# Making Waves in Response to *Sporhase*: An Analysis of the *Sporhase* Doctrine, How States Have Responded, and What Might and Should Happen Next

LEIGH S. BARTON*

ABSTRACT

*In 1982, the U.S. Supreme Court opened a new chapter in U.S. water law when it struck down parts of a Nebraska statute that restricted interstate water exports on dormant commerce clause grounds. In* Sporhase v. Nebraska*, the Court may have made it harder for water-rich states to protect their water resources by setting a negative precedent with respect to conservation measures. However, the* Sporhase *decision also left significant uncertainties with regards to the types of interstate water export restrictions that may be permissible. While* Sporhase*'s progeny clarify these uncertainties to a degree, they leave much uncertainty intact. Moreover, while many western states have changed or drafted interstate water export legislation in response to the* Sporhase *decision, these enactments avoid almost all of the uncertainties left by* Sporhase*. Therefore, this paper argues that to understand fully the types of interstate water export restrictions that are permissible, courts need to determine the constitutionality of states' more creative responses to* Sporhase *and promulgate legislation that tests the limits of the uncertainties left by the* Sporhase *decision.*

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* Georgetown Law, J.D. 2019; Wellesley College, B.A. 2014. 

## INTRODUCTION: THE CONTROVERSY OVER INTERSTATE WATER EXPORT RESTRICTIONS

A new chapter in U.S. water law opened in 1982 when the U.S. Supreme Court struck down part of a Nebraska statute restricting interstate water exports on dormant commerce clause grounds.[1] This decision, *Sporhase v. Nebraska*, has important implications for how states can respond to worsening water scarcity. As the problem of water scarcity worsens due to climate change, population growth, and our increasingly consumptive lifestyles,[2] water-poor states will increasingly look out-of-state for their water supply. Water-rich states, however, will increasingly seek to protect and preserve their water resources for both human consumption and the states' water-based ecosystems.[3] These conflicting interests present an important question: should interstate water export restrictions be encouraged as valid conservation measures or should they be rejected as undesirable economic protectionism?[4]

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1. Mark S. Davis & Michael Pappas, *Escaping the* Sporhase *Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 175, 179 (2012) (referring to Sporhase v. Nebraska, 458 U.S. 941 (1982)). The dormant commerce clause (sometimes referred to as the "negative" commerce clause) historically has been invoked to invalidate state regulations that interfere unduly with interstate commerce. Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 134 (2011).

2. Hydrologists estimate that water demand will increase due to population growth, but that the overall water supply will decrease due to climate change, drought, and flooding. *See* Ellie Kincaid, *California Isn't the Only State with Water Problems*, BUS. INSIDER (Apr. 21, 2015, 5:56 PM), https://perma.cc/AP2C-B4KU; JAMES MCNIVEN, BULK WATER EXPORTS: ENVIRONMENTAL CONCERNS AND BUSINESS REALITIES 1 (2005), https://perma.cc/8DXV-QCPK. This combination of increasing demand and decreasing supply will worsen the problem of water scarcity across the country. *Cf., e.g.*, Mark Davis & James Wilkins, *A Defining Resource: Louisiana's Place in the Emerging Water Economy*, 57 LOY. L. REV. 273, 273 (2011) (explaining that water in Louisiana "will be a scarce resource that will demand a well-thought-out and integrated approach to its stewardship" balancing "navigation, flood control, environmental, agricultural, industrial, and drinking water supplies," and, "[a]s if things are not complicated enough, regional and interstate water needs are also growing, as are energy-driven water uses").

3. *See* Davis & Pappas, *supra* note 1, at 180.

4. Klein, *supra* note 1, at 132. For more on *Sporhase*'s impact on water law and policy, see, e.g., Robert Currey-Wilson, *Do Oregon's Water Export Regulations Violate the Commerce Clause?*, 16 ENVTL. L. 963 (1986); A. Dan Tarlock, *So It's Not "Ours"—Why Can't We Still Keep It? A First Look at* Sporhase v. Nebraska, 18 LAND & WATER L. REV. 137 (1983); Charles E. Corker, Sporhase v. Nebraska ex rel. Douglas*: Does the Dormant Commerce Clause Really Limit the Power of a State to*

*Sporhase* may have made it harder for water-rich states to protect their water resources by setting a precedent of invalidating an interstate water export restriction. However, the decision also left great uncertainties as to what types of interstate water export restrictions might be permissible. While three subsequent cases further clarify these uncertainties, they leave much uncertainty intact. Moreover, while many western states have changed or drafted interstate water export legislation in response to *Sporhase*, their enactments avoid almost all the uncertainties and challenges presented by the *Sporhase* doctrine. Therefore, to understand fully the types of interstate water export restrictions that are permissible, courts need to determine the constitutionality of states' more creative responses to *Sporhase* and promulgate legislation that tests the limits of the uncertainties left by the *Sporhase* line of cases.

This paper is divided into three parts. Part I details the *Sporhase* doctrine, examining both *Sporhase* itself as well as its three subsequent cases. Part II describes the aftermath of *Sporhase* and its progeny, discussing first the doctrine's uncertainties and then states' legislative responses. Finally, Part III predicts how courts might respond to states' post-*Sporhase* legislation and provides recommendations on how states should act to force the courts to clarify the remaining uncertainties.

## I. BACKGROUND: THE *SPORHASE* DOCTRINE

This Part first details the *Sporhase* decision and the conditions under which an interstate water export restriction might survive dormant commerce clause analysis. It then describes the three subsequent cases that have addressed *Sporhase*, focusing on what each case adds to the original *Sporhase* analysis.

