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The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries

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ABSTRACT

Increasing competition for scarce water resources should lead to a re-examination of constraints on water reallocation. Some constraints are "spatial" in nature and reduce the areal extent of reallocation processes. Interstate compacts are an example. Proponents of state protectionism look on compacts as a permanent allocation of water between states. A willing seller is not allowed to sell their water to a willing buyer in another state. On the other hand, the U.S. Constitution's Commerce Clause was designed to create an economic union that includes all states and all citizens. State attempts at economic protectionism through export bans are generally unconstitutional unless they can pass one of the limited exceptions to the Commerce Clause. One potential exception is through the use of interstate compacts. The question examined here is to what extent can interstate water compacts act as a constraint on water marketing? Allocations contained within an interstate compact should be looked on as an initial allocation of water, not a permanent one. In this article we examine the Rio Grande Compact in detail and interstate compacts in general to determine whether compacts place limits on water markets between states.

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I. INTRODUCTION

In the western United States, water shortages influence both the region's economy and environment.[1] When shortages occur, conflicts between competing uses may become bitter and frequently polarize communities.[2] For example, in New Mexico's Middle Rio Grande Valley, the recent conflict over the silvery minnow was portrayed as either water for cities and farmers or water for the endangered silvery minnow.[3] When water reallocation choices are defined in terms of "either/or," one party must win and the other must lose, hence the polarization. Water conflicts are commonly framed as "either/or" because only a few places have unallocated surface or ground water available for new uses, and the potential for obtaining "new" supplies through infrastructure development is limited.[4] However, in many instances, the real issue is not

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1. *See* David S. Brookshire et al., *Western Urban Water Demand*, 42 NAT. RESOURCES J. 873 (2002); Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361 (2001); Lora Lucero & A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 43 NAT. RESOURCES J. 803 (2003); A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management and Western Water Law: From Urban Oases to Archipelagos*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 163 (1999).

2. *See* Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197 (2002); Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279 (2003); Sean O'Connor, Comment, *The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 U. COLO. L. REV. 673 (2002).

3. After a federal district court decision reducing water deliveries by the Bureau of Reclamation, Albuquerque's Mayor Martin Chavez took out a half-page ad in the *Albuquerque Journal* with the headline "Someone's Stealing Our Water!" He also said that Judge Parker's decision ignored "common sense and human need" and that keeping water in the river for minnows was "a thoughtless and insensitive act." Leslie Linthicum, *Mayor's Ad Enlists Public in Minnow Fight*, ALBUQUERQUE J., Sept. 24, 2002, at A1. In his opinion, Judge Parker clearly places the blame on the federal agencies:

> The actions and inactions of the BOR [Bureau of Reclamation] resulted in a crisis that was then thrust upon this Court a few days ago. This Court had to make very difficult choices with limited [Endangered Species Act] options on an emergency basis. The Court believes this crisis situation could have been avoided if the Federal Defendants, especially the BOR, had properly performed their statutory duties.

Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1225-26 (D.N.M. 2002).

4. Many local projects have been proposed in the West. For example, eastern slope users are continually looking for additional water supplies from Colorado's western slope and the San Luis Basin. Jerd Smith, *Seeking a Water Deal: July Meeting Aims to Protect Rivers, Provide for Denver*, ROCKY MTN. NEWS, June 4, 2005 at A4; Ed Quillen, *A Water Baron Takes on the Establishment*, HIGH COUNTRY NEWS, Oct. 26, 1998, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=4560. Although these Colorado examples have not resulted in water projects, Albuquerque is in the process of constructing a $346,000,000 project that will divert San Juan Chama water from the Rio Grande and store it underground for later use. Dan McKay, *Water Project Costs up by 29%*, ALBUQUERQUE J. Apr. 19, 2005, at A1.

inadequate supply, but inefficient uses such as failing to conserve water or using water to produce low value goods.[5] If these inefficiencies are the real problem, then the solution is to encourage conservation and to develop better means of reallocating water to higher value uses.[6] Focusing efforts on improving efficiency, rather than creating winners and losers, is a more productive approach to conflicts. Markets[7] and regulation[8] are two ways for reallocating water. There are advantages and disadvantages to both methods.[9] Markets are the focus of this article.

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5. Economists use the term "efficiency" in a very specific way. *See, e.g.*, Charles W. Howe, *Protecting Public Values in a Water Market Setting: Improving Water Markets to Increase Economic Efficiency and Equity*, 3 U. DENV. WATER L. REV. 357, 358 (2000). Because 80 percent of western water use is related to irrigation, this sector of the economy has the greatest possibility for making water available for other uses. When this article refers to inefficiency, irrigated agriculture is to be inferred. An inefficient agricultural use is one that produces a low value crop instead of a high value one. Flood irrigation or unlined ditches can also be "inefficient" because other technologies could be used to conserve water, making it available for other uses. For example, using unlined ditches in the Middle Rio Grande means only a portion of the water diverted from the river actually reaches a farmer's field. The maximum efficiency of the Middle Rio Grande Conservancy District's (MRGCD) delivery system between 1976 and 1999 was 36.7 percent with an average for all years of 30.3 percent. S.S. PAPADOPOLOUS & ASSOCS., INC., MIDDLE RIO GRANDE WATER SUPPLY STUDY tbl.3.6 (2000), http://www.sspa.com/ashu/rio/start.htm (follow "Project Report" hyperlink, then follow "Tables only" hyperlink).

6. *See generally* William M. Fleming & G. Emlen Hall, *Water Conservation Incentives for New Mexico: Policy and Legislative Alternatives*, 40 NAT. RESOURCES J. 69 (2000). Oregon has legislation that allows water right holders to conserve water and then sell up to 75 percent of that conserved to other users. OR. REV. STAT. § 537.470 (2003). Water users have been reluctant to participate in that program. *See* Jesse A. Boyd, Student Writing, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RESOURCES J. 1151, 1185–86 (2003).

7. *See, e.g.*, BONNIE COLBY SALIBA & DAVID B. BUSH, WATER MARKETS IN THEORY AND PRACTICE (1987); RICHARD W. WAHL, MARKETS FOR FEDERAL WATER SUBSIDIES, PROPERTY RIGHTS, AND THE BUREAU OF RECLAMATION (1989); Victor Brajer et al., *The Strengths and Weaknesses of Water Markets as They Affect Water Scarcity and Sovereign Interests in the West*, 29 NAT. RESOURCES J. 489 (1989); Arthur H. Chan, *To Market or Not to Market: Allocating Water Rights in New Mexico*, 29 NAT. RESOURCES J. 629 (1989); Ronald C. Griffin & Fred O. Boadu, *Water Marketing in Texas: Opportunities for Reform*, 32 NAT. RESOURCES J. 265 (1992); John D. Musick, Jr., *Reweave the Gordian Knot: Water Futures, Water Marketing, and Western Water Mythology*, 35 ROCKY MTN. MIN. L. INST. 22-1 (1989); Bonnie Colby Saliba, *Do Water Markets "Work"? Market Transfers and Trade-Offs in the Southwestern States*, 23 WATER RESOURCES RES. 1113 (1987); Marca Weinberg et al., *Water Markets and Water Quality*, 75 AM. J. AGRIC. ECON. 278 (1993). For an extensive bibliography on markets and transfers, see Ronald A. Kaiser & Michael McFarland, *A Bibliographic Pathfinder on Water Marketing*, 37 NAT. RESOURCES J. 881 (1997).

8. One of the best examples of the reallocations of water by regulation is the Endangered Species Act. Much has been written about this. *See articles by* Benson, Doremus & Tarlock, *and* O'Connor, *supra* note 2. *See also* Sandra K. Dunn, *Endangered Species Act Versus Water Resources Development: The California Experience*, 25 PAC. L.J. 1107 (1994); A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV.

In establishing water markets, the areal extent or scale of the market is sometimes limited. For example, the market could be limited to a watershed,[10] a state,[11] or a smaller political subdivision such as a county[12] or irrigation district.[13] These spatial limitations impose artificial boundaries on the potential market. If market reallocation is only allowed within a limited area, the market is arbitrarily constrained and desired water use efficiencies may not be obtained. Limitations on the market area are sometimes imposed for policy reasons such as protecting a local economy[14] or ensuring that the tax base supporting the water

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1 (1985); Melissa K. Estes, Comment, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027 (1992); Michael A. Yuffee, Note, *Prior Appropriations Water Rights: Does* Lucas *Provide a Takings Action Against Federal Regulation Under the Endangered Species Act?*, 71 WASH. U. L.Q. 1217 (1993).

9. *See generally* Chan, *supra* note 7; Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2000); Harrison C. Dunning, *Reflections on the Transfer of Water Rights*, 4 J. CONTEMP. L. 109 (1977); Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27 (1996); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1543–45 (1989); Howe, *supra* note 5; Olen Paul Matthews, *Fundamental Questions about Water Rights and Market Reallocation*, 40 WATER RESOURCES RES., Aug. 2004, at W09S08; Olen Paul Matthews, *Simplifying Western Water Rights to Facilitate Water Marketing*, 126 WATER RESOURCES UPDATE 40 (2003); Olen Paul Matthews et al., *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions*, 41 NAT. RESOURCES J. 329 (2001); Zackary L. McCormick, *Institutional Barriers to Water Marketing in the West*, 30 WATER RESOURCES BULL. 953 (1994).

10. Watersheds are not generally considered a limiting factor in the West but there are exceptions. CAL. WATER CODE § 11460 (West 1992). Watershed limitations are more common in the East. *See generally* Robert Haskell Abrams, *Interbasin Transfer in a Riparian Jurisdiction*, 24 WM. & MARY L. REV. 591 (1983); Charles E. Hill, *Limitation on Diversion from the Watershed: Riparian Roadblock to Beneficial Use*, 23 S.C. L. REV. 43 (1971). The Regulated Riparian Model Water Code requires consideration be given to sustainable development in the basin prior to out of basin transfers. AM. SOC'Y OF CIVIL ENG'RS, THE REGULATED RIPARIAN MODEL WATER CODE: FINAL REPORT OF THE WATER LAWS COMMITTEE OF THE WATER RESOURCES PLANNING AND MANAGEMENT DIVISION OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS § 6R-3-06, at 250 (Joseph Dellapenna ed., 1997).

11. *But see* Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941 (1982) (Nebraska statute limiting exports found unconstitutional).

12. CAL. WATER CODE § 10505 (West 1992). *See generally* Robirda Lyon, Comment: *The County of Origin Doctrine: Insufficient as a Legal Water Right in California*, 12 SAN JOAQUIN AGRIC. L. REV. 133 (2002).

13. Under state law, a local irrigation district may have to grant permission before a transfer outside the district is made. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-172(A)(5) (2003); IDAHO CODE ANN. § 42-108 (2003); OR. REV. STAT. § 541.333 (2003). There may also be restrictions under the Reclamation Act. *See* Bruce Driver, *The Effect of Reclamation Law on Voluntary Water Transfers*, 33 ROCKY MTN. MIN. L. INST. 26-1 (1988); Richard Roos-Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation*, 13 ECOLOGY L.Q. 773 (1987).

14. Owens Valley is the classic example. *See* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 54–107 (rev. ed., Penguin Books 1993)

delivery infrastructure is not eroded.[15] This protectionist tendency is frequently seen in state water policy through a variety of limitations.[16]

Although most western states have water markets,[17] marketing water across state boundaries is generally resisted.[18] In fact, until 1982, many western states had statutes limiting or prohibiting water exportation.[19] In 1982, one of these anti-export statutes was held to be an

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(1986). *See also* Lawrence J. MacDonnell & Charles W. Howe, *Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches*, 57 U. COLO. L. REV. 527 (1986); Gary D. Weatherford, *Legal Aspects of Interregional Water Diversion* , 15 UCLA L. REV. 1299 (1968); Kenneth R. Weber, *Effects of Water Transfers on Rural Areas: A Response to Shupe, Weatherford, and Checchio*, 30 NAT. RESOURCES J. 13 (1990).

15. If the transfer is from a Reclamation Act project, approval of the Bureau of Reclamation is required. Approval is based partly on whether an irrigation district's repayment obligations will be impacted. *See* Driver, *supra* note 13, at 26-14; Roos-Collins, *supra* note 13, at 849; Joseph L. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13, 36–40 (1965).

16. ALASKA STAT. §§ 46.15.035, 46.15.037, 46.15.133 (2006) (fees); ARIZ. REV. STAT. ANN. § 9-431 (1996) (payment in lieu of property taxes); CAL. WATER CODE §§ 10505 (West 1992) (county not deprived of water needed for local development), 11460 (West 1992) (watershed and vicinity limitation); COLO. REV. STAT. ANN. § 37-45-118 (West 2004 & Supp. 2006) (compensatory storage); IDAHO CODE ANN. §§ 42-202A(3) (2003), 42-202B(3) (Supp. 2006) (local public interest), 42-226 (legislative approval required); KAN. STAT. ANN. § 82a-1502 (Supp. 2005) (local public interest, balancing test); MONT. CODE ANN. § 85-2-301 (2005) (only the state can appropriate water for export); NEB. REV. STAT. §§ 46-233.01 (2004), 46-613.01 (2004) (factors to be considered in inter-basin transfers); NEV. REV. STAT. ANN. §§ 533.438 (LexisNexis 2006) (county of origin may impose fees), 533.4385 (LexisNexis 2006) (mitigation planning), 533.370(6) (LexisNexis 2006) (list of factors considered in transfers), 533.363 (LexisNexis 2006) (county notification); N.M. STAT. ANN. § 72-5-29 (1978) (local public interest), OKLA. STAT. ANN. tit. 82, §§ 105.2 (West 1990), 105.12(A), (B) (West Supp. 2007) (preference given to in-basin use when an application is made for out-of-basin use); OR. REV. STAT. § 537.803 (2003) (local public interest, list of concerns to address); TEX. WATER CODE ANN. § 11.085 (Vernon Supp. 2006) (balancing test and list of requirements, 50-year test); WYO. STAT. ANN. § 41-3-104(a)(i) (1999) (economic loss to local community).

17. *See* Charles W. Howe et al., *Innovative Approaches to Water Allocation: The Potential for Water Markets*, 22 WATER RESOURCES RES. 439, 443 (1986); James L. Huffman, *Water Marketing in Western Prior Appropriation States: A Model for the East*, 21 GA. ST. U. L. REV. 429 (2004); Kaiser & McFarland, *supra* note 7.

18. An exception to resistance to transboundary water transfers is the Arizona Water Bank. 43 C.F.R. § 414.1 (2005) ("Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States"). *See* Margaret Bushman LaBianca, Note, *The Arizona Water Bank and the Law of the River*, 40 ARIZ. L. REV. 659 (1998); Tarlock & Van de Wetering, *supra* note 1, at 170 n.45 ("A proposed Department of Interior permissive rule for the lower Colorado River would allow states to deposit unused increments of their Compact entitlements into state-authorized water banks and subsequently transfer the water to a 'consuming' state.").

19. Edward B. Schwartz, Student Article, *Water as an Article of Commerce: State Embargoes Spring a Leak under* Sporhase v. Nebraska, 12 B.C. ENVTL. AFF. L. REV. 103, 106 & n.20 (1985) (citing the following statutes: ARIZ. REV. STAT. ANN. § 45-153B (1956); COLO. REV. STAT. § 37-81-101 (Supp. 1980); IDAHO CODE ANN. § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. REV. CODES ANN. § 85-1-121 (1979); NEB. REV. STAT. §§ 46-233.01, 46-

unconstitutional burden on commerce by the U.S. Supreme Court.[20] In spite of the Court's decision, many states continue to feel that water within their boundaries is theirs exclusively, and should only be used to benefit their citizens, not the citizens of the entire United States.[21] This form of economic protectionism is not what was envisioned in the Commerce Clause of the Constitution. The policy choice made by the Framers of the Constitution was to create an economic union that included all states and all citizens. State attempts at economic protectionism through mechanisms such as export bans are generally unconstitutional unless they can pass one of the limited exceptions to the Commerce Clause. One potential exception is through the use of interstate compacts.[22] As a result, Commerce Clause analysis forms the foundation for any evaluation of restrictions on marketing water across state boundaries. The question examined here is: To what extent do interstate water compacts act as a constraint on water marketing?[23]

Many states look upon a compact as a permanent allocation of water between states that cannot be changed.[24] However, this viewpoint is overly restrictive and constrains markets unnecessarily. An allocation contained within an interstate compact should be looked upon as an initial allocation of water, not a permanent one. In this article we

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613.01 (1978); NEV. REV. STAT § 533.520 (1979); N.M. STAT. ANN. § 72-12-19 (1979); OKLA. STAT. ANN. tit. 82, § 1085.2.2 (West Supp. 1980); OR. REV. STAT. § 537.810 (1979); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1980); UTAH CODE ANN. § 73-2-8 (Supp. 1979); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. § 41-3-105 (1977)).

