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## **New Mexico's Water Exportation Statute: Will It Float**

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## NEW MEXICO'S WATER EXPORTATION STATUTE: WILL IT FLOAT?

**WATER LAW—NEW MEXICO'S EXPORTATION STATUTE:** New Mexico's new water exportation statute, which places conservation and public welfare restrictions on interstate permit applications, should not survive commerce clause analysis because, with few exceptions, it fails to place similar restrictions on in-state permit applications. N.M. STAT. ANN. § 72-12(B)-1 (Cum. Supp. 1983).

### INTRODUCTION

In February 1983, the New Mexico Legislature passed a new water exportation statute legitimizing the interstate transportation and use of New Mexico's public waters.<sup>1</sup> The legislation responded to the invalidation, in *El Paso v. Reynolds*, of the state's absolute embargo on the exportation of New Mexico groundwater.<sup>2</sup> The New Mexico Federal District Court, relying on the U.S. Supreme Court's holding in *Sporhase v. Nebraska* that water is an article of commerce,<sup>3</sup> ruled that the statutory embargo amounted to economic protectionism and, thus, could not withstand commerce clause scrutiny.<sup>4</sup> New Mexico appealed the decision to the Tenth Circuit Court of Appeals which remanded the case to the New Mexico Federal District Court to be considered in light of the new exportation statute.<sup>5</sup>

This Note will discuss the constitutionality of New Mexico's exportation statute. First, the *Sporhase v. Nebraska* decision will be analyzed as well as the application of that decision in *El Paso v. Reynolds*. Second, the new exportation statute will be examined, applying the *Sporhase* guidelines. Finally, this Note will discuss the probable outcome of a constitutional challenge to the new exportation provision.

### SPORHASE V. NEBRASKA

Prior to the U.S. Supreme Court's holding in *Sporhase* that water is

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1. N.M. STAT. ANN. § 72-12(B)-1(A) (Cum. Supp. 1983).

2. 563 F. Supp. 379 (D.N.M. 1983). The embargo statute, in pertinent part, read:

No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico. . . .

N.M. STAT. ANN. § 72-12-19 (1978).

3. 458 U.S. 941 (1982).

U.S. CONST. Art. I, § 8, cl. 3 provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

4. 563 F. Supp. at 390.

5. Civ. no. 80-730 HB.

an article of commerce, states assumed that they had free rein to regulate their water resources.<sup>6</sup> Like New Mexico, Nevada and Colorado imposed absolute embargoes on the interstate transfer of state waters<sup>7</sup> while other states applied various limitations on the out-of-state transport and use of their waters. Several states required legislative approval before water could be transferred interstate.<sup>8</sup> Other state exportation statutes contained reciprocity clauses whereby state water could not be transferred into a state which prohibited the interstate transfer and use of its own water.<sup>9</sup>

Nebraska's reciprocity clause prompted the Supreme Court's ruling that water is an article of commerce.<sup>10</sup> The Court held that Nebraska's assertion of state ownership of its groundwater was a "legal fiction."<sup>11</sup> The Court found that while the state's interest and competency in the

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6. Historically, Congressional deference to the states' control of their water resources was expressed in the Mining Act of 1866 and the Act of July 9, 1870, in which Congress acknowledged state water law. Also, in furthering its homesteading policy, Congress passed the Desert Land Act of 1877 which authorized state control of the appropriation of water not beneficially used by the settlers. The Reclamation Act of 1902, which allocated funds for Western water development, deferred to state law in two significant respects: 1) the Act required the Secretary of Interior to obtain water rights in accordance with state laws and 2) once the water was released from a Reclamation dam, the water was within the control of the state. Comment, *Sporhase v. Nebraska Ex. Rel. Douglas: Diverting the Course of Western Water Law*, 28 S.D.L. REV. 122, 126-67 (1982).

7. NEV. REV. STAT. § 533.520 (1979); COLO. REV. STAT. § 37-81-101 (1978). Following the Sporhase ruling, the Colorado General Assembly amended its absolute embargo to provide that if an owner of agricultural land in Colorado owns contiguous agricultural land in an adjacent state, specific authorization of the General Assembly, on the advice of the State Engineer, is required before Colorado water may be used in the adjacent state for agricultural purposes. COLO. REV. STAT. § 37-81-101 (Cum. Supp. 1982).

8. MONT. CODE ANN. § 85-1-121 (1981); OKLA. STAT. ANN. tit. 82, § 1085.2.2 (West 1981); OR. REV. STAT. § 537.810 (1979); WYO. STAT. § 41-3-105 (1977).

9. IDAHO CODE § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); NEB. REV. STAT. § 46-613.01 (1978); and S.D. CODIFIED LAWS ANN. § 46-1-13 (Supp. 1981). Following Sporhase, South Dakota revised its exportation statute, providing that water rights may be granted for uses outside the state on the same basis and subject to the same terms and conditions as water rights granted for use within South Dakota. S.D. CODIFIED LAW. ANN. § 46-1-13 (1983). The Nebraska legislature, pursuant to the Sporhase ruling, severed the reciprocity requirement from its exportation statute. NEB. REV. STAT. § 46.613.01 (1983).

