, and deprives El Paso of equal protection of the laws.¹

The issue is of more than regional interest, as at least 14 states and the District of Columbia have statutes directly prohibiting or regulating the export of state water;² other statutes indirectly regulate such export by narrow definitions of beneficial use³ or by legislation designed to protect the needs of the area in which the water originates.⁴ Additionally, increased demands for water, and conflicting water law principles of neighboring states, lend an element of tension to the confrontation. *El Paso v. Reynolds* may well be the first stage in the clarification of an issue which has been obscured by the presence of contradictory case law over the years and, further, may be a landmark decision in the field of natural resources law as water supplies continue to dwindle, demands continue to increase, and states become even more concerned with protecting their citizens and conserving their local resources.

HISTORY OF ANTI-EXPORTATION STATUTES

The commerce clause of the U.S. Constitution provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."⁵

1. *City of El Paso v. Reynolds*, Civ. No. 730 M (D.N.M., filed Sept. 5, 1980).

2. White, *Reasonable State Regulation of the Interstate Transfer of Percolating Water*, 2 NAT. RESOURCES LAW. 383, 385 n.11 (1969).

3. See, e.g., MONT. CODE ANN. § 85-2-104 (1979): "[A] use of water for slurry to export coal from Montana is not a beneficial use."

4. White, *supra* note 2, at 385.

5. U.S. CONST. art. I, § 8, cl. 3.

Because the federal government has thus pre-empted the field of interstate commerce, state legislation or activity which interferes with or burdens the flow of interstate commerce is forbidden.⁶

State embargos have, over the years, been challenged as undue burdens on the free flow of interstate commerce. In 1896, the United States Supreme Court, in *Geer v. Connecticut*, held that a Connecticut non-exportation statute was a valid exercise of state power and did not violate the commerce clause.⁷ The statute in question prohibited the transport of game birds killed in Connecticut to points beyond.⁸ The Court discussed ancient laws, which acknowledged that a person's right to possess wild animals was an ownership qualified by governmental authority. Such authority is to be exercised for the benefit of the society as a whole, and the state, in this sense, is a trustee for its citizens.⁹ The Court concluded that a state's attempt to keep its property within its jurisdiction is not a burden on interstate commerce.¹⁰ Because the state has a duty to preserve a valuable food supply for its citizens, the Court held the law effecting such a result to be constitutional, even if "in doing so commerce might be remotely affected."¹¹

Geer remained good law for more than 80 years and served as foundation for *Hudson County Water Co. v. McCarter*,¹² which in turn is the chief support for anti-exportation proponents in modern times. In *Hudson*, Justice Oliver Wendell Holmes held constitutional a New Jersey statute prohibiting the transportation of New Jersey river water out of state; specifically, the state embargo did not impair contracts, deny privileges or immunities, offend due process notions, or interfere with interstate commerce. Referring to *Geer* and a state's right to exercise its police power, Holmes said:

... few 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.¹³

Holmes gave short shrift to the commerce clause argument, stating

6. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949).

7. *Geer v. Connecticut*, 161 U.S. 519 (1896).

8. CONN. GEN. STAT. § 2546 (1888).

9. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

10. *Id.* at 530.

11. *Id.* at 535.

12. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

13. *Id.* at 356.

that “[a] man cannot acquire a right to property by his desire to use it in interstate commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end.”¹⁴

Because a person’s right in wild animals and water was conditioned on a state’s ability and duty to protect such resources for all citizens, a state embargo to that end was considered legitimate. A few years later, *Hudson* was distinguished in *Oklahoma v. Kansas Natural Gas Co.*,¹⁵ largely on the basis of the difference in treatment of water and gas.¹⁶ In *Oklahoma*, the Court held that natural gas and oil, when reduced to possession by the owner of the land, are subjects of interstate commerce, despite statutory assertions of the state’s right and intent to conserve its resources. Private property interests in the gas and oil were at issue here, as opposed to state fiduciary interests in water, protected by *Geer*.