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

21. Subsequent to the *Sporhase* decision, many states passed additional legislation that attempts to conform to the constitutional limitations but still may inhibit the free movement of water across state boundaries. *See infra* notes 261-289 and accompanying text.

22. Interstate compacts become federal law on congressional acceptance creating the exception. Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985).

23. Douglas L. Grant raised this question and suggests that there may be doubts as to whether compacts limit exports: "[D]oes congressional consent to a compact allocating a certain volume of water to a signatory state mean that the state can bar the interstate export of this water free of the commerce clause? The *Sporhase* statement about the effect of congressional consent to compacts...seems to cast doubt on this possibility." Douglas L. Grant, *State Regulation of Interstate Water Export*, *in* 4 WATERS AND WATER RIGHTS § 48.03(c)(6), at 48-44 (Robert E. Beck ed., repl. vol. 2004) [hereinafter Grant, *State Regulation of Interstate Water Export*].

24. For a general discussion of whether the compacts themselves are permanent, see Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105 (2003) [hereinafter Grant, *Compacts*], and Jill Elaine Hasday, Student Article, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997). *See also* Zachary L. McCormick, The Use of Interstate Compacts to Resolve Transboundary Water Allocation Issues (May 1994) (unpublished Ph.D. dissertation, Oklahoma State University) (on file with author).

examine the Rio Grande Compact in detail and interstate compacts in general to determine whether compacts place limits on water markets between states. We conclude that compacts may constitutionally limit markets, but most do not do so. This policy is sound, because it benefits all U.S. citizens by allowing our economic free trade zone to function as envisioned in the Constitution. Reducing the size of a market area by limiting water exports constrains the ability to move water from inefficient uses to more efficient ones. If the goal is to reduce water conflicts, then state boundaries need to be erased when developing water markets.[25] The Commerce Clause provides the mechanism for doing this.

Our article looks first at water supply and demand in the Upper Rio Grande. We then evaluate the Commerce Clause and its exceptions. Because interstate compacts can provide an exception to the free trade requirements of the Commerce Clause, compacts in the West will be examined, with special attention given the Rio Grande Compact. State water laws relevant to marketing water are also examined to see what can survive Commerce Clause scrutiny. Special attention is paid to Colorado's and New Mexico's water laws. After analyzing the situation, we conclude that compacts need very specific language in order to limit exports and that specific language is missing from the Rio Grande Compact.

II. WATER IN THE UPPER RIO GRANDE VALLEY

The Upper Rio Grande Valley,[26] from Elephant Butte Reservoir upstream to the headwaters of the Rio Grande, is a microcosm of the problems facing western states. The region has pressures to convert

25. Australia is able to market water across state boundaries without creating rancor among its states. The Murray-Darling Basin Commission and the Murray-Darling Basin Ministerial Commission manage transboundary problems within the Murray-Darling basin. In 1997 a cap on water diversions was set for each basin state. This in essence fixed the allocation of water among the states. *See* DARLA HATTON MACDONALD & MIKE YOUNG, A CASE STUDY OF THE MURRAY-DARLING BASIN (rev. Feb. 2001), *available at* http://www.clw.csiro.au/publications/consultancy/2001/MDB-IWMI.pdf; Henning Bjornlund & Jennifer McKay, *Australian Water Market Policies: Current Issues and Future Directions*, 28 WATER 74, 75-78 (Mar. 2001). In spite of this allocation or perhaps because of it, trading in water between states started in 1998. *See* MIKE YOUNG ET AL., INTER-STATE WATER TRADING: A TWO YEAR REVIEW (2000) *available at* http://www.clw.csiro.au/publications/consultancy/2000/inter_trading.pdf.

26. This area includes the entire basin from Elephant Butte Reservoir to the headwaters in Colorado. Although much of what is said in this article also applies to areas downstream from Elephant Butte Reservoir, our focus here is more limited. The Upper Rio Grande consists of three regions for our purposes: the Middle Rio Grande from Elephant Butte reservoir to Cochiti reservoir, the area from Cochiti reservoir to the Colorado state line, and the portion of the basin in Colorado.

agricultural water use to urban uses, upstream and downstream allocation problems across state boundaries, conflicts between federal and state interests, inefficient uses, un-quantified water rights, and other common western issues. Many of these problems are rooted in historic approaches to water management and no longer reflect societal preferences. The institutional structure for water management in the Upper Rio Grande is slowly addressing these problems as are institutions in the rest of the West.[27]

The Rio Grande originates in Colorado's high mountains and then flows into the San Luis Valley where it is used for irrigation.[28] Subsequently, the river flows into New Mexico where historically it supported many traditional communities found along the Rio Grande and its tributaries.[29] Early conflicts between New Mexico and Colorado centered on allocating water between the two states to accommodate increases in agricultural water use, drought, and an embargo on the use of federal lands for new agricultural water diversions.[30] The situation today is very different, with urban and environmental needs taking a

27. For a discussion of the recent issues in the Middle Rio Grande, see John R. Brown, *"Whisky's fer Drinkin'; Water's fer Fightin'!" Is It? Resolving a Collective Action Dilemma in New Mexico*, 43 NAT. RESOURCES J. 185 (2003); Lisa D. Brown, *The Middle Rio Grande Conservancy District's Protected Water Rights: Legal, Beneficial, or Against the Public Interest in New Mexico?*, 40 NAT. RESOURCES J. 1 (2000) [hereinafter Brown, *Protected Water Rights*]; Denise D. Fort, *Restoring the Rio Grande: A Case Study in Environmental Federalism*, 28 ENVTL. L. 15 (1998); Lucero & Tarlock, *supra* note 1; Ethan R. Hasenstein, Note, *Frankenstein and Pitbull? Transmogrifying the Endangered Species Act and "Fixing" the San Juan-Chama Project after* Rio Grande Silvery Minnow v. Keys, 34 ENVTL. L. 1247 (2004), Celina A. Jones, Student Writing, *The Administration of the Middle Rio Grande Basin: 1956–2002*, 42 NAT. RESOURCES J. 939 (2002); O'Connor, *supra* note 2; Beth Richards, Case Note, *The Pump Don't Work Because the Bureau Took the Handle: The United States Bureau of Reclamation's Discretion to Reduce Water Deliveries to Comply with the Endangered Species Act.* Rio Grande Silvery Minnow v. Keys, *333 F.3d 1109 (10th Cir. 2003)*, 4 WYO. L. REV. 113 (2004).

28. By 1894, 400,000 acres were under irrigation and in 1997 over 600,000 acres. *See* William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENV. WATER L. REV. 1, 5–6 (2001) [hereinafter Paddock, *Rio Grande Compact*]. *See generally* Steven E. Vandiver, The Administration of the Rio Grande Compact in Colorado (presentation at the 44th Annual N.M. Water Conf., Dec. 2, 1999) (on file with author) (Vandiver's paper is an excellent summary on how the compact is administered in Colorado.).

29. *See, e.g.*, ALVAR W. CARLSON, THE SPANISH-AMERICAN HOMELAND: FOUR CENTURIES IN NEW MEXICO'S RÍO ARRIBA (1990); JOSÉ A. RIVERA, ACEQUIA CULTURE: WATER, LAND, AND COMMUNITY IN THE SOUTHWEST (1998); José A. Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context*, 36 NAT. RESOURCES J. 491 (1996) [hereinafter Rivera, *Irrigation Communities*]; Christopher J. DeLara, Student Writing, *Who Controls New Mexico's Acequias? Acequia Government and* Wilson v. Denver, 40 NAT. RESOURCES J. 727 (2000).

30. *See* Paddock, *Rio Grande Compact*, *supra* note 28. By 1904, all streams entering the basin in Colorado were appropriated with over 600,000 acres being irrigated by 1929. McCormick, *supra* note 24, at 92–93.

more central role. The growth of urban centers in New Mexico and the classification of the silvery minnow as an endangered species has increased pressure on this limited resource, making water shortages during dry years a common occurrence.[31] Although about 80 to 90 percent of all water in the Upper Rio Grande is diverted for agricultural uses,[32] future demands are in the urban and environmental sectors. The pressure for converting agricultural uses to urban uses falls mostly on surface waters, because agricultural consumption in this area comes mostly from surface supplies. In addition, ground water and surface water are conjunctively managed in the Middle Rio Grande with new permits for ground water being denied unless surface water rights are retired.[33] As in other places in the West, reallocating water from agricultural to urban uses is an ongoing challenge, especially when endangered species are thrown into the mix.[34] The challenge exists in the Upper Rio Grande because inefficient uses are protected by the current property rights regime, and because very little New Mexico water is available for reallocation through market processes.[35]

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31. *See* O'Connor, *supra* note 2, at 677. *See also* Lucero & Tarlock, *supra* note 1.

32. ERNIE NIEMI & THOMAS MCGUKIN, WATER MANAGEMENT STUDY: UPPER RIO GRANDE BASIN. REPORT TO WESTERN WATER POLICY REVIEW ADVISORY COMMISSION (1997). A high percentage of agricultural use is common in all the western states. *See* WAYNE B. SOLLEY, ESTIMATES OF WATER USE IN THE WESTERN UNITED STATES IN 1990 AND WATER-USE TRENDS 1960–1990 (Rep. to the W. Water Pol'y Rev. Advisory Comm.) 2–3, 5, 7–8 (1997).

33. City of Albuquerque v. Reynolds, 379 P.2d 73 (1962). *See* Charles T. DuMars, *Changing Interpretations of New Mexico's Constitutional Provisions Allocating Water Resources: Integrating Private Property Rights and Public Values*, 26 N.M. L. REV. 367 (1996); Jones, *supra* note 27.

34. *See* Benson, *supra* note 2; Doremus, *supra* note 1; Doremus & Tarlock, *supra* note 2; Lawrence J. MacDonnell & Teresa A. Rice, *Moving Agricultural Water to Cities: The Search for Smarter Approaches*, 2 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 27 (1994); Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319 (1996); Tarlock & Van de Wetering, *supra* note 1; Megan Hennessy, Comment: *Colorado River Water Rights: Property Rights in Transition*, 71 U. CHI. L. REV. 1661 (2004); Ryan Waterman, Comment, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step?*, 31 ECOLOGY L.Q. 117 (2004).

35. Many water rights are owned in perpetuity such as those of Albuquerque and other municipalities. When these rights and other water rights incapable of passing the tests for validity are taken off the table, there are only 50,000 to 60,000 acre-feet left that could be traded. David S. Brookshire et al., *Are There Any Water Rights Left to Trade in the Middle Rio Grande?* (poster presented at N.M. Water Resource Res. Inst. Ann. Conf., 2002), *available at* http://www.unm.edu/~brookshi/posters/waterlefttotrade.pdf. With little water to trade, shortages will have to be met with water from outside the area. Warnings about water shortages in New Mexico are not new. Brian McDonald & John Tysseling, *Water Availability in the New Mexico Upper Rio Grande Basin to the Year 2000*, 22 NAT. RESOURCES J. 855 (1982).

The property rights system developed under the prior appropriation doctrine was designed to protect investments by establishing a preference system based on priority of use.[36] The first rights developed have a priority over subsequently established rights. As the system has evolved, inefficient uses have been protected.[37] Inefficient uses include traditional practices such as unlined ditches or uses with a low or negative rate of economic return such as alfalfa or irrigated pastures.[38] The property rights system protects these practices because the standard for establishing a right is not based on whether the use is "efficient," but on whether the use is "beneficial."[39] Although "wasteful" practices are prohibited, waste is defined by historic concepts, not current best management practices. As a result, water can be used to irrigate a pasture because that use is considered beneficial even if it is not very profitable. Inefficient uses can, however, be converted to more efficient uses through a market. Irrigators have water rights that are a property right with the same constitutional protections given property rights in land.[40] As a result, the right can be sold even though such sales are not always simple.[41] Significant problems exist for establishing markets in water, but success has occurred in some smaller regions.[42] For example, a water bank has been established in central New Mexico.[43] However, demands in Albuquerque, Santa Fe, and Rio Rancho cannot be completely satisfied by purchasing water from local sources because not much water is actually available.[44]

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36. *See* Robert E. Beck et al., *Elements of Prior Appropriation, in* 2 WATERS AND WATER RIGHTS § 12 (Robert E. Beck ed., repl. vol. 2001 & Supp. 2005).

37. *See* Fleming & Hall, *supra* note 6; Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998); Steven Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982).

38. NIEMI & MCGUKIN, *supra* note 32, at 58 (stating that in 1993 pasture in the Middle Rio Grande when supplied with three acre-feet of water per acre produced net earnings of a negative $80 per acre).

39. *See* Neuman, *supra* note 37, at 933.

40. Wyatt v. Larimer & Weld Irrigation Co., 29 P. 906, 910 (Colo. Ct. App. 1892), *rev'd on other grounds*, 33 P. 144 (1893) ("[I]t is...the property of the appropriator in every legal aspect."). *See* sources cited *infra* note 228.

41. *See* George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1 (1988); Frank Trelease, *Changes and Transfers of Water Rights*, 13 ROCKY MTN. MIN. L. INST. 507 (1967); Michael D. White, *Problems Under State Water Laws: Changes in Existing Water Rights*, 8 NAT. RESOURCES LAW. 359 (1975).

42. *See* Howe et al., *supra* note 17.

43. *See* N.M. ADMIN. CODE § 21.7.5 (1995); Subas Shah, *The Middle Rio Grande Conservancy District: Sustaining the Middle Valley for over 70 Years, in* WATER GROWTH AND SUSTAINABILITY: PLANNING FOR THE 21ST CENTURY 4 (45th Ann. N.M. Water Conf. Proc., 2000), *available at* http://wrri.nmsu.edu/publish/watcon/proc45/contents.html.

44. *See* Brookshire et al., *supra* note 35.

The situation facing Albuquerque and the other urbanizing areas in New Mexico is not unique.[45] These urban interests are willing to buy, but few sellers can be found. The situation in Albuquerque will illustrate the problem. Albuquerque has traditionally taken its water from a large aquifer underlying the city. The size of the aquifer was grossly over estimated, and studies have shown that the level of use that occurred in the 1990s could not be sustained.[46] As a result, Albuquerque is developing a project to use water allocated to it from the Rio Grande under the San Juan Chama Project.[47] Current uses of the river consume its entire surface flow in dry years. When Albuquerque begins to use surface water, more pressure will be created on the limited resource. In addition to using its San Juan Chama waters, Albuquerque has been buying available surface or groundwater rights.[48] Although some sales have been made, very few are currently occurring.

Competing for water in the area are agricultural interests and the in-stream needs of the endangered silvery minnow. The Middle Rio Grande Conservancy District represents many of the agricultural interests in the area because it delivers water to the area's farmers. The district claims rights to deliver water to individuals who have vested rights to irrigate 80,785 acres of land and claims rights on its own to irrigate 42,482 acres of land.[49] These claims have not been adjudicated and are not scheduled to be in the near future. In addition, the conservancy district's water may be limited to use within the district's boundaries.[50] The conservancy district has a standing offer to buy water and does not appear to be willing at this time to sell any rights. In

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45. *See* Tarlock & Van de Wetering, *supra* note 1; MacDonnell & Rice, *supra* note 34.

46. *See generally* John Michael Kernodle, *Simulation of Ground-water flow in the Albuquerque Basin, 1901–1995, Central New Mexico, with Projections to 2020* (U.S. Geological Surv. Open-File Rep. 96-209, 1998); J.M. Kernodle et al., *Simulation of Ground-water Flow in the Albuquerque Basin, 1901–1995, Central New Mexico, with Projections to 2020* (U.S. Geological Surv. Water-Resources Investigations Rep. 94-4251, 1995).

47. *See* McKay, *supra* note 4.

48. The price the City of Albuquerque is willing to pay is going up. When the study was done on available supply in the area, Brookshire et al., *supra* note 35, the standard offer by the city was $3,900. In 2004, the city was paying $4,500 to $5,000 per acre-foot. Prices for 2005 were $6,000 to $7,000 per acre-foot. Telephone Interview with Andrew Lieuwen, Water Resources, City of Albuquerque (Oct. 10, 2005).