10. The Nebraska statute provided, in pertinent part:

If the Director of Water Resources finds that the withdrawal of ground water is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska. NEB. REV. STAT. § 46.613.01 (1978).

The appellants, in Sporhase, owned contiguous tracts of land in Colorado and Nebraska for which a well in Nebraska provided the groundwater for irrigating both tracts. The prior owners of the land registered the well, but neither they nor appellants applied, pursuant to NEB. REV. STAT. § 46.613.01 (1978), for the permit as required by law. Appellee, the State of Nebraska, brought suit to enjoin appellants from transferring water across state lines without a permit. The trial court rejected the appellants' defense that the statute imposed an unconstitutional burden on commerce and granted the injunction. The Nebraska Supreme Court affirmed. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981).

11. 458 U.S. at 951.

regulation of scarce groundwater resources were factors in determining the reasonableness of the state-imposed burden on commerce, the mutuality of the arid Western states' interests in the preservation of adequate water supplies and the critical role which water played in commerce mandated commerce clause scrutiny.<sup>12</sup>

The existence of that dormant commerce clause power, however, does not preempt the state's regulatory authority over its water resources, the in-state uses of its water, or even of interstate commerce in its water.<sup>13</sup> The commerce clause simply mandates that if a state statute burdens interstate commerce, the state must show the legitimacy of the burden.<sup>14</sup> To determine whether the Nebraska statute impermissibly burdened commerce, the Court applied the test enunciated in *Pike v. Bruce Church, Inc.*<sup>15</sup> The *Pike* test balanced three elements to determine the validity of the state's burden on commerce. First, the Court examined whether the statute operated evenhandedly with only an incidental burden on commerce (or whether the statute discriminated facially or in practical effect against out-of-state residents). Second, the Court identified whether the statute facilitated a legitimate state purpose. Finally, the Court determined whether alternative means existed for facilitating this purpose which would not burden commerce.

The Court found that the Nebraska statute discriminated facially against interstate commerce because the statute applied only to out-of-state groundwater applicants.<sup>16</sup> The Court acknowledged, however, that Nebraska's asserted interest in the conservation and preservation of its diminishing groundwater was "[u]nquestionably legitimate and highly important"<sup>17</sup> and enumerated justifications for a state's applying different standards for out-of-state groundwater withdrawal and use applications.<sup>18</sup> Primarily, the Court ruled that a state, such as Nebraska, which placed strict withdrawal and use restrictions on in-state applicants<sup>19</sup> did not discriminate against interstate commerce when placing restrictions on the uncontrolled exportation of its groundwater.<sup>20</sup> In addition to evenhanded

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12. *Id.* at 953. The court stated that water, used for irrigation, is "archtypical of commerce among the several states" and that the Nebraska water at issue was of multistate character, originating from the Ogallala Aquifer which extends to Oklahoma, Texas, Colorado, New Mexico and Kansas as well as Nebraska.

13. *Id.* at 954.

14. *Id.*

15. 397 U.S. 137 (1970).

16. 458 U.S. at 955.

17. *Id.* at 954.

18. *Id.* at 955-56.

19. The geographical area at issue is part of the Upper Republican Natural Resources District, a control area so designated because of its critical water supply problems. Appropriations in the District are under strict regulation. *Id.* at 955.

20. *Id.* at 955-56.

conservation restrictions, the Court recognized four additional factors which may enhance the constitutionality of inconsonant in-state and out-of-state water appropriation standards.<sup>21</sup> First, the Court acknowledged the police power of the state to regulate water, in times of severe shortage, to protect the health and safety of its citizens.<sup>22</sup> Second, the Court recognized the states' legal expectations, fostered by equitable apportionments and interstate compacts, that, under some circumstances, they may restrict water use to within their borders. The Court stated that by fashioning equitable apportionments and enforcing interstate compacts, the law "[h]as recognized the relevance of state boundaries in the allocation of scarce water resources."<sup>23</sup> Third, the Court found that while a state's claim to ownership of public waters cannot justify a total ban on exportation of state waters, the state's claim to public ownership may justify a state's "limited preference" for its own citizens.<sup>24</sup> Finally, the Court stated that water saved through state conservation efforts has "[s]ome indicia of a good publicly produced and owned" for which, in times of water shortage, a state may favor its own citizens.<sup>25</sup>

The Court found that three conditions in the Nebraska exportation statute—reasonable withdrawal, not contrary to the conservation and use of groundwater, and not detrimental to the public welfare—advanced the state's interest in the conservation and preservation of its groundwater while evenhandedly affecting both in-state and out-of-state applicants.<sup>26</sup> The Court ruled, however, that the reciprocity condition impermissibly burdened commerce because Nebraska had failed to put forth any evidence that the reciprocity requirement was "[n]arrowly tailored to the conser-

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21. *Id.* at 956-57.