### A. *SPORHASE* LIMITS INTERSTATE WATER EXPORT RESTRICTIONS UNDER THE DORMANT COMMERCE CLAUSE

The *Sporhase* doctrine prohibits some but not all types of interstate water export restrictions. In *Sporhase v. Nebraska*,[5] the U.S. Supreme Court analyzed an interstate water export restriction under the dormant commerce clause and held that one of the restriction's two requirements was unconstitutional because it posed an explicit barrier to interstate commerce and failed strictest scrutiny. Appellants, Joy Sporhase and Delmer Moss, owned a farm on the Colorado-Nebraska border.[6] Their house was located on the Colorado side of the border, but they wanted to irrigate their property on both sides of the border with water

Forbid (1) the Export of Water and (2) the Creation of a Water Right for Use in Another State?, 54 U. COLO. L. REV. 393 (1983); Stephen F. Williams, *Free Trade in Water Resources:* Sporhase v. Nebraska ex rel. Douglas, 2 SUP. CT. ECON. REV. 89 (1983).

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

6. *Id.* at 944.

drawn from a well on the Nebraska side.[7] The Nebraska Attorney General sought a permanent injunction against their proposed interstate transport of groundwater.[8] He alleged that the transfer would violate a Nebraska statute requiring exporters of interstate groundwater to acquire a permit from the Nebraska Department of Water Resources.[9] In their defense, Sporhase and Moss challenged the constitutionality of the statute, arguing that it imposed an undue burden on interstate commerce in violation of the commerce clause.[10]

The relevant Nebraska statute, Section 46-613.01, required all interstate groundwater exporters to obtain a permit from the Nebraska Department of Water Resources.[11] To obtain a permit, two requirements had to be met. First, the state Director of Water Resources had to make three findings: that the withdrawal of the groundwater was (1) reasonable, (2) not contrary to conservation and use, and (3) not otherwise detrimental to the public welfare.[12] Second, the state receiving the transfer of groundwater had to grant reciprocal withdrawal and transport rights to the State of Nebraska.[13]

In evaluating the constitutionality of Section 46-613.01, the Supreme Court considered three main issues: (1) whether the water was an article of commerce subject to the commerce clause;[14] (2) whether Section 46-613.01 imposed an impermissible burden on interstate commerce; and (3) whether Congress had granted permission to the state to regulate groundwater in an otherwise impermissible way.[15] On the first issue, the Nebraska Supreme Court previously had held that groundwater was not an article of commerce.[16] Relying on this previous holding, in *Sporhase*, the state claimed that the water at issue was not an article of commerce and was not therefore subject to commerce clause review.[17] The U.S. Supreme Court, however, overturned the state supreme court's decision, holding that Nebraska's groundwater *was* an article of commerce and therefore *was* subject to the commerce clause. The Court reasoned that finding otherwise "would not only exempt Nebraska ground water regulation from burden-on-commerce

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7. *Id.*

8. *Id.*

9. *Id.* Note that neither the previous owners of the land nor Sporhase and Moss applied for the permit required by the Nebraska statute. *Id.*

10. *See id.*

11. *See id.* at 944 (citing NEB. REV. STAT. § 46-613.01 (1978)).

12. *Id.* Note that this requirement is frequently referred to as the "finding" requirement. *See, e.g.*, Philip M. Barnett, *Mixing Water and the Commerce Clause: The Problems of Practice, Precedent, and Policy in* Sporhase v. Nebraska, 24 NAT. RESOURCES J. 161, 166 (1984).

13. *Id.* Note that this requirement is frequently referred to as the "reciprocity" requirement. *See, e.g.*, *Sporhase*, 458 U.S. at 944 n.2; Barnett, *supra* note 12, at 167.

14. The commerce clause of the U.S. Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

15. *Sporhase*, 458 U.S. at 943.

16. *Id.* at 944 (citing State v. Sporhase, 305 N.W.2d 614, 616 (Neb. 1981)).

17. *Id.* at 953.

analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation."[18]

Next, the Supreme Court found Section 46-613.01's finding requirement to be constitutional while striking down its reciprocity requirement as unconstitutional. In determining the constitutionality of the two requirements, the Court first analyzed each requirement under the *Pike v. Bruce Church* balancing test,[19] the results of which determine whether a regulation is a permissible evenhanded restriction or whether it is an impermissible explicit barrier to interstate commerce.[20]

Under this balancing test, the Court found that the finding requirement was a permissible, evenhanded restriction because (1) the statute's purpose was a legitimate public interest,[21] (2) preventing the uncontrolled transfer of water out of a state by imposing withdrawal and use restrictions on the state's citizens does not discriminate against interstate commerce,[22] and (3) the finding requirement was no more strict in application than the state's intrastate water transfer restrictions.[23] Moreover, the Court noted that this holding was supported by a "reluctan[ce] 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."[24] The Court upheld the finding requirement even if it proved to be stricter in application to interstate water law than to intrastate water law.[25]

On the other hand, the Court held that the Nebraska statute's reciprocity requirement "operate[d] as an explicit barrier to commerce between the two States" because Colorado law at the time also forbade the exportation of Colorado's groundwater.[26] In other words, due to the Colorado restriction, the Nebraska statute's reciprocity requirement prohibited the export of water to Colorado.

To be constitutionally valid despite being facially discriminatory, the Supreme Court required Nebraska to demonstrate that its restriction was "narrowly tailored

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18. *Id.*

19. The *Pike v. Bruce Church* balancing test provides:

> Where the statute regulates evenhandedly 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.

397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)).

20. *Sporhase*, 458 U.S. at 954, 957.

21. *Id.* at 954–55.

22. *Id.* at 955–56.

23. *Id.* at 956.