49. Shah, *supra* note 43, at 3. Actual irrigation in the district has been declining and is now less than 60,000 acres, but in spite of the decline in acres irrigated, the amount diverted has increased. *See* Brown, *Protected Water Rights*, *supra* note 27, at 13; NIEMI & MCGUKIN, *supra* note 32, at 86.

50. "The Reclamation Act makes no specific reference to reallocation of project rights," Amy K. Kelly, *Federal Reclamation Law*, *in* 4 WATERS AND WATER RIGHTS § 41.06(a), at 41–78 (Robert E. Beck ed., repl. vol. 2004). Commentators generally feel reallocation is allowable, but the circumstances are not always clear. *See sources cited supra* note 15.

addition to agricultural needs, the federal rights associated with the silvery minnow have been in litigation, and somehow the minnow must be accommodated.[51] Under drought conditions all these water needs cannot be met.

Upstream from Albuquerque and the Middle Rio Grande Conservancy District are other water users, but again surplus water may not be available for sale to Albuquerque. Water from acequia communities in northern New Mexico is limited in volume and may have significant institutional constraints against sale.[52] Santa Fe and Rio Rancho are also looking upstream for potential sources of water. In situations like this, the area in which trade takes place needs to be expanded well beyond the local area in order for a market to function.

One solution is to expand the boundaries of the market to include water in another state.[53] Upstream on the Rio Grande is Colorado's San Luis Valley. In an average year, 975,000 acre-feet of water from the Rio Grande flows into the valley and 650,000 acre-feet are consumed.[54] About 600,000 acres of land are irrigated,[55] with the principal crops being barley, potatoes, alfalfa, and some winter wheat. The water rights in the San Luis Valley have all been adjudicated. As a result of these factors, water could be available in the San Luis Valley, but political resistance to sales outside the valley is strong. Although sales across the state boundary may be rational to the state receiving the water, the perspective from the other side is quite different.[56] The

51. Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1225–26 (D.N.M. 2002), *aff'd*, 333 F.3d 1109 (10th Cir. 2003), *vacated*, 355 F.3d 1215 (10th Cir. 2004).

52. N.M. STAT. ANN. §§ 72-5-24.1, 73-2-21 (Supp. 2006) (giving acequia commissioners the power to deny transfers if they are "detrimental to the acequia, community ditch or its members"). *See also* Rivera, *Irrigation Communities*, *supra* note 29. For public interest considerations, see *In re* Application of Sleeper, 760 P.2d 787 (N.M. Ct. App. 1988) (finding that the statute requiring consideration of "public welfare" did not apply at the time of the disputed water transfer) (referring to 1985 amendment to N.M. STAT. ANN. § 72-5-23, enacted after the transfer).

53. El Paso, Texas, can make the same arguments used in this article about water in New Mexico.

54. NIEMI & MCGUKIN, *supra* note 32, at 4.

55. Paddock, *Rio Grande Compact*, *supra* note 28, at 5. In comparison, the Middle Rio Grande has a maximum of 400,000 acre-feet available for consumption from the river when there is at least 1.5 million acre-feet in the Rio Grande at Otowi gage. Additions to the river below Otowi gage allow for total consumption of about 600,000 acre-feet. Consumption includes agricultural, municipal, riparian, and reservoir evaporation. If there is less than 1.5 million acre-feet at Otowi gage, then consumptive amounts in the Middle Rio Grande must be reduced in order to deliver sufficient water to Elephant Butte to meet compact obligations. PAPADOPOLOUS, *supra* note 5, tbls. ES-2, ES-3.

56. *See, e.g.*, Christi Davis & Douglas M. Branson, *Interstate Compacts in Commerce and Industry: A Proposal for Common Markets Among States*, 23 VT. L. REV. 133 (1998). Moving water out of a basin but within a state can also be problematic. Quillen, *supra* note 4.

question is whether a state can legally restrict water marketing to the area within its own boundaries. The answer lies partly in the Commerce Clause of the U.S. Constitution.[57]

III. THE COMMERCE CLAUSE

The Articles of Confederation, which preceded the U.S. Constitution, defined the relationships between the states and between the states and the federal government. The Articles of Confederation allowed states to enact protectionist tariffs, taxes, and duties, which resulted in limiting the movement of goods and services.[58] The result was economic chaos. One reason the constitutional convention was called was to rectify this problem, and the Commerce Clause was the mechanism for doing so.[59] On its face, the Clause gives the federal government power over commerce, which was confirmed by early interpretations related to navigation.[60] Over the years, judicial interpretation of the Clause has expanded federal power over natural resources with few limitations.[61] The Supreme Court also has interpreted

57. U.S. CONST. art. I, § 8.

58. *See* Martin Diamond, The Federalist *on Federalism: "Neither a national or a Federal Constitution, but a Composition of Both,"* 86 YALE L. J. 1273 (1977); Olen Paul Matthews, *The Supreme Court, the Commerce Clause, and Natural Resources,* 12 ENVTL. MGMT. 413 (1988).

59. Matthews, *supra* note 58, at 413.

60. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871).

61. *See, e.g.,* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (finding that a privately owned pond dredged to connect to the Pacific and serve as a marina became subject to federal regulation as navigable waters under the Commerce Clause); United States v. Grand River Dam Auth., 363 U.S. 229 (1960) (finding no compensable state interest when the federal government exercised Commerce Clause authority to condemn state land for a flood control project); United States v. Twin City Power Co., 350 U.S. 222 (1956) (holding that a private power company was not entitled to Fifth Amendment taking compensation for value created by a federal power project when that value derived from proper congressional exercise of Commerce Clause authority); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (finding that a river is navigable and thus subject to federal control if potential improvements make it navigable in fact and even if actual navigable use is infrequent or absent); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) (finding federal jurisdiction to regulate nonnavigable tributaries to or reaches of streams that are navigable downstream). A few recent cases have, however, restricted congressional power. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that the Clean Water Act did not allow the Corps of Engineers to define intrastate waters used by migratory birds as navigable waters). For non-natural resource cases, see also *United States v. Morrison,* 529 U.S. 598 (2000) and *United States v. Lopez,* 514 U.S. 549 (1995) (holding that the Violence Against Women Act and the Gun-Free School Zones Act, respectively, were insufficiently related to interstate commerce to be a valid exercise of Commerce Clause authority). The link between the Commerce Clause and natural resources has generated considerable discussion. *See, e.g.,* Jonathan H.

the Clause to prevent states from passing statutes that will interfere with commerce. This judicial interpretation is generally referred to as the negative or dormant Commerce Clause.[62] Discriminatory state statutes that put a burden on commerce will only be allowed under limited circumstances. The intent of the Commerce Clause was to create one economic unit where goods and services could be freely moved and traded. Banning imports and exports, taxing goods from outside the state differently, and charging higher fees to out-of-state businesses all discriminate and harm the common market the Constitution created.[63] Barriers are prohibited except where needed to protect local interests in health and safety such as with quarantines.[64] Other exceptions include congressional consent to placing a burden on commerce[65] and instances

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Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005); Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*, 26 ENERGY L.J. 135 (2005); George C. Coggins, *Grizzly Bears Don't Stop at Customs: A Preface to Transboundary Problems in Natural Resources Law*, 32 U. KAN. L. REV. 1 (1983); James H. Goetz, *Federalism and Natural Resources: Prologue*, 43 MONT. L. REV. 155 (1982); James Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); P.C. McGinley, *Federalism Lives! Reflections on the Vitality of the Federal System in the Context of Natural Resource Regulation*, 32 U. KAN. L. REV. 147 (1983); Paula C. Murray & David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71 (2003); A. Dan Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain*, 32 U. KAN. L. REV. 111 (1983).

62. For discussion of the negative Commerce Clause, see, for example, Natasha Ernst, *Flow Control Ordinances in a Post-Carbone World*, 13 PENN ST. ENVTL. L. REV. 53 (2004); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. 1505 (2005); Douglas R. Williams, *Trash, Trains, Trucks, Taxes – And Theory*, 49 ST. LOUIS U. L.J. 835 (2005).

63. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992); Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992); Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Wash. St. Apple Adver. Comm'n, 432 U.S. 333 (1977); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911).

64. Maine. v. Taylor, 477 U.S. 131 (1986); Asbell v. Kansas, 209 U.S. 251 (1908); Reid v. Colorado, 187 U.S. 137 (1902).

65. New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 339–40 (1982).

where there is sufficient "state interest" to overcome the constitutional prohibitions.[66]

Commerce Clause analysis in the Supreme Court generally centers on several questions. The first question provides the foundation for subsequent analysis. Is the item, in this case water, an article of commerce? Is state regulation evenhanded or does it discriminate? Is there a legitimate local interest without any nondiscriminatory alternatives? Has Congress created an exception by giving permission to place an otherwise impermissible burden on commerce? Is there a state interest exception? Within any single controversy these questions are often overlapping. All are relevant for understanding water marketing across state boundaries.

A. Is Water an Article of Commerce?

For many years western states operated under the premise that water was the property of the state and therefore fell under a state interest exception to the Commerce Clause.[67] Several historic court decisions related to water and wildlife seemed to uphold this concept. In *Geer v. Connecticut*[68] the Supreme Court upheld a ban on the export of wildlife, and in *Hudson County Water Co. v. McCarter*,[69] a water export ban was upheld. Although state ownership was barely mentioned in *Hudson County*, the state ownership concept became ingrained in state policy with states passing statutes banning exports of water based on this presumed ownership.[70] State ownership was first called into question in the *City of Altus v. Carr*.[71] In this case, Altus, Oklahoma, had a contract with a Texas landowner and intended to pump ground water for city use. Texas passed a statute prohibiting water export. In Texas, ground water once withdrawn from the ground was considered personal property. Based on the idea that water was personal property, a three-judge federal district court had little difficulty deciding that, in Texas, at

66. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809, 811 (1976). *See also* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

67. The state interest exception sets the framework for the Supreme Court's decisions. For the current scope of the exception, see *infra* notes 117-126 and accompanying text.

68. 161 U.S. 519 (1896).

69. 209 U.S. 349 (1908).

70. Some western state constitutions have provisions stating that water is the property of the state or is held in trust by the people of the state. *See, e.g.*, IDAHO CONST. art. 15, § 1 (use of water is a "public use"); MONT. CONST. art. IX, § 3(3) (water is the "property of the state"); N.M. CONST. art. XVI, § 2 (water belongs "to the public"); WYO. CONST. art. VIII, § 1 (water is the "property of the state").

71. 255 F. Supp. 828 (W.D. Tex. 1966); *aff'd*, 385 U.S. 35 (1966).

least, ground water was an article of commerce. The ban on exports was prohibited. This case did not get to the question of whether states that claimed water ownership would be similarly barred. The Supreme Court decided that issue in *Sporhase v. Nebraska*.[72]

In 1982, the U.S. Supreme Court ruled that a Nebraska export ban was unconstitutional. Nebraska argued that its ownership interest in ground water was much stronger than a state's interest in wildlife and stronger than the ownership interest Texas had in ground water. The Supreme Court, however, said that, although Nebraska's claim of a greater ownership interest in ground water had some merit, it did not remove ground water from Commerce Clause scrutiny. The Court said that state ownership claims are based on a legal fiction.[73] Nebraska also argued that its state interest was stronger with water than with other natural resources because water was necessary for human survival.[74] Although the court conceded that Nebraska had a strong interest in water, they went on to conclude that water was an article of commerce:

> Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation.[75]

Clearly the Court held that water was an article of commerce and subject to the dormant Commerce Clause.

In two subsequent federal district court decisions, New Mexico's statutes controlling out-of-state water use were challenged. In the first, an export ban was found unconstitutional.[76] After this, New Mexico revised its laws based on the *Sporhase* decision. El Paso challenged New Mexico's revised statutes, but the same district court upheld them.[77] State statutes controlling out-of-state transfers will be examined in more detail below.[78]

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72. 458 U.S. 941 (1982). The Court also rejected the idea of state ownership of wildlife as a defense to a commerce clause challenge to a state ban on transportation of fish for sale outside the state. Hughes v. Oklahoma, 441 U.S. 322 (1979).

73. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 951 (1982).

74. *Id.* at 952.

75. *Id.* at 953 (citation omitted).

76. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984).

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

78. See *infra* notes 248–277 and accompanying text.

As an article of commerce, water is subject to federal regulation, but states can also regulate water, including the way in which out-of-state transfers occur. In order for state statutes to pass Commerce Clause scrutiny, they must pass a two-part test.[79] First, state statutes must be evenhanded and applied without discrimination. Second, state statutes must be designed to accomplish a legitimate local purpose.[80] This two-part test will be discussed in the next two sections.

B. Is State Regulation Evenhanded or Does It Discriminate?

States are free to regulate articles of commerce as long as federal law has not preempted state law,[81] but states cannot regulate articles of commerce in ways that interfere with the economic free trade zone the Commerce Clause was designed to protect.[82] A common way states have come into conflict with the dormant Commerce Clause is through state statutes that ban exports and imports.[83] The Supreme Court has not been very sympathetic to state attempts to ban the free movement of goods, because such statutes discriminate against those from out of state. This form of discrimination is called "facial discrimination" because the language of the statute specifically excludes imports or exports. Other statutes that are facially discriminatory are tax-related with states taxing out-of-state goods and services differently than those inside the state.[84]

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79. This test is for facially discriminatory statutes. For those with discriminatory impact a balancing test is used. Examples of cases finding facial discrimination can be found *supra* in note 63.

80. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 954 (1982) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

81. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (finding no federal preemption but holding that a state statute barring the importation of solid and liquid waste unconstitutionally interfered with interstate commerce).

82. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) ("The principle that our economic unit is the Nation...has as its corollary that the states are not separable economic units."); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) ("one state in its dealings with another may not place itself in a position of economic isolation").

83. *See, e.g., Sporhase*, 458 U.S. 941 (water); *City of Philadelphia*, 437 U.S. 617 (garbage); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (natural gas); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911) (natural gas). The Court has also struck down laws where states attempted to exercise jurisdiction beyond their boundaries. Healy v. Beer Inst., Inc., 491 U.S. 324 (1989).

84. *See, e.g.*, Associated Indus. of Mo. v. Lohman, 511 U.S. 641 (1994) (state tax on personal property purchased outside state created discriminatory burden on interstate commerce); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (state property tax exemption for charitable institutions impermissibly favored institutions serving state residents); Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue, 483 U.S. 232 (1987) (exemptions to tax for manufacturers selling products within the state discriminated against interstate commerce); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

In these cases the free movement of goods and services is not barred, but it is made more expensive. State statutes considered facially discriminatory will be subjected to the strictest scrutiny by the courts.[85] In addition, state laws that are not facially discriminatory, but have a discriminatory impact, may also be unconstitutional.[86] Because state laws that facially discriminate are strictly scrutinized by the courts, they are almost always found invalid.[87] Those state laws that are only discriminatory in their impact are tested by a less strenuous balancing approach.[88]

The Court's long line of decisions makes it quite clear that state statutes must be evenhanded and nondiscriminatory. Citizens from

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(sales tax for the "privilege of...doing business" within state did not violate Commerce Clause). When out-of-state residents or corporations pay a tax that is in some way different from that of residents or domestic corporations, the state statute is discriminatory. The discrimination can be overcome if the tax is a compensatory or complementary tax designed to offset a domestic tax or service. S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (franchise tax on foreign corporations was not comparable to taxes on domestic corporations and thus violated the Commerce Clause); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1994) (state sales tax on interstate bus travel had sufficient nexus to state to be valid under dormant Commerce Clause); Barclays Bank, PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994) (state method for calculating corporate franchise tax allowed approximations that did not unfairly burden foreign corporations). The person or corporation being taxed must have a minimal connection or sufficient nexus with the taxing state to justify the tax. Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458, 464 (2000). These cases often have "due process" elements. Even if a nexus exists, taxation must be on a proportional basis. *See Hunt-Wesson*, 483 U.S. at 279. Another way states discriminate through taxation is by charging a higher tax on goods imported from out of state. Excise taxes on alcohol have been struck down. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1990); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

85. Wyoming v. Oklahoma, 502 U.S. 437, 456 (1992) (citing Hughes v. Oklahoma, 441 U.S. 322 337 (1979)).

86. See Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

87. An exception is *Maine v. Taylor*:

> As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, apart from their origin, to treat [out-of-state baitfish] differently.