22. *Id.* at 956.

23. *Id.* Congress, however, had not granted the states permission to engage in groundwater regulation that would violate the commerce clause. The Court found that the federal statutes which defer to state water law and Congressionally-approved interstate compacts are merely indicative of Congressional deference to state water law. In order for the Court to find Congressional relinquishment of its commerce clause power, the Court stated that it would require an express statement of Congressional intent. *Id.* at 958-60.

24. *Id.* at 956.

25. *Id.* at 957. The distinction the Court alludes to is the difference between a state's role as a market regulator and its role as a market participant. When a state, in its regulatory capacity, discriminates against interstate commerce, the state's actions are challengeable under the commerce clause. When, however, the state is an actual participant in the marketplace, commerce clause concerns do not arise because the state is not regulating, but participating in the market. The Supreme Court has held that, in its participatory role in the market, a state may favor its own residents. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (a state, when purchasing goods, may favor its own citizens); *Reeves, Inc. v. State*, 447 U.S. 429 (1980) (a state, as a seller of goods, may exercise a preference for its own citizens). *See also*, Water Law Study Committee, *The Impact of Recent Court Decisions Concerning Water and Interstate Commerce on Water Resources of the State of New Mexico* 58-62 (A Report to Governor Toney Anaya and the Legislative Council Pursuant to Laws, 1983, ch. 98) (available in the University of New Mexico School of Law Library).

26. *Id.* at 955.

vation and preservation rationale."<sup>27</sup> The Court, however, did not rule that reciprocity conditions *per se* violate the commerce clause, but rather, suggested situations in which a reciprocity requirement would be narrowly-tailored to the conservation and preservation goal.<sup>28</sup> These situations include: the existence of a statewide water shortage; the feasible intrastate transport of water from water-plentiful areas to water shortage areas; and importation of water from adjoining states which would compensate for exportation to those states.<sup>29</sup> The Court added that "[a] demonstrably arid state conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water."<sup>30</sup>

While *Sporhase* painted a gloomy picture for the future unfettered state control of water regulation, the opinion did not sound the death knell for state water law sovereignty. Consistent with its recognition of the scarcity of Western water resources, the Court upheld the legitimacy of the states' interests in the conservation and preservation of their water supplies.<sup>31</sup> The Court also acknowledged the superiority of the states' competency and interests in water regulation, stating that these were among the factors to be considered when determining the reasonableness of the state-imposed burden on commerce.<sup>32</sup> The primary mandate which emerged from *Sporhase* was that states which assert water conservation and preservation interests to justify a regulation's burden on commerce must ensure, in order to survive commerce clause analysis, that the conservation restrictions apply evenhandedly to in-state and out-of-state water applicants and that the restrictions are narrowly-tailored to the conservation interest. Regulations which are discriminatory or are thinly-veiled attempts to protect the state's economy, under the guise of conservation and preservation, will fail commerce clause scrutiny.

#### EL PASO V. REYNOLDS

The New Mexico Federal District Court, in *El Paso v. Reynolds*,<sup>33</sup> ruled that New Mexico's absolute embargo on the exportation of groundwater

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27. *Id.* at 957-58. Because Colorado absolutely prohibited the export of its waters, Nebraska's reciprocity condition was an explicit barrier to commerce between Colorado and Nebraska. COLO. REV. STAT. § 37-81-101 (1978).

28. 458 U.S. at 958.

29. *Id.*

30. *Id.*

31. *Id.* at 954.

32. See *supra* notes 13 and 21-27.

33. 563 F. Supp. 379 (D.N.M. 1983). The City of El Paso filed 326 applications to appropriate annually 296,000 acre-feet of groundwater from two southern New Mexico aquifers, the Lower Rio Grande and Hueco Basins. The State Engineer denied all 326 applications on the bases that the applications were contrary to the statutory exportation embargo and the New Mexico Constitution. *Id.* at 381.

was not narrowly-tailored to implement the state's interest in the conservation and preservation of its groundwater.<sup>34</sup> Rather, the court held that the exportation ban was "tantamount to economic protectionism" and could not be squared with the Constitution.<sup>35</sup> In ruling, the court applied the *Pike* test to determine the constitutionality of the exportation embargo. The *Pike* analysis required the state to show that the ban served a legitimate state purpose; was narrowly-tailored to achieve that purpose; and that no adequate non-discriminatory alternatives existed for achieving the state's goals.<sup>36</sup>

To justify the embargo's explicit barrier to commerce, New Mexico advanced the state's interests in the conservation and preservation of state groundwater.<sup>37</sup> The state claimed that its purpose was legitimate because the state's water supply was insufficient to meet future needs.<sup>38</sup> While acknowledging the legitimacy of the state's interests in the conservation and optimum utilization of its dwindling water supply, the court ruled that these interests did not justify the total ban on interstate commerce in groundwater.<sup>39</sup> The state's water conservation and optimum utilization interests could legitimize only a limited and non-discriminatory burden on commerce.<sup>40</sup> The only constitutional justification for the total ban on the exportation of New Mexico's groundwater would be an actual state water shortage, threatening to the health and safety of the state's citizens.<sup>41</sup> Beyond human survival needs, water is an economic resource, and state water regulation must conform to commerce clause standards.<sup>42</sup> Because the state was not experiencing a water shortage or predicting one in the near future, the court ruled that the embargo protected the state's economy rather than the health and safety of the state's residents.<sup>43</sup>

The court hypothesized that even if the embargo were designed to promote the health and safety of New Mexico's citizens and not its

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34. *Id.* at 390.