The two cases coexisted for many years, and state embargos on exportation of water withstood constitutional challenges until 1966. That year the Oklahoma city of Altus sued in federal court for a declaratory judgment that a Texas statute prohibiting removal of water from private Texas wells was unconstitutional. The district court in *Altus v. Carr*¹⁷ held that such a statute did in fact violate the commerce clause because it placed an unreasonable burden on interstate commerce. The Supreme Court of the United States affirmed per curiam, without overruling *Hudson*, and without indicating grounds for affirmance.

Because of the coexistence of seemingly disparate federal and state court opinions on anti-exportation statutes and state powers, and because the distinct nature of individual resources often leads to differing results, an analysis of the rationale behind the precedent governing non-exportation statutes is necessary to anticipate and evaluate the upcoming results in *El Paso v. Reynolds* and other embargo cases.

ANALYSIS OF ANTI-EXPORTATION STATUTES

The conflict between *Hudson County Water Co. v. McCarter* and *Altus v. Carr* derives primarily from differences in conceptualization of property rights, state powers, and public policy. Problems in reconciling the two cases are enormous, and many have attempted to analyze their relative weights from both procedural and substantive

14. *Id.* at 357.

15. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

16. *Id.* at 258-60. “And surely we need not pause to point out the difference between such a river, flowing upon the surface of the earth, and such a substance as gas, seeping invisible through sands beneath the surface.” *Id.* at 260.

17. *Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff’d mem.*, 385 U.S. 35 (1966).

points of view.¹⁸ Though many commentators feel that *Altus* left *Hudson* with very little bite and suggest that all anti-exportation statutes are invalid,¹⁹ the conclusion is not unanimous.²⁰

The problem with *Altus* is that the Supreme Court did not write or publish an opinion, leaving us with merely a per curiam order affirming a district court opinion. This is especially disconcerting because the district court relied heavily upon two natural gas cases,²¹ both of which were accompanied by dissents and both of which involved out-of-state reliance upon a continued gas supply.²² Thus the precedent, incorporated by reference, was based on different issues as well as assumptions as to the legal and physical similarities between natural gas and water.

Hudson, too, has its weaknesses, as it relies heavily upon *Geer*; *Geer* has recently been expressly overruled in *Hughes v. Oklahoma*, which rejected the state-ownership-of-wild-animals theory.²³ Also, though the district court and Supreme Court both considered *Hudson* before deciding *Altus*, both chose to base their final decision on the more recent and contradictory gas law cases. And yet, it seems unlikely that the Supreme Court would abandon an aged precedent to adopt, without any explanation, an entirely new concept of state power.²⁴ It is very difficult to evaluate an opinion which not only lacks explanation but also fails to indicate an awareness of the magnitude of the issue.²⁵

18. As recently as 1979, a federal district court cited *Geer* for the proposition that a state has authority to regulate its fish and game, in the absence of federal pre-emption. *United States v. Michigan*, 471 F. Supp. 192, 266 (W.D. Mich. 1979). But in April of 1979, the Supreme Court overruled *Geer*, holding that a state statute which forbade exportation of natural minnows taken within the state was unconstitutional. *Hughes v. Oklahoma*, 441 U.S. 332 (1979).

A subsequent eighth circuit decision held that a state's refusal to sell cement to out-of-state customers during a cement shortage did not violate the commerce clause. *Reeves, Inc. v. Kelley*, 603 F.2d 736 (8th Cir. 1979), *cert. granted*, 444 U.S. 1031 (1980). Also pending for review is a Pennsylvania Supreme Court decision holding that a state can legitimately pass regulations controlling water pollution. *National Wood Preservers v. Pennsylvania, Pa.*, 414 A.2d 37, *appeal dismissed*, 101 S.Ct. 47 (1980). The latter case is interesting in that it cites *Hudson* as support for its holding. Dictum in the case states that police power is necessary and, even if harsh, cannot be limited as long as it is not arbitrary but is reasonable. *Id.* at 43.

