

## A Different Front Arises: Conservation for Interstate Commerce

City of El Paso By & Through Pub. Serv. Bd. v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984) (El Paso II)

If applied in a manner which does not unduly burden interstate commerce, regulation of ground water appropriations for purpose of promoting conservation is constitutionally permissible.

U.S.C.A. Const. Art. 1, § 8, cl. 3.

A state may not limit water exports merely to protect local economic interests; this is true even though the health of the state's economy has a direct bearing on the public welfare of its citizens. When state exercises a preference for its citizens under the rubric of protecting their public welfare and economic interests are implicated, the resulting burden on interstate commerce must be weighed against the putative, noneconomic local benefits.

If public welfare criterion is used to effectuate simple economic protectionism, a per se rule of invalidity under the commerce clause will be applied.

If public welfare criterion is used to promote a legitimate purpose with only incidental burdens on interstate commerce, court must try to accommodate the competing local and national interests; if equally effective, less burdensome alternatives are available, state must use them.

A state may favor its own citizens in times and places of shortage; this preference must be limited to times and places where its exercise would not place unreasonable burdens on interstate commerce relative to the local benefits it produces.

[Now the in-state local effects of water shortages caused through climate change where the local needs are legally given a preference in use of available water, such must be weighted against the burdens that it imposes on interstate commerce.] Proximity in time of a projected water shortage, the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage are all factors which must be weighed when balancing local interests served by exercise of a preference in use of available water against burdens it places on interstate commerce.

Since six factors listed in export statute which state engineer must consider when acting upon any application to export ground water informed determination whether burdens on commerce imposed by state ground water regulation are reasonable or unreasonable, it could not be said that consideration of those factors by the state engineer when acting upon an application for export impermissibly discriminated against interstate commerce. NMSA 1978, § 72-12B-1, subd. D.

Since city had not filed any applications to appropriate surface water or ground water from undeclared basins, nor did it presently seek a permit for a supplemental well, city had no standing to attack application of conservation and public welfare criteria to appropriations from those sources. ; NMSA 1978, § 72-12B-1, subds. A, C.

City and other plaintiffs had standing to challenge application of conservation and public welfare criteria to their attempts to export water from domestic and transfer wells and that issue was ripe for adjudication. Utilization of conservation and public welfare criteria when acting on applications to export water from domestic and transfer wells but not when acting on applications for in-state transfers and domestic wells created an unconstitutional burden on

interstate commerce.

Statute imposing a two-year moratorium on new appropriations of ground water hydrologically connected to the Rio Grande below Elephant Butte on its face disclosed an impermissible, discriminatory purpose, namely, to prevent plaintiff city from obtaining any ground water from New Mexico, and thus it violated the commerce clause.

### **Ponderosa Ridge:**

Ponderosa Ridge LLC v. Banner Cnty., 250 Neb. 944, 554 N.W.2d 151 (1996)  
(Nebraska company appealed denial of its application for permit to transfer ground water from in-state well to out-of-state by the director of Department of Water Resources.)

The application requested a transfer of a maximum of 1,532 acre-feet of water per year at a rate of no more than 1,368,000 \*947 gallons per day. The water was to be used to flush pig production facilities and then stored in the lagoon upstream from Ponderosa Ridge's well, which is located approximately 50 feet from the Nebraska–Wyoming border. Water from the lagoon was then to be used in center-pivot systems to irrigate land in Wyoming. The well was to be continuously operated 24 hours a day, 356 days a year, and was to provide a "cone of depression" which would trap any leakage from the lagoon and prevent any pollution or contamination of the aquifer downstream.

In entering his order of denial, the director determined that granting the permit would result in a beneficial use of the water, but that a supply developed from sources in Wyoming would be sufficient to meet the needs of Ponderosa Ridge, that the negative effects the withdrawal of ground water might cause could not be quantitatively determined, and that the expected impacts upon future demands were unclear.