35. *Id.*

36. *Id.* at 388.

37. *Id.* at 388-89.

38. *Id.* The State Engineer predicted that by or before the year 2020, the state will experience a statewide consumptive use shortage of at least 626,000 acre-feet per year. *Id.* at 389-90.

39. *Id.* at 389. The court acknowledged that New Mexico was a "pioneer in ground water management" with the state's regulatory process embodying principles of effective groundwater regulation: the recognition of the interrelationship of underground and surface waters [see *Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1962)] and the regulation of mining non-rechargeable groundwater basins [see *Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1966)].

40. 563 F. Supp. at 389.

41. *Id.*

42. *Id.*

43. *Id.* at 390. The court found that the estimated demand for water necessary to meet the health and safety needs of state residents in the year 2020 will be 220,000 acre-feet per year while the renewable water supply will be 2.2 million acre-feet annually. *Id.* at 389.

economy, the statute would fail commerce clause scrutiny because it was not narrowly-tailored to serve the conservation and preservation objective.<sup>44</sup> If a shortage were imminent, the embargo would not preserve or conserve the state's groundwater because it prevented only the out-of-state transport of New Mexico groundwater.<sup>45</sup> No conservation restrictions were placed on in-state applicants.<sup>46</sup> The court found if New Mexico were faced with a water shortage, threatening to the health and safety of the state's residents, the state water code would not ensure a reserve supply adequate to meet the state's needs.<sup>47</sup> Therefore, the absolutely discriminatory nature of the embargo and its failure to be narrowly-tailored to the effectuation of a health and safety objective caused the statute to fail the *Pike* analysis.

Following *Sporhase* and *El Paso*, it is clear that a state may not place an absolute prohibition on the exportation of its groundwater, unless the state asserts a legitimate state interest justifying the ban, and demonstrates that the prohibition is narrowly-tailored to the achievement of the state's interest. The court in *El Paso* ruled that only an imminent water shortage, affecting the health and safety of state residents, would legitimize an exportation embargo. The federal court's ruling is narrower, however, than the U.S. Supreme Court's holding in *Sporhase*. In *Sporhase*, the Court gave more regulatory leeway to the states, concluding that a "demonstrably arid state" might be able to justify an absolute ban on interstate commerce in its water by showing a "close means-end relationship"

44. *Id.* at 391.

45. *Id.*

46. *Id.* Under New Mexico law, the State Engineer could not deny an in-state application if there was unappropriated water available, and the appropriation would not impair existing rights. N.M. STAT. ANN. § 72-12-3 (1978).

New Mexico water rights are governed by the doctrine of prior appropriation. The doctrine embodies two principles: 1) the first appropriator in time has the right to use the water and 2) so long as the right is put to beneficial use, the right continues as against subsequent users. DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues*, 22 NAT. RES. J. 1045 (1982), citing CLARK, WATER AND WATER RIGHTS 74, 76 (1967).

"Beneficial use" is the basis, the measurement, and the limit of the right to use water in New Mexico. N.M. CONST. art. XVI, § 3. "Beneficial use" means the useful and lawful employment of the water for a use consistent with public's interest in the maximum utilization of the resource. DuMars, *supra*. Neither New Mexico statute nor the State Engineer, however, defines "beneficial use"; water only ceases to be used beneficially when it is wasted, forfeited, or abandoned. Therefore, the basic premise behind the prior appropriation doctrine and its accompanying "beneficial use" standard is that because the Western water supplies are so scarce, water should be put to use by those who use it to its fullest extent. DuMars, *supra*.

The federal court, in *El Paso*, stated that New Mexico's "maximum beneficial use" policy "envisions putting as much water to beneficial use as soon as possible. 563 F. Supp. at 391. If the "beneficial use" standard were applied strictly, the court found that the most immediately productive use for the water was in El Paso, the economic and trade center of the southern New Mexico region.