19. White, *supra* note 2, at 389 nn.46-49.

20. See, e.g., Corker, *Can a State Embargo the Export of Water by Transbasin Diversion?*, 12 IDAHO L. REV. 135 (1976); White, *supra* note 2; Comment, *It's Our Water!—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER L. REV. 119.

21. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

22. Corker, *supra* note 20, at 147 n.46.

23. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See also note 18, *supra*.

24. Comment, *supra* note 20, at 135.

25. White, *supra* note 2, at 389 n.50.

The Court's affirmance in *Altus* does not necessarily imply an acceptance of the commerce clause argument, merely an acquiescence in the result. Possibly the affirmance is narrowly limited to a specific fact situation in which there is out-of-state reliance on a continued supply, absolute ownership theories of water law, and a failure to show conservation purposes inherent in the offending statute.²⁶ Attempts to determine the current law on the subject by analyzing what the Court did not say, and the fact that it did not say it, are minimally useful second-guessing of the Supreme Court. Substantive analysis of the two conflicting opinions is only slightly more useful.

While *Hudson* implies that water is not an article of commerce until it begins to move in interstate traffic,²⁷ *Altus* clearly considers water to be an article of commerce.²⁸ Apart from *Altus* itself, there is no precedent for treating water as an article of commerce;²⁹ the Supreme Court has indicated in the past its tendency to treat water as a unique commodity, unlike gas or other natural resources.³⁰ This is important because other natural resources have been held to be articles of commerce,³¹ especially once they have been transformed into a condition suitable for transporting; statutes that interfere with interstate transport of these articles are unconstitutionally burdensome.³²

Despite the apparent conflicts in the holdings of *Altus* and *Hudson*, both remain good law. Several tests and analyses have developed recently in an attempt to reconcile the conflict. Because many states have anti-exportation statutes and may want to prevent certain resources from leaving the state, awareness of the arguments on each side is important for them.

THE HUGHES TEST

In 1979, the Supreme Court in *Hughes v. Oklahoma* overruled *Geer*, the Connecticut game bird case, and adopted a general test for determining whether state law burdens interstate commerce.³³

[W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in

26. See 255 F. Supp. at 839-40.

27. 209 U.S. at 357-58.

28. 255 F. Supp. at 840.

29. Comment, *supra* note 20, at 128.

30. See *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). See also Comment, *supra* note 20, at 134-35.

31. Comment, *supra* note 20, at 129 nn. 60 & 61.

32. *Id.* at 129-30.

33. 441 U.S. 322 (1979).

practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.³⁴

The Court noted that the initial burden is upon the party claiming discrimination, but once discrimination against commerce is shown, the burden is upon the state to justify the statute in terms of local benefit and lack of nondiscriminatory alternatives.³⁵ Further, the Court is not constrained by the characterization given to the law by the legislature, but instead "will determine for itself the practical impact of the law."³⁶

Thus, though state interest in conservation and protection of its resources was viewed as a legitimate local purpose, the Court said that a state may not use the fiction of state ownership, as it did in *Geer*, to place the burden on non-residents when there are equally suitable conservation alternatives.³⁷

In *Hughes*, the statute under review was an Oklahoma law which forbade the transport of natural minnows to points outside of Oklahoma. Because such an embargo was one of the more discriminatory alternatives available to Oklahoma, and because the Court, in overruling *Geer*, decided that wild animals can become articles of commerce, the state statute was held to violate the commerce clause. The Chief Justice joined Justice Rehnquist in a dissent that recognized Oklahoma's interest in conservation³⁸ and noted in passing that, given the primacy of local interest, he would require the challenger of state conservation laws to establish a much greater burden on interstate commerce than was shown in the case at bar.³⁹

Analyzing the strength of any anti-exportation legislation in terms of the *Hughes* test can be done only after gaining a familiarity with the arguments surrounding the commerce clause, state powers, and property rights. Because of the tension between the state and federal sovereigns, caused by the desire of each to regulate and control for the benefit of its own citizens, future litigation in this area will involve close judicial scrutiny of the purposes and effects of embargo statutes.