24. *Id.*

25. *See id.*

26. *Id.* at 957.

to serve ... the State's legitimate conservation and preservation interest."[27] However, because Nebraska had presented no such evidence and had failed to even claim that such evidence existed, the Court held that "[t]he reciprocity requirement d[id] not survive the 'strictest scrutiny' reserved for facially discriminatory legislation"[28] and therefore violated the commerce clause.[29]

Finally, the Court held that Nebraska's "suggestion that Congress ha[d] authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water [wa]s not well founded."[30] The Court stated that none of the evidence presented by the state supporting its suggestion "constitute[d] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce."[31] According to the Court, the only acceptable evidence of such congressional consent would have been an express statement that it was "Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause."[32] Because Nebraska did not present this evidence, however, its reciprocity requirement was unconstitutional.[33]

In the end, because the Court ruled that only the reciprocity requirement was unconstitutional, it remanded the case for consideration of whether the reciprocity requirement was severable.[34] Since *Sporhase*, the Nebraska Supreme Court has held that the reciprocity requirement *was* severable, leaving the finding requirement valid state law in Nebraska.[35]

### B. POST-*SPORHASE* CASES FURTHER CLARIFY *SPORHASE*'S DORMANT COMMERCE CLAUSE ANALYSIS

The three subsequent cases that address *Sporhase* and its dormant commerce clause analysis further clarify when interstate water export restrictions are

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27. *Id.* at 958. Providing guidance on how Nebraska might demonstrate that its reciprocity requirement was "narrowly tailored to ... the State's legitimate conservation and preservation interest," the Supreme Court stated:

> If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. 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.

*Id.*

28. *Id.* (internal citation omitted).
29. *See id.* at 960.
30. *Id.* at 958.
31. *Id.* at 960.
32. *Id.* (internal quotation marks and citations omitted).
33. *See id.*
34. *See id.*
35. *See* Nebraska v. Sporhase, 329 N.W.2d 855, 857 (Neb. 1983).

constitutional. This section describes each of the three post-*Sporhase* cases in chronological order.

1. *El Paso I* Limits the Definition of "Legitimate Local Purpose" and Clarifies When Total Bans Pass Strictest Scrutiny

In *City of El Paso v. Reynolds* ("*El Paso I*"),[36] the District Court of the District of New Mexico considered New Mexico's prohibition on interstate groundwater exports and held it unconstitutional under the dormant commerce clause. The City of El Paso, Texas ("El Paso"), faced with a water supply "insufficient to meet the city's future needs," had attempted to appropriate groundwater from neighboring New Mexico.[37] However, both New Mexico's constitution and a New Mexico statute (collectively, "New Mexico's groundwater embargo" or the "embargo"[38]) had banned the interstate export of New Mexico's groundwater.[39] As such, the New Mexico State Engineer denied El Paso an appropriation permit.[40] In response, El Paso challenged New Mexico's groundwater embargo under the dormant commerce clause.[41]

In evaluating *El Paso I*, the district court first addressed and dismissed several jurisdictional issues raised by the defendants, including their claim that the Rio Grande Compact of 1938 (the "Compact") disallowed commerce clause analysis in this instance.[42] The defendants claimed that the Compact proscribed commerce clause analysis "because any ground water pumping by El Paso would take surface water apportioned to New Mexico under the Compact."[43] Thus, because the embargo merely implemented the Compact, it could not contravene the commerce clause.[44] However, the district court dismissed this claim, finding no validity to the contentions that the Compact apportioned the water at issue in the case and that it controlled the use of hydrologically connected groundwaters.[45]

The district court then turned to the legality of the embargo under the dormant commerce clause, ultimately finding it unconstitutional because it was facially discriminatory and failed strictest scrutiny.[46] Following the Supreme Court's analysis in *Sporhase*, the district court first concluded that the groundwater at

36. 563 F. Supp. 379 (D.N.M. 1983) [hereinafter *El Paso I*].
37. *Id.* at 381.
38. *See id.* (referring to the state constitution and the statute at issue, collectively, as "New Mexico's ground water embargo"). Note that the district court found it immaterial whether the embargo was based on the state constitution or a state statute. *See id.*; *see also* City of El Paso v. Reynolds, 597 F. Supp. 694, 696 (D.N.M. 1984).
39. *See El Paso I*, 563 F. Supp. at 381.
40. *Id.*
41. *Id.*
42. *See id.* at 381–88.
43. *Id.* at 383.
44. *Id.*
45. *Id.* at 383–84.
46. *See id.* at 391.

issue was categorically an article of commerce.[47] Next, the district court applied the *Pike v. Bruce Church* balancing test and found that because "New Mexico's embargo bar[red] the export of ground water absolutely; it [wa]s an explicit barrier to interstate commerce."[48] Finally, the district court applied strictest scrutiny, requiring the defendants to "demonstrate that the embargo serve[d] a legitimate local purpose, that it [wa]s narrowly tailored to that purpose and that there [wer]e no adequate non-discriminatory alternatives."[49] The defendants stated that the embargo's purpose was to conserve and preserve the state's internal water supply.[50] However, the district court found this purpose illegitimate, interpreting *Sporhase* as holding "that a state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource."[51] Thus, because the defendants did not claim that New Mexico was "experiencing a shortage of water for health and safety needs" or that it "w[ould] do so in the near future,"[52] the district court found the defendants' stated purpose "tantamount to economic protectionism" and therefore illegitimate.[53]

Moreover, even "[i]f the embargo's purpose were to conserve and preserve the water supply for the health of New Mexico's citizens and not the health of its economy," the district court held that the embargo still would "be unconstitutional because it [wa]s not narrowly tailored to achieve that purpose."[54] The district court emphasized that because the embargo was "a total ban on interstate commerce in ground water," it "c[ould] only be justified if it [wa]s narrowly tailored to times and places of shortage."[55] Thus, because the embargo's stated purpose was not legitimate and because it was not "narrowly tailored to times and places of shortage," it failed strictest scrutiny and was unconstitutional.