*Id.*

47. *Id.* at 391.

between the embargo and the state's interest in the conservation and preservation of its waters.<sup>48</sup>

New Mexico no longer places an absolute ban on water exports. Therefore, in a constitutional challenge to the new exportation statute, the issues will be to what extent a state may qualify the exportation of its waters, and to what extent, short of totally banning exportation, a state may limit the out-of-state usage of its waters. The U.S. Supreme Court in *Sporhase* upheld the legitimacy of Nebraska's interests in the conservation and preservation of its groundwater. The Court allowed Nebraska to place conservation and public welfare restrictions on out-of-state groundwater applications, upon a showing that similar restrictions were placed also on in-state residents. The Court could have stopped when it found that the restrictions operated evenhandedly, but it went on to enumerate factors which contributed to the legitimacy of differing in-state and out-of-state standards,<sup>49</sup> suggesting that states retain some power to favor their own citizens.<sup>50</sup> While the *El Paso* court stressed the overriding legitimacy of state health and safety concerns, the court was confronted with an absolute ban on interstate commerce. The court did not limit the ambit of legitimate state interests to health and safety concerns, but expressly recognized that New Mexico's interests in the conservation and optimum utilization of its waters were highly important.<sup>51</sup> These interests would justify the state's imposition of a limited and non-discriminatory burden on commerce.<sup>52</sup> The court stated that New Mexico had not lost its power of water management and that New Mexico may regulate interstate water demands "to the same extent as intrastate usage."<sup>53</sup> Although the *El Paso* court did not recognize the limited state right, articulated in *Sporhase*, to prefer its own citizens, the court did uphold the state's water regulatory power, limiting that power only to the extent necessary to ensure that out-of-state and in-state water uses are regulated evenhandedly. Because the legitimacy of the state's interests in the conservation and preservation of its waters has been upheld by the U.S. Supreme Court and the federal district court, the critical current concern is whether the new exportation standard equitably regulates in-state and out-of-state water permit applications.

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48. 458 U.S. at 958.

49. See *supra* notes 23-29.

50. 458 U.S. at 957. The Court stated that while a state's claim to ownership of public water could not justify an absolute embargo on the exportation of its waters, the state ownership claim may justify a state's "limited preference" for its citizens.

51. 563 F. Supp. at 389.

52. *Id.*

53. *Id.* at 390.

## NEW MEXICO'S NEW EXPORTATION STATUTE

The exportation statute struck down in *El Paso v. Reynolds* explicitly banned the out-of-state transport and use of New Mexico groundwater.<sup>54</sup> The new statute, in contrast, provides that "under appropriate conditions" the interstate transportation and use of New Mexico's public waters are not in conflict with the public welfare of the state's citizens or the conservation of the state's waters.<sup>55</sup> In referring to "public waters," the new statute is not limited to groundwater, but also encompasses surface waters.

The statute requires that the person or entity desiring to export water outside of New Mexico shall apply for a permit from the State Engineer approving the withdrawal.<sup>56</sup> In addition to requiring the State Engineer to publish notice of the permit application,<sup>57</sup> the statute stipulates that the State Engineer, prior to granting the permit, must find that the withdrawal and transportation of the water outside of the state will not impair existing water rights.<sup>58</sup> The State Engineer also must find that the proposed export is neither contrary to water conservation policies within the state nor otherwise detrimental to the public welfare of New Mexico's citizens.<sup>59</sup> In making his decision, the State Engineer shall consider, but is not limited to the following factors:

- 1) the supply of water available to New Mexico;
- 2) water demands of New Mexico;
- 3) whether there are water shortages within New Mexico;
- 4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in New Mexico;
- 5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- 6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.<sup>60</sup>

The statute further provides that by filing an application to export New Mexico water, the applicant shall submit to the New Mexico laws governing the appropriation and use of the water.<sup>61</sup> The State Engineer is empowered to condition the permit to guarantee that the water, once out-

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54. The exception to the absolute prohibition was the transportation by tank truck of New Mexico groundwater outside the state for use in the exploration and drilling for oil or gas, provided that the amount of water did not exceed three acre-feet. N.M. STAT. ANN. § 72-12-19 (1978).

55. *Id.* § 72-12(B)-1 (Cum. Supp. 1983).

56. *Id.* at § 72-12(B)-1(B). The New Mexico State Engineer administers the appropriation, transfer, and distribution of waters within the state. *Id.* at § 72-2-1 (1978).

57. N.M. STAT. ANN. § 72-12(B)-1(B) (Cum. Supp. 1983).

58. *Id.* at § 72-12(B)-1(C).

59. *Id.*

60. *Id.* at § 72-12(B)-1(D).

61. *Id.* at § 72-12(B)-1(E).

of-state, will be used in accordance with the rules and regulations imposed upon in-state users.<sup>62</sup>

In response to the *El Paso* court's observation that New Mexico law placed no conservation restrictions on in-state groundwater permit applicants,<sup>63</sup> the New Mexico legislature amended its in-state groundwater withdrawal criteria. Prior to the *El Paso* decision, the in-state groundwater application statute required the State Engineer to issue a withdrawal permit if he found that unappropriated groundwater was available and that the withdrawal would not impair existing water rights.<sup>64</sup> Following the *El Paso* ruling, in-state applicants must meet two additional criteria: the appropriation must not be contrary to water conservation within New Mexico or detrimental to the public welfare of the state's citizens.<sup>65</sup>

### ANALYSIS

The broad language of the new exportation statute suggests that the statute regulates multiple methods of water rights acquisition for out-of-state usage.<sup>66</sup> The statute clearly applies to surface and groundwater.<sup>67</sup> Within the surface and groundwater categories, the statute apparently regulates two means of obtaining water rights: first, the purchase of existing water rights and the withdrawal and use of the water outside of the state and second, the withdrawal of unappropriated waters for use outside of the state. The legitimacy of a state's efforts to conserve its water resources and to protect the welfare of its citizens has been upheld.<sup>68</sup> The critical inquiries, therefore, are whether the withdrawal and use restrictions will operate evenhandedly on in-state and out-of-state applicants and whether the restrictions are narrowly-tailored to achieve New Mexico's interests in the conservation of its water and the public welfare of its residents.