477 U.S. 131, 151-52 (1986) (internal quotation marks and citations omitted) (bracketed text in original).

88. Some state statutes pass this less stringent test. *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

outside the state must be treated the same as citizens from inside the state. Goods and services from outside the state must also receive the same treatment as goods and services from inside the state. The Commerce Clause requires a level playing field in all aspects of commerce. In spite of the requirement to be evenhanded, states continue to have a protectionist attitude that places a burden on interstate commerce. Although exceptions do exist, many state attempts are simply poorly disguised attempts at economic protectionism. Such economic protectionism is unconstitutional.

States have tried to get around the evenhanded treatment required by the Commerce Clause by limiting the transfer of water rights to other in-state users outside a watershed or by denying transfers to all users both inside the state and outside. One form of statute limiting the transfer to other in-state uses is called "basin of origin" statutes.[89] They are designed to protect the citizens of a basin from situations like the one in the Owens Valley when Los Angeles de-watered the entire region. Statutes that deny all transfers are justifiable only if there is a legitimate local interest with no nondiscriminatory alternatives. This exception will be discussed in the next section. The question here is whether basin of origin statutes, and others like them, will pass constitutional muster. Proponents argue that there is no discrimination because all potential users outside the boundaries of the watershed are treated alike, both in-state and out-of-state interests. However, limiting water transfers to users within a watershed may not be any more acceptable than limitations on transfers within a county or some other spatial sub-unit of the state. A Supreme Court opinion involving a Michigan statute sheds some light on how the Court would approach this issue.[90]

Michigan's Solid Waste Management Act contained a provision prohibiting the disposal of solid waste generated in another county or state unless the county receiving the waste had a solid waste management plan that specifically allowed it.[91] A landfill in St. Clair County applied for a permit to accept solid waste from out of state and was denied permission because the St. Clair County plan did not allow out-of-county solid waste. The landfill sued, seeking to overturn the statute as unconstitutional under the Commerce Clause.[92] The district

89. *See supra* notes 10–16 and accompanying text.

90. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992).

91. Bill Kettlewell Excavating, Inc. v. Mich. Dep't of Natural Res., 732 F. Supp. 761, 762 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *aff'd, Fort Gratiot Sanitary Landfill*, 504 U.S. 353.

92. *Id.*

court dismissed the action, and it was appealed. The appeals court found the statute nondiscriminatory because the out-of-state waste was treated the same as waste outside the county but from in-state sources.[93] This decision was appealed to the Supreme Court, which said,

> The Waste Import Restrictions enacted by Michigan authorize each of the State's 83 counties to isolate itself from the national economy. Indeed unless the county acts affirmatively to permit other waste to enter its jurisdiction, the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas. In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case.[94]

Even though Michigan argued strongly that there was no discrimination, the Court would not allow a county to do something the state would be prohibited from doing. By analogy, banning the export of water from a watershed or county would also be unconstitutional. Spatial limitations on commerce are inherently discriminatory and will fail unless a legitimate local purpose is found.[95]

C. Is There a Legitimate Local Purpose Without Any Nondiscriminatory Alternatives?

Finding a legitimate local purpose without nondiscriminatory alternatives is difficult, but not impossible. The Supreme Court has suggested several situations where local interests could prevail even though in these instances the state failed to do so.[96] The major case where the court has actually upheld a discriminatory state law is *Maine v.*

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93. Bill Kettlewell Excavating, Inc. v. Mich. Dep't of Natural Res., 931 F.2d 413, 417 (6th Cir. 1991).

94. *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361.

95. See also *C & A Carbone, Inc. v. Town of Clarkston*, in which a local ordinance requiring that a local waste transfer station be used by all residents was found unconstitutional even though all state residents were being treated alike. 511 U.S. 383 (1994).

96. *See, e.g.*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342-47 (1992) (nondiscriminatory "quarantine" measures to protect local health from dangers of hazardous waste); Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 952-57 (1982) (local interest in conserving and preserving scarce water resources to protect citizens' health).

Taylor.[97] Maine had a statute barring the importation of minnows. A bait business attempted to import live golden shiners, a species of minnow used as a bait fish that was also found in Maine's waters. The bait dealer was indicted for violating the Lacey Act,[98] and the dealer moved to dismiss, arguing that the state law was unconstitutional under the Commerce Clause. The federal district court decided the statute was constitutional,[99] but the court of appeals reversed the decision.[100] On appeal, the Supreme Court disposed of several issues and then focused on whether the local purpose was legitimate. The justification for the ban was the threat posed by imported minnows to Maine's fishery. The threats came from the possibility of introducing parasites into native golden shiners and the potential for disrupting Maine's aquatic ecology through the introduction of non-native species that might be commingled with native species. For the Court's majority, the substantial uncertainty over the ecological effects of importing non-native minnows was a legitimate local purpose deserving protection. The Court also concluded that less discriminatory means of protecting the fishery from threats were unavailable.[101] Two other examples will help show what the Court feels are legitimate local interest exceptions.

In *Chemical Waste Management, Inc. v. Hunt*,[102] the Supreme Court was asked to examine the validity of an Alabama statute that imposed an additional fee on hazardous waste generated outside the state. The Alabama Supreme Court upheld the statute, but the U.S. Supreme Court reversed. The discriminatory higher tax on out-of-state waste was an obvious burden on interstate commerce that could only be justified if there was a legitimate local purpose and the absence of nondiscriminatory alternatives. Alabama argued and their Supreme Court agreed that the local purpose was to protect its citizens from toxic substances and to conserve the environment and natural resources of the state. The fee would be "compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama."[103] The risk to the health and welfare of Alabama's citizens would be reduced by limiting the flow of hazardous wastes on Alabama's highways. The Court recognized that these might be legitimate local interests but questioned why only out-of-state wastes

97. 477 U.S. 131 (1986).

98. 16 U.S.C. §§ 3371-3378 (2000). It is a crime to import wildlife contrary to state law. *Id.* § 3372(a)(2)(A).

99. United States v. Taylor, 585 F. Supp. 393 (D. Me. 1984).

100. United States v. Taylor, 752 F.2d 757 (1st Cir. 1985).

101. Maine v. Taylor, 477 U.S. 131, 151-52 (1986).

102. 504 U.S. 334 (1992).

103. Chem. Waste Mgmt., Inc. v. Hunt, 584 So. 2d 1367, 1389 (Ala. 1991).

had been targeted to protect these interests. The only reason for the fee was the origin of the waste, which the Court considered to be a form of economic protectionism. The U.S. Supreme Court agreed that reducing the movement of waste within the state was an acceptable local purpose and went on to point out less discriminatory alternatives that could be used to accomplish the state's legitimate local interests. The alternatives mentioned included an additional fee on all hazardous waste entering the disposal site, a per-mile tax on all vehicles carrying hazardous waste, and a cap on the total tonnage that would be accepted at the site.[104] The Court concluded that other local purposes, such as environmental conservation, could be satisfied without using discriminatory methods. The risks associated with these local purposes did not vary with the origin of the waste.

In a similar case, the Court was asked to determine whether an Oregon surcharge on out-of-state solid waste was a burden on commerce.[105] In-state fees for the disposal of solid waste were $0.85 per ton while out-of-state solid waste was charged an additional $2.25. The Court concluded that the tax was discriminatory and could only be justified if there were a legitimate local purpose. Oregon justified the additional surcharge as a compensatory tax. In addressing how compensatory taxes fit into "local purposes" the Court said the following: "Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means."[106] In order to justify a tax as compensatory, the state must identify the tax burden for which the state is attempting to compensate, the interstate tax must roughly approximate the intrastate tax, and the events being taxed must be substantially equivalent. The Court concluded that Oregon's tax failed under all three criteria and, therefore, was not a compensatory tax.

States cannot discriminate against articles of commerce "unless there is some reason, apart from their origin, to treat them differently."[107] Two exceptions have been developed. Congress can consent, and states may be exempt when acting as market participants or when they have some other state interest strong enough to justify an exception.

104. Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344–45 (1992).
105. Or. Waste Sys. Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994).
106. *Id.* at 102.
107. City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978).

D. Has Congress Given Permission to Place an Otherwise Impermissible Burden on Commerce?

Whether Congress has given consent to an otherwise impermissible restriction on commerce is a frequent issue in Commerce Clause cases. In *Sporhase*, Nebraska claimed the 37 statutes deferring to state water law, along with the number of congressionally approved compacts, showed by implication that Congress intended to give permission to place a burden on interstate commerce.[108] The Court disagreed, saying that such consent must be "expressly stated."[109] In *Maine v. Taylor*, it was argued that the Lacey Act gave states power to regulate wildlife, but the Court disagreed, saying, "there simply is no unambiguous statement of any congressional intent whatsoever."[110] In another case, Oklahoma contended that the Federal Power Act's provision giving states power over local retail electric rates was congressional consent to influence the movement of Wyoming coal.[111] Citing precedent, the Court said that the Federal Power Act contained no such exception.[112]

One case stands out for its requirement of the need for a clear and explicit statement from Congress.[113] Federal policy in Alaska

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108. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 958–59 (1982).

109. According to the Court in *Sporhase v. Nebraska*:

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "expressly stated."

Id. at 959–60 (quoting New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982) (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946))).

110. Maine v. Taylor, 477 U.S. 131, 139 (1986).

111. Wyoming v. Oklahoma, 502 U.S. 437, 457–58 (1992).

112. "We...found nothing in the statute or legislative history 'evinc[ing] a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause."'" *Id.* at 458 (quoting New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (quoting United States v. Public Utilities Comm'n of Cal., 345 U.S. 295, 304 (1953))) (alteration in original).

113. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

required that timber taken from federal land be processed prior to export. When Alaska imposed a similar requirement on state lands the statute was challenged under the Commerce Clause. The appellate court held that express approval was not needed because the federal policy was so clear with respect to federal land. The Supreme Court disagreed. "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent."[114] The Court also said that the intent of Congress must be "unmistakably clear."[115] "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine."[116] The requirement for "affirmative contemplation" indicates the need for a particular issue to be directly in front of Congress. The absence of provisions limiting commerce in interstate compacts would preclude this "affirmative contemplation."

E. Is There a State Interest Exception?

The second way discriminatory state statutes are acceptable is when a state interest exception can be found. The exact parameters of this exception are not completely clear. A state interest exception was argued in *Sporhase* with regard to water being state property, but the Supreme Court called this a legal fiction.[117] However, when a state is acting as a market participant, sufficient state interest is present.[118] The

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114. *Id.* at 92.

115. *Id.* at 91.

116. *Id.* at 91-92. The policy is based on representation. If states can burden commerce, they are impacting citizens from other states who are not represented in the decision process. *Id.* at 92. Congress, on the other hand, represents people from all states. *Id.* In this case, Congress had been asked to change the policy and refused to do so. *Id.* at 93 n.8.

117. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 951 (1982). Although the Court recognized that the state had a legitimate interest in water, it was insufficient to overcome Commerce Clause scrutiny.

118. Sometimes the market participation exception is looked on as an independent exception. The definition of market participation has been stretched to include many things so that it might more appropriately be considered a form of "state interest." "State" also includes local governments. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 410 (1994) (Souter, J., dissenting); White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983). The mere fact of municipal ownership may be enough to change from strict scrutiny required in facial discrimination to the less stringent balancing test of *Pike*.

> [T]he fact that a municipality is acting within its traditional purview must factor into the...determination of whether the local interests are substantially outweighed by the burdens on interstate commerce. With that understanding, we reverse and remand for a determination of

exception operates when the state "is acting as a market participant, rather than as a market regulator."[119] Examples of states acting as market participants include a bounty on in-state licensed junk cars,[120] restricting the sale of cement produced from a state owned cement plant to state residents,[121] and a requirement that construction projects funded by a city employ a work force that has at least 50 percent city residents.[122]

Wyoming v. Oklahoma[123] provides an interpretation of market participant criteria. Oklahoma had a statute requiring all utilities generating electricity with coal to purchase ten percent of their coal from in-state sources. Wyoming, a major exporter of coal, challenged the statute as unconstitutional under the Commerce Clause. One of the utilities was a state agency, the Grand River Dam Authority. The Supreme Court found the statute in violation of the Commerce Clause but said Oklahoma could rewrite its statute to require the state agency to use Oklahoma coal under the market participant doctrine.[124] The market participant exception has been argued less successfully in other cases.[125] The doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."[126] Markets are to be narrowly defined, and the state cannot impose any regulatory conditions outside that particular market. Thus, a state could buy a water right and choose to sell it only to its own citizens. It could not, however, limit a state citizen who bought the water from selling it to someone from out of state.

F. Commerce Clause Summarized

A state could conceivably restrict water exports and pass the constitutional tests discussed above. Assume the volume of water in a watershed is very limited, with the only uses being a domestic water supply for a small town and an endangered species living in the

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whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

United Haulers Ass'n, Inc. v. Onieda-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 264 (2d Cir. 2001).

119. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

120. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

121. Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

122. White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983).

123. 502 U.S. 437, 459 (1992).

124. *Id.* at 461.

125. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 589 (1997) (dismissing the assertion without much discussion); S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

126. *Wunnicke*, 467 U.S. at 97.

watershed. The city has water rights, as do a few private individuals. Assume the city and its residents have taken every conservation measure possible to allow water to remain in the stream for the endangered species. In spite of that, the city has to ration water frequently and the rest of the time there is barely enough to satisfy demands. A ban on water exports might pass constitutional muster in this case, because the water is needed to protect the public's health and safety. However, little water may be available for sale and what is available would most likely be purchased by the city. If we add other water users to the system, such as farmers irrigating pasture, and lessen the strain on the city's supply, the ban would fail because protecting the irrigated pasture would be economic protectionism. Banning the export of water so someone can benefit economically is the very thing the Commerce Clause was designed to prevent. In most situations where water is being used for irrigation, a ban on exports will fail. Bans designed solely to protect economic interests are unconstitutional.

States have tried to protect their water sources by passing nondiscriminatory statues or by trying to find a legitimate local interest. These are only partially successful. The only way to support a complete ban on water exports is through one of the exceptions to the Commerce Clause. The relevant one here is whether Congress has consented. If Congress gives its consent to an import or export ban or other discriminatory conduct, then the constitutional prohibition can be overcome. Congress can do this in two ways. A federal statute could be passed allowing such state actions. Although federal legislation related to water is common and these statutes generally defer to state water allocation laws, *Sporhase* makes it clear that these federal statutes are not consent to burden commerce. Congress can also consent by approving a compact between two states.

IV. INTERSTATE COMPACTS

Interstate compacts are agreements between two states that are approved by Congress.[127] Once approved, compacts are federal law that

127. *See* Douglas L. Grant, *Water Apportionment Compacts Between States*, *in* 4 WATERS AND WATER RIGHTS § 46.01–46.05 (Robert E. Beck ed., repl. vol. 2004) [hereinafter Grant, *Water Apportionment Compacts*]; Grant, *Compacts*, *supra* note 24; Douglas L. Grant, *Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts*, 43 NAT. RESOURCES J. 373 (2003); Hasday, *supra* note 24; Jerome C. Muys, *Interstate Water Compacts: The Interstate Compact and Federal-Interstate Compact* (Legal Study No. 14 prepared for the Nat'l Water Comm'n, 1971); McCormick, *supra* note 24.

can preempt contradictory state law.[128] As discussed above, in order for a federal law to create an exception to the Commerce Clause, the language limiting the movement of water across state boundaries must be "expressly stated" or in some way made "unmistakably clear" with the opportunity for Congress to "affirmatively contemplate" it.[129] The issue must be "directly in front of Congress." One case from Montana recognizes a Commerce Clause limitation as a result of congressional approval of a compact.[130]

The Yellowstone River Compact has a provision stating, "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states."[131] The signatory states are Wyoming, Montana, and North Dakota. The compact was challenged when a company applied for a permit to take water out of the basin, and it was denied based on the provisions of the compact. The constitutionality of the provision was challenged and was upheld by a three-judge federal district court. The district court said that the "Compact was ratified by Congress [and therefore it] must be interpreted as federal law, immune from Commerce Clause attacks."[132] The court also discussed the need for explicit statements to show intent to immunize the state against Commerce Clause attacks. In the Yellowstone Compact, the provision is explicit, making congressional consent clear. On appeal, the Ninth Circuit called the three-judge district court decision "well reasoned."[133] The court stated that there could be no question about congressional approval. "The Compact was before Congress and Congress expressly approved it."[134] Although the language in the Compact in this case was clear in prohibiting out of basin transfers without the unanimous consent of the signatory states, most

128. "When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law." Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293, 296 (1983).