34. *Id.* at 336.

35. *Id.*, citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

36. *Id.* at 336.

37. *Id.* at 337.

38. *Id.* at 346 (dissent).

39. *Id.* at 343 n.7.

STATE POWERS

Though clearly the states have exercised regulatory control over the natural resources within their boundaries, it is unclear where the source of such power lies. States generally claim three sovereign powers: (1) the police or regulatory power necessary to protect public health and safety; (2) compact powers enabling states to enter into mutual agreements concerning resources which take precedence over previously vested private rights; and (3) the right of *parens patriae* which obligates the state to represent its citizens and their common interests.⁴⁰ These sovereign powers include all powers not specifically reserved to the federal government or the people by the federal and state constitutions.⁴¹ The specific reservations of power serve as limitations on state control.

The commerce clause limitation is one such reservation, though it is flexible: courts tend to balance the national interest in facilitating interstate commerce against the local interest in conservation and regulation.⁴² Only where the burden on interstate commerce is direct and substantial, and the local interest slight, will the national interest prevail.⁴³

National policy as well may limit sovereign powers, but even policy restrictions against discrimination are flexible, and deference to state sovereignty tends to support any reasonable classification set forth in the statute.⁴⁴ This allows for disparities in treatment if those discriminated against are a source of evil which the statute seeks to regulate⁴⁵ and if such discrimination is adequately justified.⁴⁶

Whether or not there are discriminatory elements to state statutes prohibiting export of water, public policy arguments support such an exercise of state power. When water is retained for use within the state, the state derives an economic benefit through increased production and property value; further, income and state revenues are increased. These benefits are an integral part of the concept of "beneficial use" which is at the heart of water law in prior appropriation states such as New Mexico.⁴⁷ Following this reasoning, it is proposed

40. *Parens patriae*, the parent of the country, is the doctrine which recognizes the duty of the state to protect its citizens. See Martz, Grazis, *Interstate Transfer of Water and Water Rights—The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33, 50 (1977).

41. *Id.* at 51.

42. *Id.* at 54-55.

43. *Id.*

44. *Id.*

45. Comment, *supra* note 20, at 130.

46. *Id.*

47. *Id.* at 126.

that "[t]here is no justifiable reason which should require that sister state to sacrifice its future growth for the immediate growth of the requesting state."⁴⁸ The opposing argument is, of course, that which insists "our economic unit is the Nation"⁴⁹ and rejects economic protectionism.

Still, because of the unique nature of water, as recognized in water compacts and judicial decisions,⁵⁰ states have been allowed, generally, to regulate the use and taking of waters within their boundaries. Extension of this policy arguably may include the enforcement of non-exportation statutes which have at their source the recognition "that water is the one building block which is essential to the economic growth of any state, municipality, industry or agricultural endeavor."⁵¹ Such a theory presumes that the states must be allowed to determine how best to regulate the waters within their own boundaries, free from federal interference. Apart from the jurisdictional conflict as to whose laws regulate and preempt, many other water law issues affect an analysis of non-exportation statutes. Such issues as the legal limitations on removal of water from appurtenant lands or basins of origin, burdens of showing lack of injury to other water users, and prohibitions against enlarging uses⁵² are settled by state law and are inextricably intertwined with policy considerations underlying embargo laws.

Public policy arguments in favor of state regulation of water are especially persuasive in states which claim their waters for the beneficial use of their citizens.⁵³ In states where water rights may be individual property rights, the state has a more difficult time justifying its desire to regulate commerce in water; but in a state which "owns" its water for public use, and merely permits individual citizens the right to use the water according to strict statutory guidelines, there is a strong argument in favor of allowing the state to exercise its control over the water. This distinction in proprietary concepts of water law is important and is the consideration upon which the final results of the non-exportation issue may pivot.