In order for an out-of-state applicant to purchase an existing surface or groundwater right and transport the water for use outside of New Mexico, the application must meet the statutory exportation criteria. The proposed transfer must not impair existing water rights and must not be contrary to water conservation within New Mexico or detrimental to the public welfare of New Mexico's citizens.<sup>69</sup> In making his determination

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62. *Id.* at § 72-12(B)-1(F).

63. *See supra* note 46.

64. N.M. STAT. ANN. § 72-12-3(E) (1978). *See discussion infra* note 81.

65. *Id.* at § 72-12-3(E) (Cum. Supp. 1983).

66. The statute provides that the permit requirements apply to any intention to withdraw water from any surface or underground water source within New Mexico and transport it for use outside the state. N.M. STAT. ANN. § 72-12(B)-1(B) (Cum. Supp. 1983).

67. *Id.*

68. *See supra* notes 17 and 40.

69. N.M. STAT. ANN. § 72-12(B)-1(C) (Cum. Supp. 1983).

of whether to approve the transfer, the statute states that the State Engineer shall consider, but not be limited to, the six enumerated factors.<sup>70</sup> An in-state transfer or change of use applicant, however, need only show that the transfer or change of use will not impair existing water rights.<sup>71</sup>

The discrepancy between the out-of-state and in-state transfer regulations will be the probable basis for a ruling that the inconsonant standards impermissibly burden commerce. Literally read, the restrictions do not operate evenhandedly. New Mexico is demanding that the out-of-state transfer not be contrary to state water conservation standards or detrimental to state public welfare while placing no similar restrictions on in-state transfer applicants. Further, the restraint on interstate commerce is not narrowly-tailored to the accomplishment of the asserted state interests. The statute merely demands that out-of-state applications meet the state conservation and public welfare standards while failing to manifest within the state similar conservation and public welfare concerns. At the same time, the burden imposed on interstate commerce could be great. Most of New Mexico's surface and groundwater already is appropriated.<sup>72</sup> Therefore, the major source for the acquisition of underground or surface water rights is through the transfer process. The most appropriate remedy for the literal transfer bias would be for the State Engineer to place similar conservation and public welfare restrictions on in-state transfer applicants. Because New Mexico is faced with a finite quantity of water, such restrictions would further the state's goal of prudent management of its scarce water resources.

The second method of water rights acquisition regulated by the exportation statute is the withdrawal of unappropriated surface and underground waters. In order for an out-of-state applicant to withdraw unappropriated New Mexico surface or underground waters, the State Engineer must find that the proposed appropriation will not impair existing rights and that the appropriation will not be contrary to the state's conservation and public welfare interests.<sup>73</sup> Once again, the State Engineer shall consider, but not be limited to, the six enumerated factors when rendering his out-of-state appropriation decision.<sup>74</sup>

The in-state process for obtaining a right to unappropriated surface

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70. *Id.* at § 72-12(B)-1(D).

71. *Id.* at §§ 72-5-23 and 72-12-7 (1978). No statute expressly authorizes transfers in the ownership of groundwater rights, but the State Engineer does review notices of groundwater transfers. Water Law Study Committee, *The Impact of Recent Court Decisions Concerning Water and Interstate Commerce on Water Resources of the State of New Mexico* 15 (A Report to Governor Toney Anaya and the Legislative Council Pursuant to Laws, 1983, ch. 98) (available in the University of New Mexico School of Law Library).

72. Water Law Study Committee at 86-91.

73. N.M. STAT. ANN. § 72-12(B)-1(C) (Cum. Supp. 1983).

74. *Id.* at § 72-12(B)-1(D).

water might differ from the out-of-state procedure. In considering an in-state application for unappropriated surface water, the State Engineer shall grant the surface right if he finds that unappropriated water is available for the benefit of the applicant.<sup>75</sup> The State Engineer shall reject the application if he finds no available unappropriated surface water or he may reject the application if he determines that the proposed appropriation would be contrary to "public interest."<sup>76</sup> "Public interest" lacks definition, but, perhaps, it may be interpreted as encompassing conservation and public welfare concerns. If the exportation statute, however, supplements the in-state standard, the out-of-state applicants not only must meet the conservation and public interest criteria, but also the State Engineer's public interest analysis. This construction leads to the conclusion that "public interest" is an inquiry distinct from conservation and public welfare. The conservation and public welfare restrictions on out-of-state applications will be impermissible if they do not apply similarly to in-state applications. The constitutionality of the out-of-state appropriation restrictions will be upheld only if the State Engineer construes "public interest" as embodying conservation and public welfare concerns.