Even though *El Paso I* limited the definition of "legitimate local purpose" and clarified when a total ban passes strict scrutiny, the case still left uncertainties as

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47. *Id.* at 388. Instead of inquiring into the specifics of New Mexico water law and how the state treats water (as the *Sporhase* Court did with respect to Nebraska), "the district court read *Sporhase* as an expansive declaration that all water is an article of commerce and that all state ownership claims are legal fictions, regardless of the particularities of state law or practice." Davis & Pappas, *supra* note 1, at 195 (citing *El Paso I*, 563 F. Supp. at 388 (stating that "water is an article of commerce" and "a state's asserted ownership of public waters within the state is only a legal fiction") (internal citations omitted)).

48. *El Paso I*, 563 F. Supp. at 388.

49. *Id.* Note that by defining strictest scrutiny as requiring a "legitimate local purpose," the *El Paso I* court is equating the "legitimate conservation and preservation interest" requirement of strictest scrutiny as defined by the *Sporhase* Court, *see* 458 U.S. 941, 957–58 (1982), with the "legitimate local purpose" requirement of the *Pike v. Bruce Church* balancing test, *see* 397 U.S. 137, 142 (1970) (internal citation omitted).

50. *See El Paso I*, 563 F. Supp. at 388–89.

51. *Id.* at 389.

52. *Id.*

53. *Id.* at 390.

54. *Id.*

55. *Id.* at 391.

to what water export restrictions are permissible. After *El Paso I*, the New Mexico legislature amended the embargo and appealed the *El Paso I* decision to the Tenth Circuit.[56] However, because the state legislature had amended the embargo, the Tenth Circuit vacated *El Paso I* and remanded the matter to the district court to consider El Paso's challenge to New Mexico's new export statute.[57]

2. *El Paso II* Broadens the Definition of "Legitimate Local Purpose" and Clarifies When Restrictions Pass the *Pike v. Bruce Church* Balancing Test

In *City of El Paso v. Reynolds* ("*El Paso II*"), the District Court of the District of New Mexico considered New Mexico's new export statute and found it constitutional when applied to new out-of-state appropriations, but unconstitutional when applied to domestic and transfer wells.[58] The new statute was structured as a list of conditions under which water *could* be exported out of New Mexico.[59] The first part of the new statute "require[d] the State Engineer to find that [a proposed] export 'would not impair existing rights, [wa]s not contrary to the conservation of water within the state and [wa]s not otherwise detrimental to the public welfare of the citizens of New Mexico.'"[60] The second part of the new statute "direct[ed] the State Engineer to consider six additional factors when acting upon applications for export."[61] In the end, the district court upheld the new statute as applied to applications for new out-of-state appropriations because it was facially evenhanded (it mirrored the burdens on applications for new in-state appropriations) and it did not pose an impermissible burden on interstate commerce.[62]

In examining this application of the new statute under the *Pike v. Bruce Church* balancing test, the district court discussed at length whether "conservation and public welfare" was a "legitimate local purpose." First, the district court noted that "[a] state may not limit water exports merely to protect local economic interests," but other than that, "the [*Sporhase*] Court did not limit the public welfare interests a state may protect by regulating interstate commerce in ground water."[63] Next, the district court admitted that "except to the extent that it refers to bare human survival, every aspect of the public welfare has economic overtones."[64] However, "[t]his d[id] not mean that New Mexico [could] constitutionally

56. City of El Paso v. Reynolds, 597 F. Supp. 694, 696 (D.N.M. 1984).
57. *Id.* Note that El Paso challenged the new statute before it had been used to grant or deny any appropriation applications.
58. *Id.* at 708.
59. *Id.* at 697.
60. *Id.* (internal citation omitted).
61. *Id.* (internal citation omitted).
62. *See id.* at 698.
63. *Id.* at 700 (citing Sporhase v. Nebraska, 458 U.S. 941, 956 (1982)).
64. *Id.*

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.'"[65] Instead, the district court held, if the statute's legitimate local purpose is something other than just human survival, then the balancing part of the *Pike v. Bruce Church* test kicks in to determine whether the statute's resulting burden on interstate commerce is only incidental (and therefore permissible).[66] However, because this case was brought before the new statute could be applied to any appropriation application, the district court could not determine whether this application of the new statute would impermissibly burden interstate commerce.[67] In other words, without any case-specific facts to analyze the new statute under, applying the new statute to new appropriation applications did not violate the dormant commerce clause.[68]

On the other hand, the district court struck down the application of the new statute to "domestic wells and transfers of existing rights where the water [wa]s to be used outside the State" as impermissible burdens on interstate commerce (under any factual scenario).[69] Because this application of the new statute "requir[ed] the State Engineer to consider [the statute's conditions] 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," it was facially discriminatory.[70] As such, this application of the new statute was subject to strictest scrutiny. However, the defendants failed to meet their burden of "show[ing] that the disparate treatment of intrastate and interstate transfers and domestic wells serve[d] a legitimate local purpose, that it [wa]s narrowly tailored to that purpose and that there [wer]e no adequate nondiscriminatory alternatives."[71] Therefore, this application of the new statute posed an impermissible burden on interstate commerce and was unconstitutional.[72]

*El Paso II* broadened the definition of "legitimate local purpose" and clarified when restrictions are evenhanded under the *Pike v. Bruce Church* balancing test. However, even after this case was decided, uncertainty remained as to which water export restrictions were permissible. This uncertainty remained unaddressed for another twenty-seven years as no case directly confronted *Sporhase* again until 2011.