PROPERTY RIGHTS

Property rights vary significantly from state to state and are determined by several major doctrines.⁵⁴ The effect of the doctrines upon

48. *Id.* at 121.

49. *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949).

50. Comment, *supra* note 20, at 127.

51. *Id.*

52. *Martz, supra* note 40, at 35 n.6.

53. Comment, *supra* note 20, at 127-28.

54. *See White, supra* note 2, at 386-87.

non-exportation statutes is crucial. For example, in Texas, ground-water rights are governed by the absolute privilege doctrine which allows an individual to capture, own, possess, and dispose of his water as he sees fit.⁵⁵ Thus, the *Altus* decision that water is an article of commerce was premised upon a recognition of Texas common law allowing for the extraction and sale of percolating waters.

On the other hand, New Jersey, a riparian state, had its non-exportation statute upheld; the Court in *Hudson* assumed that water may not be diverted from a stream for more than a reasonable distance.⁵⁶ As a result, water could not be considered an article of commerce.

Although at least five property doctrines may affect water law in any given state, 17 western states follow the prior appropriation doctrine; not coincidentally, such states frequently have arid climates and scarce water supplies. They are the very states that one would expect to enact embargo legislation to protect their undependable resource. For this reason, further discussion of non-exportation laws will concentrate on the effect of such laws in prior appropriation states.

Although the water codes of prior appropriation states vary, common elements to each are: (1) the waters are declared to be public, state-owned property; appropriators gain only the right to *use* the waters, (2) underground waters are available for appropriation to beneficial use, and (3) permits are required in order to appropriate groundwater.⁵⁷

In many cases, the dedication of waters to public use or the claim of such waters as property of the state is found in the state constitution.⁵⁸ Such constitutions also limit the use of water to beneficial uses. Though certain of the constitutions limit the use to the citizens of the state,⁵⁹ none specifically prohibit the export of water to a neighboring state.

Under prior appropriation doctrines, the water user does not own the water itself, merely the usufructary right.⁶⁰ In permit states, such as New Mexico, such a use is limited by the permit and by procedures which are legislated and must be obeyed prior to the perfection of the water right.⁶¹ As the true owner, then, the state can be said to have the right to regulate its water use, within reason.⁶² Furthermore,

55. *Id.* at 387-88.

56. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 354 (1908). *See also* Martz, *supra* note 40, at 43.

57. White, *supra* note 2, at 402.

58. Martz, *supra* note 40, at 37, 47.

59. *Id.* at 38.

60. White, *supra* note 2, at 402.

61. *Id.* at 403; Comment, *supra* note 20, at 124.

62. White, *supra* note 2, at 405; Comment, *supra* note 20, at 123.

because the waters have been reserved to the benefit of the state's citizens, the state has an obligation to ensure public welfare and to preserve valuable state resources.⁶³ Thus it would appear to be a legitimate exercise of state power to disallow exportation of water resources which can be more beneficially and advantageously used within the state.

The problem with this argument is that "the particular property theory which a state has adopted with respect to its water should not make any significant difference in determining whether or not a statute unreasonably burdens or interferes with interstate commerce."⁶⁴ After all, the state ownership theory is really nothing more than a legal fiction intended to support state regulatory powers, and interstate commerce is not something which should be allowed or restrained on the basis of an individual state's conceptualization of its powers.⁶⁵

On the other hand, the states' differing theories and laws governing property and water rights have been developed over the years to meet very real and individualized circumstances. A state's interest in maintaining its workable systems is a genuine and legitimate interest to be balanced against federal commerce concerns. Although at first glance it may appear that other states are penalized by their choice of property theory, in fact the choices were all in response to state needs and resources; the states that do not have the strong need to declare state ownership of water cannot, of course, claim that their state interest in preventing interstate commerce in private property is legitimate.