The statute regulating in-state requests to withdraw unappropriated groundwater includes conservation and public welfare restrictions,<sup>77</sup> but differs from the out-of-state regulation in two respects. In considering an out-of-state application to withdraw unappropriated New Mexico groundwater, the State Engineer must find that there is no impairment of existing rights and that the proposed appropriation is not contrary to water conservation within New Mexico or detrimental to the public welfare of the state's citizens.<sup>78</sup> He again shall consider, but not limit his consideration to, the six factors.<sup>79</sup> When considering an in-state application to withdraw unappropriated groundwater, the State Engineer shall grant the permit if he finds that there is unappropriated underground water available *or* that the proposed appropriation would not impair existing rights or be detrimental to the state's conservation and public welfare interests.<sup>80</sup> The use of the conjunction "or" is troublesome. Literally read, the State Engineer has two options in approving an in-state groundwater withdrawal application: either he can approve the application solely on the basis of the availability of unappropriated groundwater or he can undertake the impairment, conservation, and public welfare analyses. Clearly, if the State Engineer scrutinizes in-state applications only on the basis of the avail-

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75. *Id.* at § 72-5-6 (1978).

76. *Id.* at § 72-5-7. See *Young v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (1910).

77. *Id.* at § 72-12-3(E) (Cum. Supp. 1983).

78. *Id.* at § 72-12(B)-1(C).

79. *Id.* at § 72-12(B)-1(E).

80. *Id.* at § 72-12-3(E). Emphasis by author.

ability of unappropriated groundwater, the out-of-state restrictions will not pass commerce clause muster because of their unevenhandedness and failure to be narrowly-tailored to the state's water conservation and public welfare interests. The more logical interpretation of the statute, however, would be to read the "or" as "and." Any other construction would result in the improbable conclusion that even if there is no available unappropriated water, the State Engineer could grant a withdrawal permit if the proposed withdrawal met the impairment, conservation, and public welfare criteria. Conversely, if there is available unappropriated groundwater, the State Engineer could grant a permit, even if doing so would impair existing rights. Both of these constructions are completely inconsistent with New Mexico water law.<sup>81</sup>

The second respect in which the in-state application process for the withdrawal of unappropriated groundwater differs from the exportation statute is that the in-state statute does not enumerate any factors for the State Engineer's consideration. The purpose behind enumerating factors for the State Engineer's consideration when assessing out-of-state applications is unclear. According to the language of the exportation statute, the State Engineer "shall consider but not be limited to" the factors when making his out-of-state permit decisions.<sup>82</sup> In stating "shall consider,"<sup>83</sup> the statute suggests that the factors are not determinative or binding on the State Engineer's decision. The statute also states, however, that the State Engineer is not limited to consideration of the enumerated factors which suggests that the State Engineer possesses an unspecified amount of discretion when scrutinizing out-of-state permit applications. The constitutionality of the statute may well depend upon how the State Engineer exercises that discretion. If he evenhandedly evaluates in-state and out-of-state applications, according to a conservation and public welfare rationale, the statute will pass the commerce clause analysis. If, however, the vague grant of discretionary power to the State Engineer is merely a cosmetic cover-up of a scheme to Balkanize New Mexico's waters, the statute will fail constitutional scrutiny.

Individually analyzing the six statutory criteria, it becomes even more apparent that the constitutionality of the factors also will depend upon the State Engineer's application of the standards. Only two of the factors received express U.S. Supreme Court recognition as legitimate justifi-

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81. The impairment and availability of unappropriated waters are joint inquiries in the State Engineer's decision whether to approve permit applications. The inquiries are routinely concurrent despite even the previous statute's language which separated the inquiries, stating that the State Engineer would grant the application if he found available unappropriated waters *or* that the proposed appropriation would not impair existing rights. (emphasis by author) N.M. STAT. ANN. § 72-12-3(E) (1978).

82. N.M. STAT. ANN. § 72-12(B)-1(D) (Cum. Supp. 1983).

83. Emphasis by author.

cations for burdening interstate commerce:<sup>84</sup> the existence of water shortages within the exporting state<sup>85</sup> and the feasibility of transporting the water to alleviate water shortages within the state.<sup>86</sup> The first and second factors,<sup>87</sup> supply and demand, are relevant to any in-state or out-of-state withdrawal and use application, but the permissibility of the supply and demand considerations will depend upon the State Engineer's applying similar interpretations of supply and demand when analyzing in-state and out-of-state applications. Supply and demand are complicated concepts. They could be interpreted as relating only to health and safety needs; to present economic development; or even to future economic development. If the State Engineer were to apply a stricter interpretation of supply and demand to out-of-state applications than to in-state applications, desiring to preserve New Mexico's water for the state's future development, the supply and demand factors will not survive commerce clause scrutiny.