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65. *Id.*
66. *Id.* at 700–01 (citing Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
67. *Id.* at 702–03.
68. *See id.*
69. *Id.* at 708.
70. *Id.* at 703–04.
71. *Id.* at 704 (citing *Hughes*, 441 U.S. at 337).
72. *Id.*

3. *Tarrant* Illustrates When the Dormant Commerce Clause Bows Before Interstate Water Compacts

In *Tarrant Regional Water District v. Herrmann*,[73] the Tenth Circuit considered Oklahoma's interstate water export restrictions under the dormant commerce clause, with the additional wrinkle that some of the waters at issue were covered by an interstate water compact (the "Compact"). The Tarrant Regional Water District ("Tarrant"), a Texas state agency, sought to appropriate water in Oklahoma for use in Texas.[74] In conjunction with its appropriation application, Tarrant sought declaratory judgment to invalidate and enjoin enforcement of the Oklahoma interstate water export restrictions.[75] Tarrant claimed that these restrictions violated the dormant commerce clause under *Sporhase*.[76] However, both the district court and the Tenth Circuit distinguished *Sporhase* from the facts of this case, holding that the dormant commerce clause was inapplicable because the waters at issue were subject to an interstate compact ratified by Congress.[77]

Tarrant appealed to the Supreme Court, which granted certiorari in January 2013.[78] Before the Supreme Court, Tarrant argued that "it [wa]s entitled to acquire water under the Compact from within Oklahoma and that therefore the Compact pre-empt[ed]" Oklahoma's restrictions.[79] "In the alternative, Tarrant argue[d] that the Oklahoma laws [were] unconstitutional restrictions on interstate commerce."[80] In response to Tarrant's main claim, the Supreme Court held that "the Compact d[id] not create any cross-border rights in signatory States,"[81] so it did not give Texas a right to acquire water from Oklahoma.[82] In response to Tarrant's alternative claim, the Court affirmed the findings and reasoning of the two lower courts.

Before the Supreme Court, Tarrant argued that the Compact left some water "unallocated," "[s]o . . . because Oklahoma's laws prevent[ed] this 'unallocated water' from being distributed out of State, those laws violate[d] the Commerce Clause."[83] However, the Supreme Court found that "Tarrant's assumption that the Compact le[ft] some water 'unallocated' [wa]s incorrect."[84] Under the

73. 656 F.3d 1222 (10th Cir. 2011).
74. *Id.* at 1227.
75. *Id.*
76. *Id.*
77. *Id.* at 1231, 1239. Interstate water compacts ratified by Congress are federal law. As such, they can preempt contradictory state law and are essentially immune from commerce clause attacks. Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries*, 46 NAT. RES. J. 601, 626–27 (2006).
78. Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614 (2013).
79. *Id.* at 618.
80. *Id.*
81. *Id.* at 639. For more information on the Court's analysis of this first claim, see *id.* at 626–39.
82. *See id.* at 639.
83. *Id.*
84. *Id.*

Compact, the water Tarrant believed to be "unallocated" was actually allocated to Oklahoma.[85] "The Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact le[ft] no waters unallocated."[86] Therefore, like both lower courts, the Supreme Court upheld Oklahoma's interstate water export restrictions.

In conclusion, while *Tarrant* further clarified that interstate water compacts are immune from dormant commerce clause analysis, it did nothing to clarify the uncertainties left after *El Paso I* and *II*.

## II. DISCUSSION AND ANALYSIS: WHAT HAS HAPPENED AS A RESULT OF *SPORHASE*?

*Sporhase* established the analysis that interstate water export restrictions must survive in order to be deemed constitutional, but it failed to clarify fully how states can draft restrictions that will pass *Sporhase*'s analysis. This Part explores the results of *Sporhase* and its three subsequent cases, first explaining the uncertainties left by the *Sporhase* doctrine and then describing how states have either changed existing or drafted new interstate water export legislation in response to *Sporhase* and its uncertainties.

### A. *SPORHASE* AND ITS PROGENY LEAVE MANY UNCERTAINTIES AS TO WHAT TYPES OF INTERSTATE WATER EXPORT RESTRICTIONS ARE PERMISSIBLE

*Sporhase* permits interstate water export restrictions that would otherwise be impermissible burdens on interstate commerce if they are "narrowly tailored to serve . . . the State's legitimate conservation and preservation interest."[87] However, neither *Sporhase* nor its three subsequent cases[88] fully explain what a state needs to do or show to meet this exception.[89] To shed light on this issue, this section identifies the three major uncertainties left by this exception: (1) what constitutes a "legitimate conservation and preservation interest;" (2) how a restriction can be "narrowly tailored" to that interest; and (3) how a state can prove that it is "demonstrably arid" or that it is experiencing a "severe shortage."

In *El Paso I* and *II*, the District Court of the District of New Mexico took on the question of what constitutes a "legitimate conservation and preservation interest,"[90] but it still left several gaps in the analysis. In *El Paso I*, the district court

85. *Id.*

86. *Id.* at 640.

87. *See* Sporhase v. Nebraska ex. Rel. Douglas, 458 U.S. 941, 957–58 (1982).

88. Note that *Tarrant* did little to clarify this exception. *Tarrant* simply held that interstate water compacts can allow states to avoid completely commerce clause analysis. But because it did not analyze the restriction at issue under the dormant commerce clause, it does not help to address the exception and its uncertainties.