129. "There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress *affirmatively contemplate* otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine." Wunnicke 467 U.S. at 91-92 (emphasis added). *See also* quote from *Sporhase*, *supra* note 109.

130. Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293, 296 (1983).

131. Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

132. *Intake Water Co.*, 590 F. Supp. at 296.

133. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 570 (9th Cir. 1985).

134. *Id.*

compacts have no language at all with regard to in-state or out-of-state transfers. Absent specific language in a compact, normal state water laws will control the transfer process.

Even if compacts are silent on transfers, congressional consent might be inferred under limited circumstances. Compacts with language of "permanence" and restrictions on place of use are the most likely ways of inferring that compacts were meant to be permanent divisions. However, most compacts are not this explicit, and thus should be looked on as an initial allocation of water with subsequent reallocations being controlled by state law including reallocation across state boundaries. In determining whether compacts are meant to be permanent divisions of water between states or an initial allocation requires an examination of the intent of each compact as shown by the express language of the compact. The issues here are: Does compact language expressly state the allocation is permanent? Is use limited by spatial restrictions? Are allocation schedules and formulas rigid? How do compacts address transfers? Are vested rights protected? Is an equitable apportionment a permanent allocation? What water is included?

A. Does Compact Language Expressly State the Allocation Is Permanent?

Two compacts have clear language related to permanent allocations, and a third might be interpreted in that way. The Colorado River Compact divides the river "in *perpetuity*"[135] with the upper and lower basin each receiving "the *exclusive* beneficial consumptive use of 7,500,000 acre-feet of water per annum."[136] The Compact also states that "[a]ll other rights to beneficial use of waters of the Colorado river system shall be satisfied *solely* from the water apportioned to that basin in which they are situate."[137] The use of the words "perpetuity," "exclusive," and "solely" indicates an express intent that the apportionment be permanent. This is supported by language in the Upper Colorado River Compact describing the Colorado River Compact as dividing the water

135. Colorado River Compact, art. III(a) (emphasis added). The Compact is widely available. *See, e.g.*, U.S. Dep't of the Interior, Bureau of Reclamation, Lower Colorado Region, The Law of The River, http://www.usbr.gov/lc/region/g1000/lawofrvr.html (follow "The Colorado River Compact of 1922" hyperlink).

136. *Id.* (emphasis added).

137. *Id.* art. VIII (emphasis added). This provision should not be read alone. Article VIII recognizes perfected rights as being unimpaired. This right includes the right to sell. One reading of this is that rights not presently perfected are the only ones that must be satisfied solely from water apportioned to that basin.

between the upper and lower basins "in perpetuity."[138] The Upper Colorado River Compact likewise has language of permanence in apportioning the water of the upper basin *among* the upper basin states "in perpetuity."[139] The Upper Colorado River Compact does not use the term "exclusive" or "solely." The third compact with language of exclusivity is the South Platte Compact. The Compact contains a provision for Lodgepole Creek giving Nebraska the "full and unmolested use and benefit"[140] of the river's water above a certain point and giving Colorado the "exclusive use and benefit"[141] of all water below that point. The language granting Colorado exclusive use is similar to that of the Colorado compacts. But Nebraska's full and unmolested use could be interpreted as giving them only those rights they would exercise under normal Nebraska law.

No other compacts include such explicit language, but there are some phrases that are close. The Red River Compact[142] in several places gives "free and unrestricted use of the water"[143] of a named sub-basin to specified states. As long as certain stream flow conditions are met, the La Plata Compact gives each state "the unrestricted right to use all the waters within its boundaries"[144] The Big Blue Compact gives Nebraska "free and unrestricted use."[145] Free and unrestricted use means that normal state water law should apply. In Nebraska, at least, the compact is specific and states that the free and unrestricted "use shall be in accordance with the laws of the state of Nebraska...."[146] Water rights established under state laws include a right to transfer water including a right to transfer water across state boundaries. The implication is that the apportionments in those compacts were meant to be an initial allocation of water and not a permanent one. Normal state water law concerning transfers was meant to apply.

Even with language of permanence present in the Colorado River Compact, proposals have been made that would move water from

138. Upper Colorado River Basin Compact, art. I, 63 Stat. 31, 31 (1949).
139. *Id.* art. III(a), 63 Stat. at 32.
140. South Platte River Compact, art. III(2), 44 Stat. 195, 196 (1926).
141. *Id.*
142. Red River Compact, 94 Stat.3305 (1980).
143. *Id.* art. IV, § 4.02(b) (sub-basin in Oklahoma), § 4.03(b) (sub-basin in Texas), art. VI, § 6.04(b) (Louisiana sub-basin), art. VII, § 7.02(b) (reach in Arkansas). *See also* Arkansas River Basin Compact, Kansas-Oklahoma, arts. V, VI , 80 Stat. 1409, 1410–11 (1966).
144. La Plata River Compact, art. II (2)(a), 43 Stat. 796, 797 (1925).
145. Kansas-Nebraska Big Blue River Compact, art. V, § 5.2, 86 Stat. 193, 196 (1972).
146. *Id.*

the upper to the lower basin.[147] Many commentators feel this would be difficult if not impossible.[148] Restrictions on transfers between the lower basin states are certainly allowable. Here there is no compact with any type of restrictive language, and new regulations by the Bureau of Reclamation have been put in place to facilitate transfers.[149] Even where there is language of exclusivity or permanence, another interpretation is possible. The language could mean that the right would be permanently or exclusively administered by the state that was allocated the water. Any transfer out of state would require approval of the state following normal state transfer laws. The water right would continue under the jurisdiction of the originating state, and their law would control subsequent transfers. Many compacts have language giving the state where the water is diverted jurisdiction over some aspects of the acquisition or delivery process when the water is used in another state.[150]

B. Is Use Limited by Spatial Restrictions?

Some compacts contain spatial restrictions that may impact water markets. Three different types of spatial restrictions are at issue: transfers or uses are only allowed within a river basin or sub-basin, uses are limited to an irrigation district, and the place of use, not point of diversion or storage, is charged for the allocation. Restricting use to a particular basin is found on the Yellowstone,[151] the Big Blue,[152] the

147. David Elliott Prange, Note, *Regional Water Scarcity and the Galloway Proposal*, 17 ENVTL. L. 81, 82–83 (1986). The proposal would have moved 300,000 to 500,000 acre-feet a year to southern California. The project is no longer active.

148. *See, e.g.*, Sharon P. Gross, Student Article, *The Galloway Project and the Colorado River Compacts: Will the Compacts Bar Transbasin Diversion?*, 25 NAT. RESOURCES J. 935, 953–56 (1985). *See also* David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997); David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 420 (1985); David J. Guy, *When the Law Dulls the Edge of Chance: Transferring Upper Basin Water to the Lower Colorado River Basin*, 1991 UTAH L. REV. 25; James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290 (2001); Marjorie A. Miller, *Water Export: Is It Legal Yet?*, 24 COLO. LAW. 817 (1995); Allen D. Freemyer & Craig M. Bunnell, Comment, *Legal Impediments to Interstate Water Marketing: Application to Utah*, 9 J. ENERGY L. & POL'Y 237 (1989); LaBianca, *supra* note 18.

149. Arizona Water Bank, 43 C.F.R. § 414.1 (2005); *see supra* note 18.

150. *See, e.g.*, Belle Fourche River Compact, art. VII, 58 Stat. 94, 97 (1944); Klamath River Basin Compact, art. VI(B), 71 Stat. 497, 501 (1957); Republican River Compact, art. VIII , 57 Stat. 86, 89 (1943).

151. Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

152. Kansas-Nebraska Big Blue River Compact, art. V, § 5.4, 86 Stat. 193, 197 (1972) (requiring approval of compact administration to export water from the basin).

Snake,[153] and the Klamath.[154] Most of these limitations are silent about transfers between the states that are signatory to the compact. The limitation is generally only explicit as to whether the water is used inside the basin or outside. The Colorado River Compact appears explicit about water transfers between the upper and lower basin states, but sales are allowed between the lower basin states.[155] Only the Klamath has an absolute prohibition against transfers.[156] If transfers outside the basin are allowed to a state that is a compact signatory, then transfers should be allowed under the same conditions to a state outside the basin.[157]

In the Arkansas River Compact between Colorado and Kansas, the restriction is on the transfer of waters outside an irrigation district. If the quantity of water available for use in the district or in Kansas will be materially depleted, then district rights shall not "be transferred to other water districts in Colorado...."[158] Although at first reading this appears to be a spatial limitation on transfers, it probably has little effect beyond applying normal Colorado law to protect Kansas water users. Normally, transfers would not be approved under Colorado law if they would "injuriously effect" other Colorado water users.[159]

Several other compacts have explicit statements making charges against each state's apportionment based on place of use rather than point of diversion or storage. This allows water to be developed in one state for use in another. The Upper Colorado Compact allows water from named tributaries to be diverted or stored in one state and used in another. The tributaries include the La Plata,[160] Little Snake,[161] Henry's Fork,[162] Yampa,[163] and San Juan,[164] with the place of use determining

153. Snake River Compact, art. IV, 64 Stat. 29, 31 (1950) (specifying that Wyoming cannot divert water outside the Snake basin without Idaho's consent and Idaho cannot divert water from the Salt River basin without Wyoming's consent). This would not prevent sale of water between the two states since presumably the state would consent to a transfer outside the basin if the sale was to its own citizens.

154. Klamath River Basin Compact, art. III(B)(2)(a), 71 Stat. 497, 499 (1957) (prohibiting diversions from the upper Klamath basin). The upper basin is partly in California and partly in Oregon. Sales could take place across the state line as long as the place of use remained within the valley.

155. *See* Arizona Water Bank, *supra* note 149.

156. Klamath River Basin Compact, art. III(B)(2), (3), 71 Stat. 497, 499 (1957).

157. Wyoming's statutory additions to the Yellowstone Compact have added criteria for approving out of basin transfers and imply that transfers cannot be made outside the three Yellowstone River Compact states. WYO. STAT. ANN. § 41-12-607(b), (c) (1999).

158. Arkansas River Compact, art. V(H), 63 145, 148–49 (1949).

159. COLO. REV. STAT. ANN. § 37-92-305(3) (West 2003).

160. Upper Colorado River Basin Compact, art. X, 63 Stat. 31, 38 (1949).

161. *Id.* art. XI, 63 Stat. at 38–39.

162. *Id.* art. XII, 63 Stat. at 39–40.

163. *Id.* art. XIII, 63 Stat. at 40.

where the apportionment will be charged. Although this was designed to allow storage and diversion works constructed in one state to benefit users in another state, it may have an impact on transferring other rights. The Compact is quite specific for all of these tributaries of the upper Colorado charging "all consumptive use of the waters of the [named river] and its tributaries shall be charged...to the state in which the use is made."[165] The Animas-La Plata Project Compact adopts the limiting language from the Upper Colorado River Basin Compact.[166] In the Arkansas River Compact (Kansas-Oklahoma), new conservation storage that is constructed subsequent to the Compact "shall be charged against the state in which the use is made."[167] This would not apply to existing rights based on stored water or any right established without storage regardless of when the right was established. In the Arkansas River Basin Compact (Arkansas-Oklahoma), the compact is more restrictive, stating, "Depletion in annual yield...caused by the operation of any water storage reservoir either heretofore or hereafter constructed...shall be charged against the state in which the yield therefrom is utilized."[168] The question is whether "charging against the place where use is made" is a permanent spatial allocation of the water rights associated with the use. For reasons developed below, we feel this is only an initial allocation of the rights.

C. Are Allocation Schedules and Formulas Rigid?

An argument can be made that apportionments at a specific point or points based on gage information permanently fixes an allocation. After all, these allocations are measurable by gages and either a fixed percentage or schedule of delivery allocates an amount.[169] Not all compacts use percentages or delivery schedules.[170] In order for this to be a permanent allocation, no adjustments in water volume should be possible. Most compacts envision circumstances that will require adjustments to what would otherwise be a rigid system. For example,

164. *Id.* art. XIV, 63 Stat. at 40–41.

165. *See, e.g., id.* art. XI(g), 63 Stat. at 39.

166. Animas-La Plata Compact, art. I(B), 82 Stat. 898, 898 (1968).

167. Arkansas River Basin Compact, Kansas-Oklahoma, art. VII(B), 80 Stat. 1409, 1411 (1966).

168. Arkansas River Basin Compact, Arkansas-Oklahoma, art. VI(B), 87 Stat. 569, 571 (1973).

169. *See, e.g., id.* art. IV, 87 Stat. at 570; Rio Grande Compact, arts. III, IV, 53 Stat. 785, 787–88 (1939).

170. *See generally* Zachary McCormick, *Interstate Water Allocation Compacts in the Western United States – Some Suggestions*, 30 WATER RESOURCES BULL. 385, 387 (1994).

many compacts have provisions stating that imported water will not be charged to the state's apportionment under the compact or they will have exclusive use of it.[171] Most of these compacts are silent as to the actual way a state will avoid having this count toward their apportionment, but in several cases it will require a change in the way gage information is interpreted.[172] Also, compacts commonly allow diversion works or storage to be built in one state where the use of water will be in another state.[173] This can change the timing and rate of delivery at the point where the allocation is measured, requiring an accounting adjustment. Other compacts have provisions stating non-use is not abandonment.[174] Somehow "non-use" must be accounted for in percentage allocations and then adjustments must be made when use actually begins. Other compacts envision adjustments as a result of natural conditions or human changes. The Pecos is one of the most complex compacts, with adjustments made for "depletions by man's activities, state line flows, quantities of water salvaged, and quantities of unappropriated flood waters."[175] The Arkansas River Basin Compact (Kansas-Oklahoma) simply requires "proper accounting of new conservation storage capacities...."[176] If a compact contemplates such accounting type adjustments either through specific language or through operational requirements, why not similar adjustments for sales across state boundaries?

171. Kansas-Nebraska Big Blue River Compact, art. V, § 5.4, 86 Stat. 193, 197; Pecos River Compact, art. VII, 63 Stat. 159, 164 (1949); Red River Compact, art. II, § 2.09, 94 Stat. 3305, 3306 (1978); Rio Grande Compact, art. X, 53 Stat. at 790; Upper Colorado River Basin Compact, art. XVII, 63 Stat. 31, 41–42 (1949).

172. *See, e.g.*, Rio Grande Compact, arts. III, IV, 53 Stat. at 787–88 (The compact uses delivery schedules based on measurements at specified gages. The schedules do not include water imported into the basin even though it is measured at the gages.); Upper Colorado River Basin Compact, arts. III, XVII, 63 Stat. at 32–33, 41–42 (Arizona is allocated a fixed amount, the other upper basin states are allocated percentages of the amount remaining, and imports are not considered as compact water. Therefore, the compact anticipated adjusting the percentages in some fashion not explained in the compact.).

173. *See, e.g.*, Belle Fourche River Compact, art VI, 58 Stat. 94, 96–97 (1944); Snake River Compact, art. VII(A), 64 Stat. 29, 32 (1950); Yellowstone River Compact, art. VIII, 65 Stat. 663, 668–69 (1950).

174. Belle Fourche River Compact, art. V(A), 58 Stat. at 96 (a state may divert or store "any unused part of the...percentages allotted to the other, but no continuing right shall be established thereby"); Pecos River Compact, art. X, 63 Stat. at 164 (failure to use is not a relinquishment); Snake River Compact, art. X, 64 Stat. at 33 (failure to use is not a relinquishment); Upper Colorado River Compact, art. XVI, 63 Stat. at 41 (non-use is not a forfeiture or abandonment).

175. Pecos River Compact, art. VI(b), 63 Stat. at 163.

176. Arkansas River Compact, Kansas-Oklahoma, art. VIII(D), 80 Stat. 1409, 1412 (1966).

Compacts that use a point to determine a percentage allocation or a schedule of delivery generally have some mechanism for making adjustments. These provisions are not meant to be rigid or permanent allocations. With flexibility built into the compacts, adjustments for interstate transfers should also be possible. To interpret the compacts differently would require a federal court to infer that Congress intended to allow adjustments for some purposes, but not adjustments for sales across state boundaries. The best way to interpret compacts is that they are initial divisions of water, which can be adjusted under a variety of circumstances. They are not rigid or permanent.