COMMERCE CLAUSE

The need to resolve such conflicts by a certain amount of balancing has arisen as a response to the commerce clause which protects interstate commerce from state interference. The purpose of the clause is to prevent national commerce from being burdened by hostile or parochial state laws.⁶⁶ Even if the federal government had not preempted the field, states may not intrude into areas in which uniform regulation is desirable.⁶⁷

The Supreme Court has consistently held that non-exportation statutes are hostile laws which interfere with interstate commerce,⁶⁸

63. Comment, *supra* note 20, at 124-25.

64. *Id.* at 141.

65. *Id.*

66. Martz, *supra* note 40, at 60 n.76.

67. White, *supra* note 2, at 385 n.13; Comment, *supra* note 20, at 131.

68. Martz, *supra* note 40, at 60.

but there is to date no precedent for extending the commerce clause to water rights.⁶⁹ If an activity is a local concern, if the item is not an article of commerce, and if the activity regulated does not bear a close and substantial relationship to interstate commerce, it is unlikely that there is a violation of the commerce clause.⁷⁰

Non-discriminatory local regulation, if based on a valid local concern, will generally be upheld.⁷¹ Thus, while state legislation concerning water rights may ultimately affect interstate commerce, it may be outside the scope of the commerce clause.⁷²

For example, both Congress and the Constitution recognize the sovereignty of the state in local regulation for the protection of natural resources. Where states are subject to interstate water compacts, the Congress has recognized the rights of the states to regulate and control those waters within their jurisdictions. The Supreme Court has also recognized the rights of the states to regulate their water resources. In short, there may be said to exist a right of the state to prohibit the exportation of those waters found wholly within its boundaries—a right which the federal government should recognize as a legitimate regulation of a matter of local concern.⁷³

Even though such a statute may affect interstate commerce, it is arguably a valid exercise of state police power if the local benefit to be gained outweighs the minor inconvenience to interstate commerce.⁷⁴ Even if the burden is heavy, it is not so unreasonable as to be impermissible, in light of water's unique status.⁷⁵

Some non-exportation statutes prohibit any exportation of water.⁷⁶ Others allow it if the recipient state has legislated reciprocal rights.⁷⁷ Statutes requiring such reciprocal rights are probably not antithetic to national policies governing commerce⁷⁸ when a state can exhibit local interest and Congress has not pre-empted the field.⁷⁹

On the other hand, statutes which absolutely forbid exportation—and statutes which require special legislative approval prior to exportation⁸⁰—are more likely to burden interstate commerce and thus be

69. *Id.* at 61.

70. *Id.* at 61-62; Comment, *supra* note 20, at 131-32. *See also* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), *citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

71. Martz, *supra* note 40, at 61-62.

72. *Id.*

73. Comment, *supra* note 20, at 125.

74. *Id.* at 126, 142.

75. *Id.* at 143.

76. Martz, *supra* note 40, at 62 n.87.

77. *Id.* at 63 n.88.

78. Comment, *supra* note 20, at 142.

79. *Id.* at 142-43.

80. *Id.* at 142-45.

invalidated. Clearly, the stated conservation purposes of such statutes may be accomplished by alternative, less discriminatory means.⁸¹ The probability is that:

if a court is permitted to strike a balance, as it is, between federal interests in interstate commerce and local interests in water conservation, development and use, the character of the local interest is such as to justify some or all of the forms of regulation described without considering them to be discriminatory interferences with interstate commerce.⁸²

Another approach to the commerce clause issue is to ask if the statutory purpose seeks to regulate an activity which bears a "close and substantial relation" to interstate commerce. If so, the statute infringes upon the federal power to regulate, even if the activity were a local concern and the statute purported to conserve a state's natural resources for its citizens; the statute bears a relation to commerce by halting it at the state line.⁸³ If, for example, the statute does not prevent exportation under certain circumstances or by specified means, the statute is less likely to have a direct and substantial effect on interstate commerce.⁸⁴

CONCLUSION

Although at first the *Altus* opinion implies that state non-exportation statutes cannot survive the commerce clause challenge, a number of distinctions support a contrary conclusion at least in the area of water legislation. Upon reviewing such distinctions, one legal commentator concluded:

Clearly, I think, the Commerce Clause does not threaten the validity of any state legislation limiting or forbidding export of water if that legislation applies to future diversions and is wholly without discrimination in favor of exports for use within [the state.] Interstate "commerce" may or may not be involved, but if it is, nondiscriminatory legislation is likely to survive if it has a clear and demonstrable relation to any state purpose—⁸⁵

In New Mexico, a prior appropriation state, any water rights which vested prior to the passage of the non-exportation statute (1953) could not be retroactively changed or controlled, absent state proof

81. *Id.*

82. Martz, *supra* note 40, at 63.

83. Comment, *supra* note 20, at 131-32.

84. *Id.* at 125.

85. Corker, *supra* note 20, at 148.

that such control is necessary for the public good.⁸⁶ And since most of New Mexico's water is already appropriated, lack of retroactive capability may indicate the lack of effectiveness of the statute.⁸⁷ However, prospective non-exportation statutes may be valid if they meet the following criteria: (1) the sovereign power encompasses state waters, (2) there is strong local interest in restricting exports, (3) the legislation is non-discriminatory, and (4) Congress has not pre-empted the field.⁸⁸

In an effort to indicate a state concern with conservation, rather than thinly-disguised discrimination, a statute should avoid flat prohibitions against transportation out of state. If a statute indicates an attempt to regulate water transfers by prohibiting the transfer outside the basin, watershed, or aquifer, as well as out-of-state, it more strongly indicates its conservationist purpose. Also, if an embargo on exportation of groundwater is necessary to prevent the impairment of a natural resource (e.g., an aquifer of percolating water), this might be a valid prohibition.⁸⁹

The New Mexico statute presently being challenged in *El Paso v. Reynolds* does not prohibit the exportation of *all* water, merely groundwater, and even that prohibition is not absolute, as it allows for the exportation of groundwater for designated uses.⁹⁰ Also, the water basin from which El Paso desires to take water has been declared a protected basin by New Mexico's State Engineer, Steve Reynolds; if he can show that the basin involved is in danger of being impaired by exportation to Texas, additional arguments favor prohibiting such transfer.

The importance of a state's interest in regulating and controlling its water is a significant factor.⁹¹ In New Mexico, the extensive water code has been developed as a means of regulating and conserving the resource which is most vital and rare to the state. The statute itself declares all waters, including underground waters, to be public waters, subject to appropriation for beneficial use.⁹² Because the need for water is crucial in New Mexico, and because the water laws prevent any diversion—in state or out—that impairs water rights, New Mexico can reasonably assert its interest in preventing exportations of water to neighboring states.

86. Martz, *supra* note 40, at 56.

87. *Id.* at 58.

88. *Id.* at 57. Note that Martz believes these criteria cannot be met by the New Mexico statute.

89. White, *supra* note 2, at 405-06.

90. N.M. STAT. ANN. § 72-12-19 (Supp. 1980).

91. Comment, *supra* note 20, at 136-37.

92. N.M. STAT. ANN. § 72-1-1, -12-1 (1978).

Of course, if a statute is discriminatory, it may place too great a burden on interstate commerce. This determination must be made after weighing federal and state interests against each other, and, if water is acknowledged as a unique resource, unlike natural gas, states can argue that they should be able to place necessary restrictions on the use and appropriation of water before the burden on interstate commerce is declared to be unconstitutional.⁹³

Given New Mexico's state-ownership theory of water as well as its strong interest in exercising its state police and regulatory powers, it should be clear that New Mexico has a sincere and long-standing need to control the disposition of water within its arid boundaries. The bulk alone of the laws and cases in New Mexico that have attempted to protect rights and the efficient use of water would indicate that New Mexico's embargo on water transfer is not discriminatory, in form or in effect, as the citizens of New Mexico, as well as Texas, are constrained by the requirements of the state water code.

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93. Comment, *supra* note 20, at 140.