89. The *Sporhase* Court provided some guidance as to what Nebraska could have shown to allow its reciprocity requirement to survive strictest scrutiny, *see supra* note 27, but it still left unanswered many questions as to how to meet this test.

90. Remember that the *El Paso I* court equated "legitimate conservation and preservation interest" with "legitimate local purpose." *See supra* note 49. This parallel was continued by the district court in *El*

limited "legitimate conservation and preservation interests" to "human survival."[91] According to the district court, "[o]utside of fulfilling human survival needs, water is an economic resource."[92] Thus, under *El Paso I*, for an interstate water export restriction to survive strictest scrutiny, its purpose must be "to promote the health and safety of [the state]'s citizens" and the state must demonstrate that it "is now experiencing a shortage of water for health and safety needs or [that it] will do so in the near future."[93] But is this the only way for a restriction to survive strictest scrutiny? Is there a way for a state experiencing water shortage issues to restrict interstate exports even if it has not yet reached conditions dire enough to affect human survival?

To help clarify this issue, the *El Paso II* court broadened the definition of "legitimate conservation and preservation interest" beyond just human survival.[94] The district court suggested that any purpose that implicates economic interests simply requires a court to balance "the resulting burden on interstate commerce . . . against the putative, non-economic local benefits."[95] In other words, if a restriction's purpose is something other than mere human survival, the restriction is not automatically impermissible. Rather, either the *Pike v. Bruce Church* balancing test or the "narrowly tailored" part of the strictest scrutiny test will kick in to determine the constitutionality of the restriction.[96] However, even this clarification only leads to more questions. For example, how economic can a "legitimate conservation and preservation interest" be? Must it always implicate human survival to some extent? The *El Paso II* court suggested that any interest that is "simple economic protectionism" is *per se* invalid.[97] But if every aspect of public welfare (aside from human survival) has "economic overtones,"[98] then is an interest involving human survival necessary to prevent an interest from being "simple economic protectionism"? These questions remain unanswered.

In *El Paso I*, the district court also addressed what it means for a restriction to be "narrowly tailored" to a legitimate interest, but, again, it left a major gap in the analysis. The district court found that even if the purpose of New Mexico's embargo was to protect the health and safety of New Mexico's citizens, the embargo itself was not "narrowly tailored" because it did not reserve the water that

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Paso II. *See supra* Part I.B.2. Therefore, this paper similarly will liken the two phrases, but refer to them collectively as "legitimate conservation and preservation interest" (rather than as "legitimate local purpose") because that was the language set forth by the Supreme Court in *Sporhase*.

91. *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D.N.M. 1983).

92. *Id*.

93. *Id*.

94. *See* City of El Paso v. Reynolds, 597 F. Supp. 694, 700 (D.N.M. 1984) ("[t]his does not mean that New Mexico may constitutionally exercise a limited preference for its citizens only when their survival is at stake").

95. *Id*. at 700–01 (internal citation omitted).

96. *See id*. (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

97. *Id*. at 701 (citing Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978)).

98. *See id*. at 700.

remained inside the state for health and safety uses.[99] Rather, it allowed any retained water to be used for a variety of purposes, including agriculture, industry, and energy.[100] Put simply, *El Paso I* required that "a valid export restriction, at a minimum, ... further a legitimate interest more than incidentally."[101] However, there is a big difference between "narrowly tailored" and "more than incidentally." Thus, uncertainties also remain with respect to what it means for a restriction to be "narrowly tailored."

Finally, neither *Sporhase* nor its progeny provide much guidance as to the third major uncertainty: how a state can show that it is "demonstrably arid" or that it is experiencing a "severe shortage." This uncertainty stems from the *Sporhase* Court's suggestion that a total ban on the interstate expropriation of water may be acceptable if a state is "demonstrably arid"[102] or if it can prove a "severe shortage."[103] This uncertainty is perhaps the most important of the three given that population growth combined with climate change, drought, and flooding is projected to worsen water scarcity across the western United States.[104] As such, water-rich states may increasingly desire to prevent water-poor states from importing their water. The only guidance provided by the *Sporhase* Court with respect to this uncertainty is that a state could show severe shortage by providing evidence of the "designation of groundwater control areas, its declarations of water shortage, and its restrictions and monitoring of in-state water use and transfers."[105] Although these three suggested showings are helpful, they too leave many questions unanswered. For example, what constitutes "severe" shortage or "demonstrable" aridity? Does the severe shortage have to be current? If not, how far into the future can the shortage be predicted? Are there any other pieces of evidence (besides those listed by the *Sporhase* Court) that would be adequate to show severe shortage or demonstrable aridity?

In summary, while the *Sporhase* doctrine does not completely prohibit interstate water export restrictions, it leaves many uncertainties as to the types of restrictions that might be permissible. To see how states have addressed *Sporhase* and its uncertainties, and to provide some insight into what issues the courts might be forced to address next, the next section provides an overview of the state legislation that has changed or sprung up in response to *Sporhase*.

### B. STATES HAVE RESPONDED TO *SPORHASE* WITH VARYING DEGREES OF CREATIVITY

Since *Sporhase*, many western states have re-examined how they regulate interstate water exports and either drafted or changed their existing statutes to

99. *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 390 (D.N.M. 1983).
100. *Id.*
101. Barnett, *supra* note 12, at 171.
102. *See* Sporhase v. Nebraska, 458 U.S. 941, 957–58 (1982).
103. *See id.* at 956.
104. *See supra* note 2.
105. Davis & Pappas, *supra* note 1, at 211 (citing *Sporhase*, 458 U.S. at 955).

reflect *Sporhase*'s analysis with varying degrees of creativity.[106] In general, states' responses to *Sporhase* can be divided into three categories: (1) those states that simply copied how Nebraska changed its statute in response to *El Paso II*; (2) those states that combined pieces of the new Nebraska statute with their own requirements; and (3) those states that took an entirely original approach to interstate water export restrictions in an attempt to avoid *Sporhase* altogether.