Similarly, the constitutionality of the fifth and sixth factors<sup>88</sup>—the supply and sources of available water in the applicant state and the demands on the applicant's water supply in the state of intended use—depends upon the evenhanded application of the standards. The out-of-state supply analysis is designed to guard against New Mexico's water being exported to out-of-state locations which possess more water than the New Mexico site from which the water was withdrawn. Such a standard certainly is designed to promote a conservation rationale. This concept, however, also must be embodied within the in-state application process. Currently, in order to transfer water from one basin to another, the only limitation is that the transfer not impair existing rights.<sup>89</sup> There is no analysis of the relative water supply in each basin. If the State Engineer were to scrutinize the water supplies in each basin and consider the impairment of existing rights, the out-of-state supply criterion would pass constitutional examination. Likewise, the out-of-state demand analysis is geared to guarding against New Mexico's water being exported to an out-of-state site where the demand for the water is less than that of the New Mexico area from which the water was exported. Although the analysis promotes a conservation interest, the demand differential for in-state interbasin transfers presently is not analyzed.<sup>90</sup> If the State Engineer were to scrutinize the competing in-state demands, the out-of-state demand analysis would be permissible.

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84. See *supra* note 29.

85. N.M. STAT. ANN. § 72-12(B)-1(D)(3) (Cum. Supp. 1983).

86. *Id.* at § 72-12(B)-1(D)(4).

87. *Id.* at § 72-12(B)-1(D)(1)-(2).

88. *Id.* at § 72-12(B)-1(D)(5)-(6).

89. *Id.* at § 72-12-7 (1978).

90. *Id.*

One remaining discriminatory aspect of the new exportation standard is the provision requiring out-of-state residents to obtain a permit before withdrawing groundwater from undeclared New Mexico basins.<sup>91</sup> New Mexico residents must acquire a permit to withdraw groundwater only from state declared basins.<sup>92</sup> No restrictions are placed on in-state appropriations or usages of undeclared groundwater.<sup>93</sup> Even if the out-of-state permit requirement were justified on the basis that it is necessary to maintain the State Engineer's monitoring of the out-of-state usage of New Mexico groundwater, the requirement will not pass commerce clause scrutiny. Such a state justification hardly would be legitimate when the State Engineer does not regulate or monitor the in-state appropriation or use of undeclared groundwater. Presumably, if the conservation of the undeclared groundwater were of significant state interest, the State Engineer would be given jurisdiction over the regulation of in-state usage. Therefore, the additional permit requirement promotes resource isolationism and likely will meet the commerce clause doom.

In summary, New Mexico's new water exportation statute will encounter difficulty clearing constitutional hurdles. The statute places water conservation and public welfare restrictions on interstate commerce while failing to expressly place similar in-state restrictions in the following cases:

- 1) an out-of-state application is filed for a new appropriation of surface water;<sup>94</sup>
- 2) an out-of-state application is filed to purchase and transfer existing surface or groundwater rights out of the state; and
- 3) an out-of-state application is filed to withdraw groundwater from an undeclared basin for use outside of the state.

### CONCLUSION

The U.S. Supreme Court, in *Sporhase*, sought to accommodate two competing interests: the Western states' desires to control and conserve their rapidly diminishing water resources and the necessity of preventing the economic Balkanization of state water resources. The Court struck a balance by requiring state regulations to be narrowly-tailored to the achievement of the state's objectives while operating evenhandedly on in-state and out-of-state residents. The Court did not indicate that it would require absolute evenhandedness in every instance but suggested that a

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91. *Id.* at § 72-12(B)-1(E) (Cum. Supp. 1983).

92. The State Engineer gains jurisdiction over underground waters by declaring that underground waters with reasonably ascertainable boundaries are public waters. *Id.* at § 72-12-1 (1978).

93. *Id.* at § 72-12-1.

94. Language in *Sporhase* suggests that state waters which are protected by interstate compacts will not be subject to commerce clause scrutiny. 458 U.S. at 956.

state's claim of public ownership might justify a "limited preference" for its own citizens or that an arid state's water conservation efforts might justify an absolute embargo on water exports. The New Mexico Federal District Court, in *El Paso*, ruled that New Mexico's interests in water conservation and optimum utilization might support a limited and non-discriminatory burden on commerce.

New Mexico's new exportation statute does not reflect adequately the directives of either *Sporhase* or *El Paso*. According to those decisions, New Mexico may place conservation and public welfare restrictions on the out-of-state usage of its waters provided that the same or comparable restrictions are placed on in-state usage. The New Mexico water code, with few exceptions, does not place express conservation or public welfare restrictions on in-state water use. The constitutionality of the exportation provisions could be determined, however, by the State Engineer's application of the statute and applicable in-state standards. If he evenhandedly evaluates in-state and out-of-state applications, the constitutionality of the statute may be upheld. If the statute is applied literally or in a manner which illegitimately discriminates against interstate commerce, the exportation statute will encounter commerce clause defeat.

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