Statute requiring permit from Department of Water Resources to withdraw ground water and transport it to another state did not impermissibly delegate legislative power to director as statute provided reasonable limitations and standards for carrying out duties; statute required director to consider whether proposed use was beneficial use of ground water, the availability to applicant of alternative sources of surface or ground water, and whether proposed withdrawal would have negative effect on surface or ground water supplies needed to meet reasonable future demands

Water is an article of commerce, implicating the commerce clause of the U.S. Constitution.  
U.S.C.A. Const. Art. 1, § 8, cl. 3.

Fact that water is an article of commerce and that Congress has not exercised federal legislation in the area does not foreclose state regulation of its water resources, or of the uses of water within the state, or of interstate commerce in water.

Where statute regulates water even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. Nebraska common law forbids the owner of land from extracting ground water under his land in excess of a beneficial use.

Generally, it is party asserting the affirmative of an issue that has burden of proving that issue.

(c)Discrimination Against Interstate Commerce

**Relying on *Sporhase v. Neb.***, In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982), the U.S. Supreme Court held that water was an article of commerce, implicating the Commerce Clause of the U.S. Constitution. See U.S. Const. art. 1, § 8, cl. 3. However, the fact that water is an article of commerce and that Congress has not exercised federal legislation in the area "does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water." 458 U.S. at 954, 102 S.Ct. at 3463. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), the U.S. Supreme Court provided the general rule for determining the validity of state statutes affecting interstate commerce:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

... Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An \*957 exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of § 46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin v. Orbeck*, 437 U.S. 518, 534[, 98 S.Ct. 2482, 2492, 57 L.Ed.2d 397] (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533[, 69 S.Ct. 657, 662, 93 L.Ed. 865] (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, e. g., *Wyoming v. Colorado*, 353 U.S. 953[, 77 S.Ct. 865, 1 L.Ed.2d 906] (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin v. Orbeck*, *supra*, at 533-534[, 98 S.Ct. at 2491-2492].

**Ponderosa Ridge at page 958-962: El Paso cases** Two other cases involving similar issues, *City of El Paso v. Reynolds*, 563 F.Supp. 379 (D.N.M.1983) (El Paso I), and *City of El Paso v.*

Reynolds, 597 F.Supp. 694 (D.N.M.1984) (El Paso II ), are of note. In El Paso I, the city, located in the State of Texas, sought to transfer ground water from New Mexico to Texas. New Mexico denied the city's applications on the ground that the New Mexico Constitution precluded utilization of New Mexico ground water outside the borders of the state. A New Mexico statute also expressly prohibited the transport of ground water from New Mexico for use in another state.

The city then sought a federal court declaration that New Mexico's ground water embargo was unconstitutional and sought an injunction against its enforcement. The federal district court held that the ground water embargo violated the Commerce Clause of the U.S. Constitution and enjoined the defendants from enforcing it. The court reasoned that as New Mexico's embargo barred the export of ground water \*959 absolutely, it was an explicit barrier to interstate commerce and subject to the strictest scrutiny; i.e., the defendants were required to "demonstrate that the embargo serve[d] a legitimate local purpose, that it [was] narrowly tailored to that purpose and that there [were] no adequate nondiscriminatory alternatives." El Paso I, 563 F.Supp. at 388. The defendants asserted that the purpose of the overall system of ground water regulation was to conserve and preserve the state's internal water supply; however, the court concluded that while the state's scheme of water regulation demonstrated a genuine effort to promote optimum utilization of its diminishing water resources and might justify a limited, nondiscriminatory burden on interstate commerce, it could not support a total ban on interstate transportation of ground water.

The New Mexico Legislature then repealed the challenged statute, enacted provisions dealing with the out-of-state use of water, and otherwise amended New Mexico's water code. El Paso II. Following these enactments, the defendants appealed the court's decision in El Paso I to the U.S. Court of Appeals for the Tenth Circuit, urging that the case had become moot. The Tenth Circuit vacated the district court's judgment and remanded the matter for consideration in light of the intervening change in New Mexico law.