The first category of states chose to model their interstate water export legislations after Nebraska's post-*El Paso II* changes to its own restriction. Nebraska repealed the statute at issue in *Sporhase* in its entirety, including the three requirements the Supreme Court upheld. It then enacted a new statute based on the New Mexico requirements upheld by the district court in *El Paso II*.[107] Like the old statute, Nebraska's new statute applies only to groundwater.[108] Unlike the old statute, however, the new statute incorporates four new criteria derived from *El Paso II*: (1) whether "[the proposed use] is a beneficial use of ground water;" (2) whether the applicant has available "alternative sources of surface or ground water;" (3) whether there is "[a]ny negative effect of the proposed withdrawal on surface or ground water supplies needed to meet present or reasonable future demands for water in the area of the proposed withdrawal;" and (4) whether there are "[a]ny other factors . . . that the director deems relevant to protect the health, safety, and welfare of the state and its citizens."[109] After Nebraska passed this new statute, at least four other states followed suit, each modelling their interstate water export statutes after the new Nebraska statute.[110]

The second category of states took pieces of the new Nebraska statute and added their own requirements. For example, Colorado took one requirement from the new Nebraska statute—"[t]he proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state"[111]—and combined it with a new, Colorado-specific requirement—"the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states."[112] Assuming that the requirement taken from the new Nebraska statute also applies to intrastate exports, this statute will likely be upheld under a dormant commerce clause attack because it is facially

106. *See* Douglas L. Grant, *Commerce Clause Limits on State Regulation of Interstate Water Export*, 105 J. CONTEMP. WATER RES. & EDUC. 10, 14 (1996). *Sporhase*'s impact on eastern states is unclear, however, because water export restriction statutes are more common in western states. *Id*.

107. *Id*. at 15.

108. *Id*.

109. Grant, *supra* note 106, at 15 (citing NEB. REV. STAT. § 46-613.01 (1984)).

110. See Grant, supra note 106, at 15 (citing UTAH CODE ANN. §§ 73-3a-108 (1991); ARIZ. REV. STAT. ANN. § 45-292 (1989); IDAHO CODE §§ 42-203A(5), -222(1), -401 (1985); MONT. CODE ANN. §§ 85-2-141(7), -311(4), -316(4) (1985)). Note that while the new Nebraska statute applies only to groundwater, these imitator statutes apply to both surface and groundwater.

111. COLO. REV. STAT. § 37-81-101(3)(b) (West 2019).

112. *Id*. at § 37-81-101(3)(a).

evenhanded.[113] Even if, however, the Nebraska-esque requirement applies only to interstate exports, it still will not be facially discriminatory because courts allow "[a] state [to] 'conserve' water within its borders for the use of its citizens."[114]

In addition, a different Colorado statute "authorizes a fee of fifty dollars per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in this state for beneficial use outside this state."[115] The Colorado Attorney General believes that this export fee violated the dormant commerce clause as no similar fee is imposed on in-state water use, so the constitutionality of this second statute is uncertain.[116] Assuming the fee is facially discriminatory, it is unlikely to be found constitutional unless the state can prove that the fee is "narrowly tailored" to the preservation and conservation of water for health and safety needs within the state (or some other legitimate local purpose).[117]

The third and final category of states pursued an entirely original approach to getting around *Sporhase*. For example, both Montana and New Mexico enacted statutes that take advantage of the market participant exemption to the dormant commerce clause.[118] The market participant exemption allows a state to favor its own residents over non-residents when the state acts as a market participant, not as a market regulator.[119] Thus, "[i]f a state operates a cement plant, . . . it is entitled to limit sales to its residents in times of shortage without" violating the dormant commerce clause.[120] Montana only allows the state to appropriate water for consumptive uses at a rate in excess of 4,000 acre-feet per year and 5.5 cubic feet per second.[121] It also only allows the state to appropriate water in any amount from six river basins for interbasin transport.[122] Anyone wishing to use this appropriated water must lease it from the state.[123] Similarly, New Mexico has passed legislation authorizing a long-term state appropriation and leasing program.[124] This legislation allows state appropriations to exist unexercised for up to a century, but does not otherwise bar private appropriations.[125] If state appropriations

113. *See* City of El Paso v. Reynolds, 597 F. Supp. 694, 698 (D.N.M. 1984) (holding a statute facially evenhanded when its burdens on out-of-state appropriations mirror its burdens on in-state appropriations).

114. *Id*. at 702.

115. COLO. REV. STAT. § 37-81-104(1) (West 2019).

116. *See* Grant, *supra* note 106, at 15 (citing OP. ATT'Y GEN., AG File No. ONR 8504 066/AON (Sept. 10, 1985)).

117. *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D.N.M. 1983).

118. Grant, *supra* note 106, at 15.

119. *Id*.

120. *Id*.

121. MONT. CODE ANN. §§ 85-2-141(6), -301(2)(ii) (West 2019).

122. *See id*.

123. *See id*.