D. How Do Compacts Address Transfers?

Compacts are almost completely silent on transfers. The Costilla Creek Compact is an exception and specifically allows "New Mexico to change the points of diversion and places of use...provided, however, that the rights so transferred shall be limited in each instance to the quantity of water actually consumed on the lands from which the right is transferred."[177] This requirement is no different than current New Mexico law on transfers. The compact is silent on whether the transfer can be across the state boundary into Colorado. As mentioned above, the Arkansas River Compact has language about transfers outside an irrigation district,[178] but this provision does not change the way state law would operate without the compact. The Arkansas River Compact (Kansas-Oklahoma) allows water exports from a sub-basin but is not very specific.[179] Any limitations on the conservation capacity of the sub-basin would be applied to the exported water.

With most compacts silent on transfers, what law should control them? Absent specific language in a compact, the normal state law on transfers should control the transfer of water rights. Without an explicit statement that Congress could affirmatively contemplate, it would be difficult for a court to imply transfers are prohibited. In addition, many compacts have language in them saying that the appropriation doctrine or state law is not changed by the compact.[180] Even without such a

177. Costilla Creek Compact, art. V(a), 60 Stat. 246, 250 (1946), *amended by* 77 Stat. 350 (1963).

178. Arkansas River Compact, art. V(H), 63 Stat. 145, 148–49 (1949).

179. Arkansas River Basin Compact, Kansas-Oklahoma, art. VIII(B), 80 Stat. 1409, 1412 (1966). *See supra* notes 10–16 and accompanying text (discussing spatial limitations).

180. *See, e.g.*, Red River Compact, art. II, § 2.01, 94 Stat. 3305, 3306 (1980) ("Each state may freely administer water rights and uses in accordance with the laws of that state...."). *See also* Colorado River Compact, *supra* note 135, art. IV(c) ("The provisions of this article

provision, the compact would have to directly contradict state law before it would be superceded.[181] With only a few compacts prohibiting transfers out of the basin, state law would allow such transfers in all other instances. Thus, a compact that is silent on transfers could allow in-state transfers under the normal operation of state law. Most state laws also have provisions controlling the way transfers to out-of-state users can be made.[182] If state law has not been superceded by the compact, then transfers outside the state should be possible. To interpret a compact differently, a court would be asked to infer that Congress intended to allow transfers inside a state, but not transfers outside the state. This type of discrimination goes to the very heart of the Commerce Clause.

The counter argument is that, when the compacts were approved by Congress, states did have laws banning exports. Under normal operation of state law, exports would have been prohibited. However, states cannot unilaterally impose barriers to commerce. Congress must do it. Without specific language in the compact banning transfers, Congress has not consented to a barrier to commerce. Silence in the compacts means normal state law will be used for transfers, but not state laws that are unconstitutional. Reinforcing this argument is the specific recognition in some compacts of vested rights.

E. Are Vested Rights Protected?

Several compacts have language stating that vested or present perfected rights are unimpaired or that state law is applicable to the rights.[183] Even if a compact is not specific on this issue, a water right is a property right protected by the Constitution.[184] A compact cannot change existing rights in ways that "take" the right without

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shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.").

181. Several compacts do this by saying non-use is not an abandonment—this is not quite like an individual right since it is the state's compact allocation that cannot be abandoned. See *supra* note 174.

182. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-292 (2003); COLO. REV. STAT. ANN. § 37-81-101(3) (West 2004); IDAHO CODE ANN. §§ 42-203A(5) (2003), 42-222(1) (Supp. 2006); MONT. CODE. ANN. § 85-2-311(4) (2005); NEB. REV. STAT. §§ 46-233.01 (2004) (surface water), 46-613.01 (2004) (ground water); N.M. STAT. ANN. § 72-12B-1 (1978); UTAH CODE ANN. §§ 73-3a-101 to 73-3a109 (Supp. 2006). *See also* Grant, *State Regulation of Interstate Water Export*, *supra* note 23, §§ 48.01 to 48.03.

183. *See, e.g.*, Belle Fourche River Compact, art. V(B), 58 Stat. 94, 96 (1944); Colorado River Compact, *supra* note 135, art. VIII; Sabine River Compact, art. III, 68 Stat. 690, 692 (1954); Yellowstone River Compact, art.V(D), 65 Stat. 663, 667 (1951).

184. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001).

compensation. One of the major elements of a property right is the right to sell it. Selling a water right includes, among other things, the right to transfer its place of use.

The line between regulating property rights and unconstitutional takings is not a clear one.[185] Property values can be reduced to some extent without a taking, but if the value is reduced to zero a taking has occurred.[186] For example, a farmer has a water right. The land the water is being used on suddenly becomes unproductive, and the farmer desires to sell her water right. The water right is very valuable, but the land is worthless. Even if the water is used on the land, nothing of value can be produced. A statute preventing the sale of the water right could be interpreted as taking the entire value of the right, because the water would have no value unless it is transferred to another place of use. The statute would be unconstitutional. Even without a full loss, reducing the value of a right could be considered a restraint of trade. Restraints on trade are often discouraged as bad policy.[187]

Because vested or perfected rights are protected in compacts, transfers are allowed. Without specific language limiting the new location for a transferred right, the transfer can be out of state.

F. Is an Equitable Apportionment a Permanent Allocation?

Compacts generally state that the intent of the compact is to achieve an equitable apportionment.[188] The question here is whether an equitable apportionment is a permanent allocation. The first Supreme

185. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). *See also* Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002); David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441 (2002); Christopher L. Harris & Daniel J. Lowenberg, *Recent Development:* Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, *and* Washoe County v. United States: *A Fifth Amendment Takings Primer*, 36 ST. MARY'S L.J. 669 (2005); Jeffrey A. Wilcox, Note, *Taking Cover: Fifth Amendment Takings Jurisprudence as a Tool for Resolving Water Disputes in the American West*, 55 HASTINGS L.J. 477 (2003).

186. *Lucas*, 505 U.S. at 1015. *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

187. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1 (2000) (passed in 1890 and prohibiting restraints of trade).

188. *See, e.g.*, Arkansas River Compact, art. I(B), 63 Stat. 145, 145 (1949); Bear River Compact, art. I(A), 72 Stat. 38 (1955), *amended by* 94 Stat. 4 (1980); Costilla Creek Compact, art. I, 60 Stat. 246, 246 (1946), *amended by* 77 Stat. 350 (1963); Rio Grande Compact, pmbl., 53 Stat. 785, 785 (1939); Upper Niobrara River Compact, art I, 83 Stat. 86, 87 (1969); Yellowstone River Compact, pmbl, 65 Stat. 663, 663 (1951).

Court case to use the equitable apportionment standard was in 1907, long before the first compact was negotiated.[189] Indeed, the Supreme Court has encouraged states to negotiate compacts rather than bring disputes to the Court.[190] Although an equitable apportionment is the purpose behind most compacts, the term is not defined within the compacts themselves. To understand the meaning of equitable apportionment, we need to look at outside sources. Recognizing that an equitable apportionment by the Supreme Court is not the same as an apportionment under an interstate compact, it is still appropriate to look at the Supreme Court's use of the doctrine because they originated it.

In the first equitable apportionment suit, Kansas farmers claimed that they were being harmed by the upstream withdrawal of water by Colorado irrigators. The Court examined the agricultural production in the two states and determined that, although the amount of water in the Arkansas River had been reduced, the production of corn and wheat in Kansas had generally increased. The Court went on to conclude:

> the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted in the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.[191]

Equality of right does not mean an "equal division of water, but to [an] equal level or plane on which all the states stand, in point of power and right, under our constitutional system."[192] The result was a balancing process with the great benefit to Colorado offsetting the harm in Kansas. Any other conclusion would at most have shifted some irrigation from Colorado to Kansas. The net overall economic gain would have been negligible. The balance favored Colorado at this time because Kansas failed to make a case that they were really harmed by Colorado's actions. However, the Court left open the possibility of future litigation: "if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may

189. Kansas v. Colorado, 206 U.S. 46 (1907). *See generally* Muys, *supra* note 127.

190. *See, e.g.*, Texas v. New Mexico, 462 U.S. 554, 575-76 (1983); Oklahoma v. New Mexico, 501 U.S. 221, 241 (1991).

191. Kansas v. Colorado, 206 U.S. at 114-15.

192. Wyoming v. Colorado, 259 U.S. 419, 465 (1922).

rightfully call for relief...."[193] Although the action was dismissed, Kansas was told new proceedings could be introduced if the "substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of the benefits between the two states..."[194] Equity thus can change with time and the circumstances of use. The doctrine is meant to be flexible.

Kansas tried again in 1943, but once again failed to prove that increased irrigation in Colorado was detrimental to farming in Kansas.[195] The Court described these disputes between quasi-sovereigns as presenting "complicated and delicate questions, and, due to the possibility of future change of conditions, necessitat[ing] expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal constitution."[196] The Court was suggesting the need for a compact because changing circumstances influence evaluations in equity. Equitable apportionments need flexibility.

The need to consider changes in circumstances was incorporated into another Supreme Court decision.[197] In resolving the dispute over the North Platte River, the Court included a re-opener provision in its decree allowing a reconsideration of the apportionment upon a change in conditions.[198] Changes in conditions include both modification to a water supply and new developments that change water availability.[199] However, before the court will re-open an equitable apportionment

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193. Kansas v. Colorado, 206 U.S. at 117.

194. *Id.* Other states have had problems proving injury. *See, e.g.*, Washington v. Oregon, 297 U.S. 517 (1936); New Jersey v. New York, 283 U.S. 336 (1931); Connecticut v. Massachusetts, 282 U.S. 660 (1931).

195. Colorado v. Kansas, 320 U.S. 383 (1943).

> As has been pointed out, despite Colorado's alleged increased depletion, the acreage under irrigation in western Kansas through existing ditches has steadily increased, over the period 1895-1939, from approximately 15,000 acres to approximately 56,000 acres. Moreover, the arid lands in western Kansas are underlaid at shallow depths with great quantities of ground water available for irrigation by pumping at low initial and maintenance cost. There is persuasive testimony that farmers who could be served from existing ditches have elected not to take water therefrom but to install pumping systems because of lower cost.

Id. at 399.

196. *Id.* at 392.

197. Nebraska v. Wyoming, 325 U.S. 589 (1945). *See also* Nebraska v. Wyoming, 515 U.S. 1 (1995); Nebraska v. Wyoming, 507 U.S. 584 (1993). In the 1995 case, Wyoming wanted the Supreme Court to redo its equitable apportionment. Nebraska v. Wyoming, 515 U.S. at 4.

198. Nebraska v. Wyoming, 325 U.S. at 620-23.

199. Nebraska v. Wyoming, 507 U.S. at 590; Nebraska v. Wyoming, 325 U.S. at 620.

decision there must be a showing of substantial injury.[200] As in the cases on the Arkansas River, the Court is reluctant to make a determination in such disputes, preferring that the states work things out themselves. However, it is also quite clear that changing circumstances can create a substantial change in the equities so that a re-balancing is required. Some compacts even have language in them which allows them to be periodically re-examined. For example, the Bear River Compact requires a re-evaluation every 20 years.[201]

Determining which factors to consider in making an equitable apportionment also sheds light on the doctrine. On the Laramie River, in a dispute between Colorado and Wyoming, the Court determined that a fair division of the river would be to apply the appropriation doctrine as if there were no state boundary.[202] The division based on the prior appropriation doctrine was equitable because both states used that doctrine.[203] Wyoming was objecting in part to Colorado taking water out of the watershed, but the Court said such diversions were a common part of the appropriation doctrine recognized by both states.[204]

Strict adherence to the prior appropriation doctrine is not required in all equitable apportionment cases. In *Nebraska v. Wyoming*, the Court expanded the factors considered to include:

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former....[205]

In discussing the kind of decree needed for an equitable apportionment, the court said the decree must deal with current conditions, and if those conditions "substantially change, the decree can be adjusted to meet the new conditions."[206] Thus, change in equities over time is an inherent part of the doctrine of equitable apportionment.

The dispute between Colorado and New Mexico on the Vermejo River sheds additional light on interpreting the doctrine of equitable

200. Nebraska v. Wyoming, 507 U.S. at 593.
201. Bear River Compact, art. XIV, 72 Stat. 38, 47 (1955), *amended by* 94 Stat. 4 (1980).
202. Wyoming v. Colorado, 259 U.S. 419, 468 (1922).
203. *Id.* at 470.
204. *Id.* at 466–67.
205. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).
206. *Id.* at 620.

apportionment.[207] Colorado water users wanted to divert water from the Vermejo River, which was already fully appropriated in New Mexico.[208] Strict application of the rules of priority under the appropriation doctrine would have precluded Colorado's diversions for a future use, but the special master's recommendation to the Supreme Court did not follow this strict interpretation and would have allowed Colorado to divert 4,000 acre-feet of Vermejo River water.[209] The special master justified the recommendation in part because one of the New Mexico users, an irrigation district, was not economically viable and the future uses in Colorado would be of greater benefit.[210] In addition, the special master felt that conservation measures in New Mexico could compensate for part of Colorado's diversion. New Mexico objected to the recommendation and argued that the rule of prior appropriation should be strictly applied. The Supreme Court disagreed with New Mexico's interpretation of the doctrine, calling it "inflexible."[211] Waste, inefficiency, and conservation potential can all be considered in making an equitable apportionment, and the harms and benefits of competing states must be weighed against each other.[212] Although the equity in protecting an existing economy will be considered in this balancing process, future benefits in another state can at times outweigh existing uses.[213] Although the Supreme Court supported the special master's interpretation of the doctrine of equitable apportionment, it found the report did not contain sufficient findings of fact to support the application of the principle.[214] On remand, the special master reaffirmed his recommendation to allow Colorado to divert 4,000 acre-feet per year.[215] However, the Supreme Court rejected the recommendation because Colorado did not prove through clear or specific evidence that conservation measures in New Mexico were feasible.[216]

The doctrine of equitable apportionment as used by the Supreme Court has several clear meanings. The doctrine is meant to be flexible with no single formula or set of criteria applicable to all situations.

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207. Colorado v. New Mexico, 459 U.S. 176 (1982).
208. *Id.* at 177.
209. *Id.* at 180.
210. *Id.* at 180–81.
211. *Id.* at 184
212. *Id.* at 184–86.
213. *Id.* at 187.
214. *Id.* at 182–83.
215. Colorado v. New Mexico, 467 U.S. 310, 315 (1984).
216. *Id.* at 319–20. The conservation measures must be "financially and physically feasible" and "within practicable limits." *Id.* (citing Colorado v. New Mexico, 459 U.S. 176, 192 (1982); Wyoming v. Colorado, 259 U.S. 419, 484 (1922)).

Balancing harms and benefits requires a consideration of all possible factors. Existing uses may not always be protected in this balancing process. Wasteful practices and the potential for conservation will be considered. Equity changes with the passage of time and the change of circumstances. If substantial injury occurs because of changing circumstances, a reapportionment may be appropriate. Because compacts use equitable apportionment as their goal or intent, compact interpretation must take into consideration the Supreme Court's interpretation of the doctrine. This includes changing circumstances that require a rebalancing of the equities. The potential for rebalancing means equitable apportionments are not permanent. One way to rebalance the equities is to let markets operate across state boundaries.

G. Is Ground Water Included?

The last issue to be considered is whether ground water is included in the compact and therefore subject to any restrictions the compact might contain. Only a few compacts mention ground water.[217] If ground water is not included, the normal state laws controlling transfers are applicable. The few compacts that mention ground water will be examined here. In the Klamath Compact, the term "water" does not include "water extracted from underground sources until after such water is used and becomes surface return flow or waste water."[218] Although ground water is mentioned in the Compact, it is specifically excluded from compact requirements until after it has been used on the surface. The Big Blue Compact requires that Nebraska regulate wells within one mile of the river in order to maintain the schedule of delivery. The provision only applies to wells established after November 1, 1968.[219] Pre-1968 wells and wells more than a mile from the river are excluded from compact requirements. The Niobrara Compact recognizes that groundwater use may impact surface flows but delays apportionment until further studies are done.[220] In *El Paso I*, the New Mexico federal district court was asked to evaluate whether tributary ground water was apportioned by the Rio Grande Compact. The court concluded that ground water was not included in the compact, but left the door open for conjunctive management. If the State Engineer does

217. Kansas-Nebraska Big Blue River Compact, art. V, § 5.2(b)(4), 86 Stat. 193, 196–97 (1972); Klamath River Basin Compact, art. II(G), 71 Stat. 497, 498 (1957); Upper Niobrara River Compact, arts. I(A), VI, 83 Stat. 86, 87, 89 (1969).