In El Paso II, the city challenged the constitutionality of the intervening legislation. The new export statute required New Mexico's state engineer to find that an applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, would not be contrary to the conservation of water within the state, and was not otherwise detrimental to the public welfare of the citizens of New Mexico in order to approve an application. The city claimed that allowing exports only when they were not contrary to the conservation of water within the state and not otherwise detrimental to the public welfare of the citizens of New Mexico unconstitutionally discriminated against interstate commerce. The federal district court ruled otherwise, noting that on its face, the statute appeared to apply the conservation and public welfare criteria evenhandedly, as the new export statute mirrored the requirements of the statute governing applications \*960 for new in-state appropriations of ground water from declared basins. In addition, the court wrote:

Although the court in Sporhase did not delineate the extent to which a state may prefer its own citizens in the utilization of \*\*162 water, it provided some guidelines. A state may not limit water exports merely to protect local economic interests.... This is true even though the health of the state's economy has a direct bearing on the public welfare of its citizens.... Other than excluding economic interests, however, the Court did not limit the public welfare interests a state may protect by regulating interstate commerce in ground water.

On its face, [the new export statute] does not direct the State Engineer to deny applications for

exports that would be detrimental only to the economic interests of New Mexico's citizens. "Public welfare" is a broad term including health and safety, recreational, aesthetic, environmental and economic interests. Admittedly, except to the extent that it refers to bare human survival, every aspect of the public welfare has economic overtones. This does not mean that New Mexico may constitutionally exercise a limited preference for its citizens only when their survival is at stake. The Supreme Court in *Sporhase* did not equate "public welfare" with "human survival." However, when the State exercises a preference for its citizens under the rubric of protecting their public welfare and economic interests are implicated, the resulting burden on interstate commerce must be weighed against the putative, non-economic local benefits.... If the public welfare criterion is used to effectuate simple economic protectionism, a per se rule of invalidity will be applied.... If it is used to promote a legitimate purpose with only incidental burdens on interstate commerce, the Court must try to accommodate the competing local and national interests.... If equally effective, less burdensome alternatives are available, the State must use them....

....

\*961 ... The term "public welfare" includes many interests, some of which the State may legitimately advance by regulating water exportation. The statutory use of the term is not forbidden since it can be narrowed by construction in this court, in the state administrative proceedings and in the state courts.

*El Paso II*, 597 F.Supp. at 700–02. As for the conservation factor, the court stated that "[a] state may ... 'conserve' water within its borders for the use of its citizens to the same limited extent that it may prefer its citizens in the utilization of the resource." *Id.* at 702.

The city also objected to six additional factors that the state engineer was required to consider when acting upon any application to export ground water. The first four factors required the state engineer to determine whether there were water shortages within the state which could be alleviated by the intrastate transportation of the water sought for export. The *El Paso II* court found that there was a legitimate reason for this requirement in that a determination of whether a shortage of water existed in the state was necessary if the state engineer was to constitutionally exercise a preference for the citizens of New Mexico in accordance with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982). The remaining two factors required an evaluation of the export applicant's water supply, of the demand placed on that supply, and of the alternative sources of supply available to the applicant in the state of import. The court found that there was also a legitimate reason for this requirement in that a state may favor its own citizens in the utilization of scarce water resources unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits, and the local benefits cannot be weighed against the burdens on commerce without knowledge of the export applicant's need for the water relative to that of prospective in-state users. The *El Paso II* court did, however, find those portions of the new legislation that required the application of conservation and public welfare criteria to all interstate uses of ground water, but only to some intrastate uses, to be unconstitutional \*962 as discriminating on their face against interstate commerce. In that regard, the court wrote:

While the State may constitutionally regulate water usage to promote the conservation of water and the public welfare of its citizens, it may not require interstate commerce to shoulder the entire burden of \*\*163 furthering those interests. There is no legitimate reason to deny interstate transfers and domestic wells if detrimental to those interests yet permit intrastate transfers and

domestic wells when they are detrimental to them.  
El Paso II, 597 F.Supp. at 704.