124. Grant, *supra* note 106, at 15 (citing N.M. STAT. ANN. §§ 72-14-43 to -44 (1987)).

125. *See id*. (citing N.M. STAT. ANN. §§ 72-14-43 to -44 (1987)).

leave no unappropriated water available for private appropriators, the private appropriators can lease the state-appropriated water.[126] Whether these enactments are constitutional is uncertain because the small number of Supreme Court cases that discuss the market participant exemption to the dormant commerce clause, like *Sporhase*, leave key questions unanswered.[127]

In summary, states mainly have responded to *Sporhase* and its uncertainties by taking the easy way out. Most states have either copied a model legislation known to be constitutionally valid under *El Paso II*, or they have adopted part of that model legislation and added it to state-specific requirements that are unlikely to affect dormant commerce clause analysis. The remaining states have sought to avoid *Sporhase* altogether by taking advantage of a different exception to the dormant commerce clause. In conclusion, states' legislative reactions to *Sporhase* have not opened the door to further litigation which would clarify the many uncertainties left by *Sporhase* and its progeny.

## III. PREDICTIONS OF AND RECOMMENDATIONS FOR THE FUTURE

Because states' response to the *Sporhase* doctrine has been one of avoidance of its complications and uncertainties, it is difficult to predict what will become of the doctrine. Based on the states' legislative responses, only two future lines of cases seem imminent. First, it is likely that the courts will address the export fee issue and either invalidate export fees entirely or, more likely, craft limitations on their use. This line of cases will be of significance to most, if not all, states because water-rich states might see the fees as a potentially significant source of income[128] and water-poor states might accept them as a relatively cost-effective way to obtain water. This would be especially true if purchasing exported water were less expensive than building or expanding desalination capacity. In addition, as water markets are more frequently implemented in the international arena,[129] more states may try to implement them domestically. As such, a determination of

126. *See id.* (citing N.M. STAT. ANN. §§ 72-14-43 to -44 (1987)).

127. *Id.* For example, does the market participant exemption apply when a state grants rights to a natural resource (like water)? (Previously, cases concerned only uses of the exemption when the state was selling a product it manufactured). *Id.*

128. For example, studies have shown that if Canada, which is the most water-rich nation in the world, started exporting its water to the United States, it could make billions in annual profits. *See* Steven Maich & Barbara Righton, *US Thirsts for Canadian Water*, THE CANADIAN ENCYCLOPEDIA, https://perma.cc/V5QU-JACG (last modified Dec. 16, 2013) ("[I]n 2001, the Frontier Centre for Public Policy, A Winnipeg-based think tank, constructed a theoretical business model showing that if Manitoba could sell 1.3 trillion gallons of water per year (roughly the amount that drains from provincial rivers into Hudson Bay in only 17 hours) at the same price charged for desalinated sea water in California, the province could reap annual profits of close to $4 billion."). Although this international example of water exports is on a much larger scale than the interstate exports that would occur in the United States, it illustrates the economic viability of exports and export fees.

129. *See, e.g., Global Water Market to Reach $915 Billion by 2023 as Oil and Commodity Prices Recover, New GWI Forecasts Reveal*, WATER ONLINE (Aug. 2, 2018), https://perma.cc/XF9Q-BH32 (last visited Sept. 11, 2019); *see generally* Jonathan H. Adler, *Warming Up to Water Markets*,

the constitutionality of export fees in the United States might essentially determine the constitutionality of interstate water markets. Second, it is likely that the courts will decide whether and to what extent states can use the market participant exemption to the dormant commerce clause to bypass *Sporhase*. As water scarcity worsens, this line of cases might be of vital importance as more states look for ways to obtain water resources from other states or to protect their own water resources from interstate exporters.

However, these two case lines will not be enough to address *Sporhase*'s uncertainties because they still skirt the issue of how to implement a restriction under *Sporhase*. To best prepare states for the future and fill in the gaps in the *Sporhase* doctrine, states need to enact legislation that exploits *Sporhase* and tests the boundaries of its uncertainties. For example, states should adopt conservation and preservation interests with "economic overtones."[130] Such an enactment would force courts to clarify how much economic overtone is acceptable and how a state can craft a restriction that is narrowly tailored to that interest. Similarly, very water-poor states should enact total bans on interstate exports, citing "human survival" as their conservation and preservation interest[131] and force courts to clarify what a state needs to show to prove a human survival interest. Doing this might also clarify uncertainties concerning whether the need to protect a state's water resources for human survival purposes must be current or whether it can reflect a future need (and if so, how far into the future the need can be). In summary, states need to force the courts to continue addressing the limits of the *Sporhase* doctrine by enacting legislation that addresses *Sporhase* head-on rather than just copying what the *El Paso II* court approved or trying to avoid *Sporhase* altogether. Only in this way can states (or anyone) truly understand *Sporhase* and its impact on U.S. water law.

## IV. CONCLUSION

In conclusion, *Sporhase* may become increasingly important as water scarcity issues drive water-poor states to seek water supplies from out-of-state and water-rich states to seek to protect their water supplies. However, given states' responses to *Sporhase* and its progeny, it seems unlikely that the many uncertainties left in the *Sporhase* doctrine will be clarified by the courts in the near future. Rather, it seems more likely that future litigation will clarify whether export fees are constitutional (and if so, how they need to be drafted) and whether (and how and to what extent) the market participant exemption to the dormant commerce

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REGULATION, Winter 2008–2009, at 14–17, *available at* https://perma.cc/682Q-QQER (advocating for international water markets as a solution to the water scarcity crisis).

130. To recall what was meant by "economic overtones" with respect to a conservation and preservation interest, see City of El Paso v. Reynolds, 597 F. Supp. 694, 700 (D.N.M. 1984).

131. To recall what was meant by "human survival" as a conservation and preservation interest, see City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D.N.M. 1983).

clause can allow states to impose an interstate water export restriction while avoiding *Sporhase* altogether. Nevertheless, because *Sporhase* leaves an opportunity for states to implement constitutional interstate water export restrictions, future state legislation should be drafted to force the courts to clarify the many gaps and uncertainties left by *Sporhase*.