218. Klamath River Basin Compact, art. II(G), 71 Stat. at 498.

219. Kansas-Nebraska Big Blue River Compact, art. V, § 5.2(b)(4), 86 Stat. at 196–97.

220. Upper Niobrara River Compact, art. VI, 83 Stat. at 89.

manage surface and ground water conjunctively, the management system must be applied "evenhandedly to both New Mexico and out-of-state appropriators."[221] This case will be discussed in more detail below. Compacts, by virtue of their silence, leave groundwater marketing almost entirely under the control of state water laws and Commerce Clause requirements.

As can be seen from the answers to the above questions, few compacts place significant restrictions on the marketing of water across state boundaries. Limitations on water marketing are generally not "expressly stated" or made "unmistakably clear." Congress did not "affirmatively contemplate" provisions that would interfere with the free movement of water across state boundaries. As a result, implying that Congress intended to place a burden on interstate commerce will be difficult in most cases. The Rio Grande Compact is examined below to see if anything can be found that would suggest water transfers are limited.

V. THE RIO GRANDE COMPACT

Allocation of the waters of the Rio Grande between Colorado, New Mexico, and Texas is controlled in part by the Rio Grande Compact.[222] The history behind the Compact is typical of many western rivers. In this case, increased water use for irrigation upstream in Colorado and New Mexico began to affect water users in the El Paso area.[223] In order to gain time to resolve this problem, an embargo was placed on using public lands for diverting Rio Grande water. Pressure from Mexico and U.S. residents around El Paso led to a treaty in 1906[224] and the construction of Elephant Butte reservoir.[225] These two events were the beginning of the apportionment process. Once the embargo was lifted in 1925, increased development led to additional conflicts. In 1929, a temporary compact was negotiated. The 1929 compact did not apportion the river but attempted to restrict new developments and fix

221. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379, 387 (D.N.M. 1983).

222. Rio Grande Compact, 53 Stat. 785 (1939).

223. William A. Paddock, *The Rio Grande Convention of 1906: A Brief History of an International and Interstate Apportionment of the Rio Grande*, 77 DENV. U. L. REV. 287, 294–95 (1999) [hereinafter Paddock, *Rio Grande Convention*].

224. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., May 21, 1906, 34 Stat. 2953 (1906).

225. Elephant Butte was authorized in 1905, before the treaty with Mexico was ratified. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814.

in place current consumptive amounts.[226] The temporary compact did not alleviate tensions as Texas brought litigation against New Mexico.[227] Eventually a final compact was signed in 1938 after significant negotiation.[228]

A. Interpreting the Rio Grande Compact

To understand the Rio Grande Compact we look at the compact language in view of the discussion above to see if there are any indications of a permanent division or spatial restrictions on place of use. The allocation schedules need to be examined to determine whether they are rigid or have built-in flexibility. The Compact also needs to be examined to determine how transfers are addressed and whether vested rights receive specific protection. The meaning of equitable apportionment within the Compact will be discussed as well as whether ground water is included.

The Compact has absolutely no language in it relating to a permanent division of water or that the water is for a state's exclusive use.[229] The Compact was negotiated and signed after the Colorado River Compact and the negotiators would have been aware of the language in that compact specifying that the division between the upper and lower basin was permanent and exclusive. The failure to include language related to a permanent and exclusive allocation means the allocation should be looked upon as an initial allocation with adjustments contemplated.

The Compact also is silent on placing spatial restrictions on where the water can be used. Restrictions on use within the watershed are absent. No limitations on transfers are included. The compact contains no language that would have place of use as the determining factor in making charges against an allocation. With no spatial restrictions on place of use, Rio Grande water should be freely transferable both inside and outside the watershed. This would include transfers outside the state.

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226. Rio Grande Compact of 1929, 46 Stat. 767 (1930).

227. Texas v. New Mexico, 296 U.S. 547 (1935) (mem.).

228. Rio Grande Compact, 53 Stat. 785 (1939). *See generally* Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163 (1974); Paddock, *Rio Grande Convention, supra* note 223; Paddock, *Rio Grande Compact, supra* note 28; S.E. Reynolds & Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 NAT. RESOURCES J. 201 (1974).

229. The words "permanent," "perpetuity," "exclusive," and "solely" are not used in the compact.

The allocation schedules only create an "obligation" to deliver a specified volume of water at a specific point according to the schedule of delivery.[230] The obligation can be changed by operation of a significant number of variables. The delivery obligation for Colorado will be corrected to account for reservoirs constructed after 1937 above Del Norte, Colorado.[231] Adjustments to the Colorado schedule of delivery can be made for changing the location of a gaging station, for depletion of runoff above the gaging stations, and for imports into the basin.[232] Adjustments to the New Mexico schedule of delivery can be made for changing the location of a gaging station, any depletion after 1929 in the natural runoff in New Mexico above Otowi Bridge, depletions in run-off during the summer months caused by works constructed on tributaries between Otowi Bridge and San Marcial after 1937, and any transfers into the basin between Lobatos and San Marcial.[233] Water imported into the basin will be credited to the state that has a right to use the water.[234] Clearly, some type of accounting system is contemplated in order to take into account all of the potential modifications to the schedule. In addition, the compact contemplates over and under delivery, which is accounted for by debits and credits.[235] The only reason given for not increasing or decreasing the schedule of delivery is to accommodate deliveries to Mexico.[236] The two schedules for delivery are meant to be flexible and to account for changes in the system. An accounting system is required to accommodate these changes. There is no reason this same accounting system could not be used to account for sales of water between the different divisions on the river.

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230. Rio Grande Compact, arts. III, IV, 53 Stat. at 787-88. The Compact specified two key points at which to measure delivery obligations: (1) Colorado is obligated to deliver water to Lobatos, near the Colorado border, based on a schedule derived from the inflows into the basin from the Rio Grande (measured at Del Norte) and tributaries of the Conejos River; (2) New Mexico was originally obligated to deliver water to San Marcial above Elephant Butte based on a schedule derived from the flows at Otowi Bridge. *Id.* In 1948, the San Marcial gaging station was abandoned. New Mexico's obligation is now based on measurements at a gaging station below Elephant Butte Dam. Rio Grande Compact Comm'n, Resolution Changing Gaging Stations and Measurements of Deliveries by New Mexico (1948), *available at* http://www.ose.state.nm.us/PDF/ISC/ISC-Compacts/Rio_Grande_Compact.pdf.

231. Rio Grande Compact, art. III(3), 53 Stat. at 787. Also, New Mexico's obligation will be corrected for the operation of reservoirs constructed after 1929 for reservoirs between Lobatos and Otowi Bridge. *Id.* art. IV(5), 53 Stat. at 788.

232. Id. art III(4), 53 Stat. at 788.

233. *Id.* art. IV(6), 53 Stat. at 788.

234. *Id.* art. X, 53 Stat. at 790.

235. *Id.* art. VI, 53 Stat. at 789.

236. *Id.* art. XIV, 53 Stat. at 792.

The Compact is silent on transfers. This means that normal state water law will apply.[237] With the *Sporhase* decision, that means transfers outside the state must be allowed under substantially the same circumstances as transfers inside the state. *Sporhase* and subsequent decisions do allow some differences between in-state and out-of-state transfer as will be discussed below in the section on state laws. The point is that the Rio Grande Compact says nothing at all about a transfer process.

Even though the Rio Grande Compact is silent on protecting vested rights, state law will give them protection. A water right is a property right.[238] The right to change the place of use of water is inherent in the right and is an incident of property ownership.[239] Limiting the location of water transfers and thus restricting potential buyers is not something property rights holders would generally support. Restricting transfer locations is a restraint on the alienation of property, which is not done lightly.[240] In addition, restricting transfers could result in an unconstitutional taking of property as discussed above.

The Compact does state that the purpose of the Compact is to achieve an equitable apportionment between the states.[241] As was discussed above, the allocation under an equitable apportionment can change as circumstances change. Such divisions are not permanent. The ability to market water across a state boundary is one way of making the adjustments equity might require.

The question remains as to whether ground water is included in the compact. A federal decision gives us an answer to that question.[242] The decision came shortly after the *Sporhase* decision concluded that water was an article of commerce.[243] In *City of El Paso v. Reynolds*, El Paso applied for a permit to take ground water from a New Mexico aquifer.[244] The New Mexico State Engineer refused to grant the permit, saying the Rio Grande Compact permanently apportioned the Rio Grande between

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237. "[S]tate laws continue to operate if they are consistent with the compact but not if they are not." Grant, *Water Apportionment Compacts*, *supra* note 127, § 46.04.

238. *See, e.g.*, Bayou Land Co. v. Talley, 924 P.2d 136, 150 (Colo. 1996); Nielson v. Newmyer, 228 P.2d 456, 458 (Colo. 1951); Posey v. Dove, 257 P.2d 541, 547 (N.M. 1953); N.M. Products Co. v. N.M. Power Co., 77 P.2d 634, 641 (N.M. 1937).

239. Clodfelter v. Reynolds, 358 P.2d 626, 630 (N.M. 1961).

240. Although water statutes are generally silent on restraints on the alienation of property, the concept does come up in other contexts. *See, e.g.*, COLO. REV. STAT. ANN. § 38-30-165 (West 2000) (real estate).

241. Rio Grande Compact, pmbl, 53 Stat. 785, 785 (1939).

242. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379, 387 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984).

243. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 952 (1982).

244. *El Paso I*, 563 F. Supp. at 381.

Texas and New Mexico including hydrologically connected ground water.[245] The court disagreed, saying that the compact did not include hydrologically connected ground water. In fact, the compact makes no mention of ground water at all.[246] In New Mexico, thousands of wells had been drilled after the compact was signed, without taking into account the compact requirements. New Mexico had not linked ground water to surface water in its permitting process until the Texas application was made. The failure to do so was a sign of discrimination.[247] The court decided a Commerce Clause violation occurred when the statute allowed a New Mexico citizen to get a permit but El Paso could not. The absence of any reference to ground water in the Compact means groundwater transfer laws cannot be excluded from Commerce Clause scrutiny through use of the Compact.[248]

As can be seen from this discussion, the Rio Grande Compact does not have "expressly stated" limitations on out-of-state transfers or "unmistakably clear" limiting language. Without this as an element, Congress could not have "affirmatively contemplated" a potential burden on commerce when they approved the Compact. To determine if there is anything that might change this evaluation, we will examine the court cases that interpret the Compact.

B. Court Interpretations of the Compact

Several decisions have interpreted the Compact, but most do not shed much light on the issue presented here. Many of the cases that discuss the Compact say that it creates an "obligation" to deliver water to the Colorado/New Mexico border[249] or to Elephant Butte Reservoir.[250] This reference to an "obligation" to deliver is simply a reflection of the language of the Compact and does nothing to define what it means. As discussed above, an obligation to deliver is not a permanent and

245. *Id.* at 383.

246. *Id.* at 387.

247. *Id.* at 387–88.

248. *Id.* at 388–92.

249. *In re* Rules and Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and their Tributaries (*Conejos Basin*), 674 P.2d 914, 917 (Colo. 1983) (the compact creates "separate obligations for deliveries" from the Conejos, a tributary of the Rio Grande, and the main stem of the Rio Grande in Colorado); Cabeza de Vaca Land & Cattle Co. v. Babbitt, 58 F. Supp. 2d 1226, 1228 (D. Colo. 1999); Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist., 734 P.2d 627, 629 (Colo. 1987).

250. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 849 P. 2d 372, 378 (N.M. Ct. App. 1993); United States v. City of Las Cruces, 289 F.3d 1170, 1185 (10th Cir. 2002).

unalterable condition. Although one case does refer to the Compact as being "permanent," the case could be interpreted as referring to the permanence of the compact rather than making the allocation specified in the compact permanent.[251] The court cases also refer to the intent of the Compact as creating an equitable apportionment between the states.[252] An equitable apportionment either through a compact or by Supreme Court decision takes precedence over rights created by state law,[253] and strictly following the priority system created under state law may not be possible.[254] As discussed above, equitable apportionment is meant to be a flexible doctrine.

One case does specifically interpret relevant parts of the compact.[255] The *El Paso* decision discussed above also addressed the question of the compact's apportionment of the river. The court held that the compact did not apportion the water between Texas and New Mexico. In the compact, New Mexico is obligated to deliver water at Elephant Butte Reservoir, 100 miles upstream from the Texas/New Mexico border. Water from the reservoir is used to irrigate land in Texas (43%) and New Mexico (57%). There is no explicit language in the Compact that apportions a specified portion of water to Texas and Texas alone. The court said that the Compact apportions water between "Colorado and the downstream states; it then apportions the remaining water between the New Mexican appropriators above Elephant Butte and the New Mexican, Texan and Mexican appropriators below Elephant Butte."[256] The actual allocation to Texas is made according to a contract between the Bureau of Reclamation, which operates Elephant Butte, and the farmers of the Texas irrigation district.

The case also discusses whether ground water is included in the Compact. El Paso wanted to export ground water from New Mexico,

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251. *Conejos Basin*, 674 P. 2d at 918. This case also says the "compact fixes Colorado's overall obligation in the equitable interstate apportionment of the Rio Grande at a level intended to protect water use as it existed from 1928-1937." *Id.* at 919. Fixing an obligation at a level of use that existed when the compact was signed is not the same as saying existing water rights cannot be sold to the highest bidder. This was a dispute internal to Colorado and the issue was much more restrictive. Similar language of permanence is found in the historic record of negotiation cited in *El Paso I*. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379, 385 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984).

252. *Conejos Basin*, 674 P.2d at 922-23; *City of Las Cruces*, 289 F.3d at 1176; United States v. Elephant Butte Irrigation Dist., No. CV 97-803 JP/RLP, 2000 U.S. Dist. Lexis 17421, at *8 (D.N.M. Aug 22, 2000).

253. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938).

254. *Conejos Basin*, 674 P. 2d at 922-23; Colorado v. New Mexico, 459 U.S. 176, 180, 183-84 (1982); Nebraska v. Wyoming, 325 U.S. 589, 618 (1945); *Hinderlider*, 304 U.S. at 98.

255. *El Paso I*, 563 F. Supp. 379.

256. *Id.* at 385.

some of which was hydrologically connected to the Rio Grande. New Mexico had a statute preventing water exports. The court found the export ban to be facially discriminatory and thus subject to the strictest scrutiny.[257] Although the court recognized that conservation of water was important to New Mexico, they nonetheless found the statute unconstitutional.[258] New Mexico also argued that the Compact effected an equitable apportionment of the ground water downstream from Elephant Butte Dam. However, the compact makes no mention of ground water, and New Mexico had allowed thousands of wells to be developed without considering the impact on compact waters.[259] The court recognized the ability of New Mexico to manage surface and ground water conjunctively but stressed that the management must be applied evenhandedly to in-state and out-of-state interests. In a subsequent decision in the same court, this interpretation of the compact was reaffirmed.[260]

VI. STATE TRANSFER LAWS

After *Sporhase*, states began to modify their transfer statutes to comply with Commerce Clause requirements.[261] The Court said that there were circumstances that would allow a state to restrict out-of-state transfers, but the circumstances allowing such restrictions were not clearly defined. The Court gave some clues, however, as to what they meant. The *Sporhase* decision upheld part of Nebraska's law requiring the transfer to be reasonable, not contrary to conservation, and not detrimental to public welfare.[262] The Court also said that a state could favor its own citizens in time of shortage.[263] Even a total ban on exports might be acceptable under some circumstances if needed for conservation and preservation.[264] With these somewhat fuzzy guidelines, states began to modify their water laws controlling exports.

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257. *Id.* at 388.

258. *Id.* at 392.

259. *Id.* at 387.

260. City of El Paso v. Reynolds (*El Paso II*), 597 F. Supp. 694, 707 (D.N.M. 1984).

261. *See generally* Grant, *State Regulation of Interstate Water Export*, *supra* note 23; Stephen D. Harrison, Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249 (1981).

262. Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 944. The case went on to use the *Pike* balancing test to determine the validity of this statute. *Id.* at 954 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

263. *Sporhase*, 458 U.S. at 957.

264. *Id.* at 958. *See also* City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984) (the health of the economy is not an acceptable reason). *But see* Maine v. Taylor, 477 U.S. 131 (1986) (a ban on baitfish upheld).

Several general approaches have been taken by the states. Clearly, reasonableness, conservation, and public welfare criteria will be upheld unless these standards are applied in a discriminatory fashion. New Mexico,[265] Montana,[266] Arizona,[267] Idaho,[268] Utah,[269] Colorado,[270] and Nebraska[271] all have statutes that use these criteria or a modified version of them. Some states now require legislative approval of all exports.[272] Other states have attempted to limit transfers to the watershed in which the water originates.[273] New Mexico used a time limit to deny El Paso's appropriation of New Mexico water. El Paso would not need the water for 40 years, which was beyond New Mexico's statutory limit on appropriations for future use.[274] The requirements of Colorado and New Mexico are examined in more detail to see how they would stand up to Commerce Clause scrutiny.

Colorado statutes allow in-state transfers with prior judicial approval.[275] The water court will not grant approval if other water right holders will be injured.[276] Two issues must be addressed in Colorado before water transfers are allowed: the historic beneficial use of water and conditions to be imposed to prevent injury to other users.[277] Colorado has also attempted to restrict exports with its water export statute and by many other means.[278] For example, Colorado has

265. N.M. STAT. ANN. §§ 72-12B-1, 72-5-23 (1978).

266. MONT. CODE ANN. §§ 85-2-141(7) (2005), 85-2-311(4) (2005), 85-2-316(4) (2005).

267. ARIZ. REV. STAT. ANN. § 45-292 (2003).

268. IDAHO CODE ANN. §§ 42-203A(5) (2003), 42-222(1) (Supp. 2006), 42-401(1) (2003).

269. UTAH CODE ANN. § 73-3a-101 (Supp. 2006).

270. COLO. REV. STAT. ANN. § 37-81-101(3)(a-c) (West 2004); *see also* Guy, *supra* note 148; Miller, *supra* note 148.

271. NEB. REV. STAT. § 46-613.01 (2004).

272. IDAHO CODE ANN. § 42-108 (2003); MONT. CODE ANN. § 85-2-402(5-6) (2005); OKLA. STAT. ANN. tit. 82, § 1085.2(2) (West Supp. 2007); OR. REV. STAT. § 537.810 (2003); S.D. CODIFIED LAWS § 46-5-20.1 (2004); WYO. STAT. ANN. § 41-3-115 (1999).

273. ALASKA STAT. § 46.15.035 (2006); OKLA. STAT. ANN. tit. 82, § 105.12(4) (West Supp. 2007). *See also* sources cited *supra* note 10.

274. N.M. STAT. ANN. § 72-1-9 (1999).

275. *See generally* James N. Corbridge, Jr., *Historical Water Use and the Protection of Vested Rights: A Challenge to Colorado Water Law*, 69 U. COLO. L. REV. 503 (1998).

276. COLO. REV. STAT. ANN. §§ 37-90-102, 37-92-103, 37-92-302, 37-92-305 (West 2004 & Supp. 2006).

277. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P. 2d 46, 53 (Colo. 1999).

278. When developers proposed to take ground water from the San Luis Valley's closed basin and ship it to the front range, residents of the valley rallied and did everything possible to prevent the export. Quillen, *supra* note 4. Two initiatives designed to facilitate the out-of-basin move were defeated at the polls. Earlier threats to the valley's water had also occurred. In order to prevent threats of this nature and to avoid potential Commerce Clause problems, title XV of the Reclamation Projects Authorization and Adjustments Act

additional requirements for out-of-state exports. The exports must be consistent with reasonable conservation and they must not deprive the citizens of Colorado of any water apportioned by compacts or court decrees.[279] The reasonable conservation provision is acceptable under the *Sporhase* decision, and a variant of this has been adopted in many states.[280] The provision stating that Colorado citizens cannot be deprived of water apportioned by compact or judicial decree is more problematic. The state cannot enlarge the rights granted by decree or compact by this provision. Other provisions attempt to limit groundwater exports by saying any such export will be credited to compact delivery

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of 1992 attempted to limit the removal of water from the valley. Pub. L. No. 102-575 § 1501, 106 Stat. 4600, 4663 (1992). Entitled "San Luis Valley Protection, Colorado," the provision states:

> (a) No agency or instrumentality of the United States shall issue any permit, license, right-of-way, grant, loan or other authorization or assistance for any project or feature of any project to withdraw water from the San Luis Valley, Colorado, for export to another basin in Colorado or export to any portion of another State, unless the Secretary of the Interior determines, after due consideration of all findings provided by the Colorado Water Conservation Board, that the project will not: (1) increase the costs or negatively affect operation of the Closed Basin Project; (2) adversely affect the purposes of any national wildlife refuge or Federal wildlife habitat area withdrawal located in the San Luis Valley, Colorado; or (3) adversely affect the purposes of the Great Sand Dunes National Monument, Colorado.
>
> (b) Nothing in this title shall be construed to alter, amend, or limit any provision of Federal or State law that applies to any project or feature of a project to withdraw water from the San Luis Valley, Colorado, for export to another basin in Colorado or another State. Nothing in this title shall be construed to limit any agency's authority or responsibility to reject, limit, or condition any such project on any basis independent of the requirements of this title.

Id. § 1501(a). On its face this appears to be a significant limitation on the transfer of water outside the state. Federal agencies cannot grant a right of way or issue a permit if the listed adverse conditions arise. However, the conditions are essentially meaningless as additional constraints on water transfers. Although this provision might have some impact on new water rights established in the closed basin, it will have no impact on the sale of existing rights. In addition, this provision is not likely to pass Commerce Clause muster. In order for a federal exception to the Commerce Clause to apply, the federal statute must be affirmatively considered by Congress, and there must be a clear affirmation of intent to allow a burden on commerce. Although the language of the bill seems clear, the manner of its passage indicates that the provision received no real consideration by Congress. This particular provision is buried along with dozens of others in an authorization bill. Even the title is misleading if the intent of the provision is really to prevent water exports.

279. COL. REV. STAT. § 37-81-101(3)(a–c) (2004).

280. N.M. STAT. ANN. § 72-12B-1 (1978); Grant, *State Regulation of Interstate Water Export*, *supra* note 23, § 48.03(c)(1).

requirements. Colorado cannot unilaterally add such restrictions to compacts.[281]

Before approving a transfer outside the state, the Colorado State Engineer must determine that "[t]he proposed use of water outside this state is expressly authorized by interstate compact...."[282] This is an attempt to make compact allocations permanent by saying water exports can only occur if the compact expressly authorizes the export. [283] This provision will not withstand Commerce Clause scrutiny. The exception to the Commerce Clause requires Congress to consent to an impairment of commerce. Congress does not have to expressly authorize an export from a state as required by Colorado's statute. Colorado has not signed any compacts expressly authorizing out-of-state transfers. The only compacts Colorado has signed expressly authorizing a limitation on commerce is the language of permanence found in the compacts on the Colorado River. A similar statute states that water transported to a destination outside the state will only be allowed if the volume exported is attributed to the importing state's compact allocation.[284] This requirement is another attempt to write into the compact a provision violating the Commerce Clause. The Commerce Clause requires an express statement by Congress before an exception to it is applicable. A Colorado statute cannot put language into a compact that was not there when Congress consented to the compact.

In New Mexico, some transfer provisions are similar. Out-of-state transfers are allowed, but they are conditioned. New Mexico allows transfers with the approval of the State Engineer.[285] The transfers cannot be detrimental to conservation or the public welfare.[286] Transfers are not allowed if injury will occur to others.[287] In addition to the regulations on in-state transfers, New Mexico has requirements for out-of-state transfers. These include looking at the New Mexico water supply, demand, shortage potential, and whether the water could be used to satisfy water shortages in New Mexico. As part of the transfer process, the water supply and demand in the importing state will also be examined.[288] Although the statute was challenged in federal court and

281. COL. REV. STAT. § 37-81-103 (2004). *See also* Robert C. Kerr, *Water Export*, 13 COLO. LAW. 1004 (1984); Richard C. Cauble, Comment, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?*, 53 U. COLO. L. REV. 655, 671 (1982).

282. COL. REV. STAT. § 37-81-101(3)(a) (2004).

283. *See generally* Miller, *supra* note 148; Kerr, *supra* note 281.

284. COL. REV. STAT. § 37-81-103(1) (2004).

285. N.M. STAT. ANN. §§ 72-5-23 to 72-5-25, 72-5A-8, 72-12-7 (1978 & Supp. 2006).

286. N.M. STAT. ANN. § 72-5-23 (1978).

287. N.M. STAT. ANN. §§ 72-5-23, 72-5-25 (1978).

288. N.M. STAT. ANN. § 72-12B-1(D)(5-6) (1978).

was found constitutional on its face, the statute would have more difficulty in preventing the transfer of existing rights. The state subsequently imposed conservation and public welfare limits on in-state transfers.[289] Still, the state cannot use these provisions to discriminate against out-of-state transfers.

VII. ANALYSIS

Without explicit language in a compact, a court must be willing to imply that the parties to the compact intended that there should be no exports across state boundaries and that Congress understood that was their intent when the compact was approved. This may be too much of a stretch for a court when a constitutional provision will be abrogated. In order to imply that a compact allows a permissible burden on interstate commerce, the court would have to imply that the division of water found in the compact was meant as a permanent, immutable allocation rather than an initial allocation. In general, when a compact is put into place, it defines the amount of water that is to go to each state and the division of water between rights holders in each state is left to state law. Therefore, if a private water right holder in an upstream state wants to sell water to someone, it is the law of the upstream state that applies. The sale of water within a state must have been contemplated during compact negotiations because all western states have some kind of process in place for the sale of water rights. However, if the state has export bans or does not allow the water to be moved outside a watershed, they run into constitutional problems with the Commerce Clause as discussed above. Under normal state law then, there are currently no statutory prohibitions against the movement or sale of water across a state boundary. If export bans are not allowed under state law, how can they be implied in a compact that has absolutely no language on sales or transfers?

The counter argument is that when the compacts were signed, states had export bans. It is possible that some states felt the compact was a permanent division of water without the possibility of any future transfer across state boundaries. Often, however, the states said their intent was to achieve an equitable apportionment of water. The Supreme Court developed the doctrine of equitable apportionment as a means to divide water between two states. This doctrine is flexible since equity changes with time and circumstances.[290] If the division of water in a compact is based on this concept, then a permanent inflexible division

289. N.M. STAT. ANN. § 72-5-23 (1978).
290. Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

could not have been intended. Regardless of the intent of the states signing a compact, it is the intent of Congress that is the key. The Commerce Clause can only be burdened by Congress, not the states. A permanent division of water by Congress would require an acceptance of the following possibilities. A farmer in an upstream state can sell water to anyone inside their state. But she cannot sell water to her downstream neighbor across a state line in the same watershed. A private party from a state that is not signatory to the compact can buy compact water but not those people living in a state that is a party to the compact. This seems a strange set of outcomes, but this is the logical result if compacts are implied to be permanent divisions. Surely Congress did not intend this when approving compacts unless there is specific language indicating it. The Commerce Clause is designed to encourage free trade, and Congress would not impede this right without serious consideration of the consequences.

The better argument is that the compacts provided an initial allocation of water between states. After this allocation is made, state water law controls any sale or transfer of the water right. Sales can take place across state boundaries, but the law of the state where the right was established controls the transaction. Even after the water is transferred to another state, the originating state still controls the use of water and the out-of-state user must comply with the state law where the right was obtained. In evaluating whether New Mexico could control El Paso's use of the water, the court in *El Paso I* states, "Interstate usage of water can be restricted and controlled to the same extent as intrastate usage."[291] Transfers out of state should be treated as any other transfer and should not count against the downstream state's compact allocation. To allow any other interpretation would create serious harm to interstate water markets. An example may be helpful.

To simplify this hypothetical example, only two states have signed the compact—Upstream and Downstream. The compact has been approved by Congress. When the compact was signed, both states had laws prohibiting exports of water. The method for allocating the river's water between the two states is based on a percentage of the river's flow as it passes a given point. The percentage for each state is the same every year, but the actual volume going to each state varies with the volume of water in the river. No mention is made of ground water in the compact. The state named Upstream uses almost all its allocation for irrigated agriculture. Typical production is potatoes, wheat, barley, and alfalfa.

291. City of El Paso v. Reynolds (*El Paso I*), 563 F. Supp. 379 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984).

Those farmers who have low priorities will use their water for irrigated pasture in the years when there is enough water, and in dry years they will not irrigate anything. Since the compact was signed, many permits for the use of ground water have been granted and some groundwater rights have been sold.

In Downstream there is a large city that has a high growth rate and a shortage of water. A similar city exists in Upstream, but it is outside the watershed of the compact river. In order to protect farmers' water from raids by the cities, a law is passed in Upstream prohibiting the export of water from the basin. The reason for the law is to protect the farm economy of the basin. The city in Upstream makes a deal to buy the water rights of a small irrigation district located in Upstream. The city in Downstream applies for a transfer of Upstream water rights to take ground water from an aquifer hydrologically connected with the compact river. A city in a state that is not a party to the compact also wants to buy water from an Upstream irrigation district. The cities all apply to Upstream's State Engineer for a transfer of the water rights and are denied permission. Upstream's city and the city from the state not party to the compact are denied because water cannot be transferred outside the basin. Downstream's city is denied because the compact allegedly made a permanent division of the river, and the ground water is hydrologically connected to it. All three cities sue.

If a court were presented with this case, the outcome would probably be as follows. The prohibition against water transfers outside the basin is blatantly unconstitutional unless it is a federal statute. The prohibition was done for economic protectionism, which is completely contrary to the Commerce Clause. It is discriminatory when a city outside the state applies for a transfer and is refused, especially when transfers within the basin are allowed. With the ban on exports outside the basin found unconstitutional, the city in Upstream would no longer have a barrier to water movement.

The city inside the basin but located in Downstream should be able to get a permit to transfer ground water. Ground water is not explicitly mentioned in the compact, and groundwater rights have been sold inside Upstream. The only hope Upstream has is if the court implies that ground water was included in the compact. As was seen in the *El Paso* case, the courts are reluctant to imply that compacts have provisions that abrogate the Commerce Clause. Compacts need to be explicit on this, but they seldom are.

The remaining possibility is to determine what would happen if the city in Downstream applied for a permit to transfer a water right covered by the compact. The court would have to imply that Congress intended no sales were to take place across a state boundary when it

approved the compact. Because sales are allowed under state laws, something explicit is needed in the compact.

Courts have also been reluctant to put constraints on the alienation of property. This would be the result if a prohibition on sales across state borders were implied. In our hypothetical example, farmers are being offered money by the downstream city for their water rights. If the city offers $5,000 an acre-foot to buy water and there is no local offer or the offer is only $100 an acre-foot, then farmers will want to take the highest offer. If the compact makes a permanent division of water, they would not be able to do so because such transfers are not allowed under the compact. The farmer would not be able to sell for $5,000 and would be limited to $100 or no sale at all. Courts should be very reluctant to imply such limitations in a compact because this would be a constraint on the alienation of property. If the goal is improving efficiency, such limitations are contrary to achieving this goal.

On the other side, one could argue that nothing explicit was put in the compact because both states had laws prohibiting exports, but the intent was implicitly there because of the statutes. The fact that the statutes were both unconstitutional would probably be enough to defeat this argument. Even if the states intended the division to be permanent, saying Congress intended to override the Commerce Clause by approving the compact is a reach. Sales of water rights were contemplated when the compact was signed as is allowed under each state's laws. If the sales were to be limited to in-state sales or limited to sales within the basin, the compact should be explicit.

No insurmountable administrative hardship will occur in Upstream as a result of such a sale. Upstream currently has an obligation to deliver a certain volume of water as specified by the terms of the compact. After the sale, that obligation will continue. If the sale is to the Downstream city, the water delivered will be the volume specified in the compact plus the volume of water allowed to be transferred under Upstream's water law. The priority date will remain the same and any future transfers must be in accordance with Upstream's laws. This is what would happen if any sale were made.

VIII. CONCLUSION

Transfers like the one discussed in the hypothetical example will be attempted in the future. Because the stakes are so high, strong resistance is likely to be met. The actual outcome is not completely certain and will depend on the language of the compacts as well as the intent of Congress and the state signatories as interpreted by the courts. The better argument in most instances will be that the compacts were an

initial division of water between states, and state law on water transfers should control subsequently. Today, state law cannot prohibit transfers across state lines except under very narrow circumstances. With that said, the example above remains hypothetical and so does the solution suggested. Until this issue is clarified in court, the resulting uncertainty can hinder water marketing. If the interpretation here is correct, compacts will not be a barrier to marketing water in the future.