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SELLING NEBRASKA’S WATER: WATER SALES, TRANSFERS AND EXPORTS

J. David Aiken

Historically, western states have been free to prohibit water exports, and most states have done so. This changed abruptly in 1982, when the U.S. Supreme Court in its Sporhase decision invalidated Nebraska’s groundwater export statute. After Sporhase, states could no longer simply prohibit the export of water, so the likelihood that water could be purchased or appropriated for export increased. In 1987 legislation was introduced to aggressively seek interstate buyers for Nebraska water. In the face of stormy opposition, the legislation was successfully recast as a study of water exports and transfers. The water exports study, however, contained the original premise: that selling Nebraska water is inevitable and could be a state financial bonanza. Analysis of the issue indicates it is not clear that selling Nebraska water is in the state’s best interests, particularly if the sale proceeds are used to construct new irrigation projects, thus adding to surplus crop production.

Introduction

Traditionally, western states, including Nebraska, have been able to prevent export of their water to other states, reserving it for in-state uses. In 1982 the U.S. Supreme Court, in the landmark decision of Nebraska v. Sporhase, invalidated a feature of Nebraska’s groundwater export statute which discriminated against out-of-state users. The Sporhase decision increased the likelihood for development of increased water exports between states and interstate sale of water rights. Some Nebraskans see the Sporhase decision as an economic development opportunity, while others see it as a threat to the state’s long-term interests. This issue is complex and controversial, and Nebraska’s policy response to the Sporhase decision must take both factors into consideration.

This chapter examines Nebraska water policy regarding water transfers and exports as well as the policies of western states in general prior to the Sporhase decision. The Sporhase decision is examined in some detail, as is water export litigation after Sporhase. The Nebraska policy response to Sporhase — a preview of the political controversy that will attend water export and transfer legislative debates in 1989 and beyond — is also profiled. Finally, water export and transfer policy alternatives are evaluated.

While the thought of exporting water may strike most Nebraska citizens as outrageous, many small-scale transfers could occur with little adverse
effect on Nebraska. The likelihood of Los Angeles, Phoenix or Denver importing massive amounts of water from Nebraska is remote, at least within the foreseeable future. If water exports occur they will most likely involve small quantities moved over short distances.

Making water rights marketable will not signal the end of irrigated agriculture in Nebraska; in fact it may provide new opportunities to resolve a variety of water conflicts.

The notion of buying and selling water rights has always aroused controversy in Nebraska, raising the specter of cities and industries drying up the irrigated areas of the state. But, in fact, allowing water rights to be purchased would broaden the water management options available to Nebraska resource managers, and could even result in enhanced protection of fish and wildlife. Even if municipal and industrial uses were doubled in Nebraska, the water could be supplied with about ten percent of the water currently used in irrigation. Making water rights marketable will not signal the end of irrigated agriculture in Nebraska; in fact it may provide new opportunities to resolve a variety of water conflicts.

In considering water export policy alternatives, one must realize that the Sporhase decision does not represent the last word on water exports law. That legal issue will continue to be developed through additional state legislation and litigation. There is little need to immediately enact legislation either promoting exports or limiting them to protect Nebraska's interests, but this would send a political signal that Nebraska is friendly or hostile toward exporting its water. Citizens and policy makers must avoid simply concluding that water exports and transfers are either terrible or the solution to all our problems. The truth lies between these extremes.

Background

While the issue of water exports and transfers appears to have been thrust upon Nebraskans with the Sporhase decision, additional factors have contributed to the development of the issue and how it will affect Nebraskans. Nebraska's abundance of groundwater means that the state is a potential source of water for more arid states. Nebraska already has a turbulent history regarding interbasin surface water transfers that may make the issue of interstate water transfers more controversial. Finally, because Nebraska is the only western state that prohibits the sale of irrigation water rights for uses other than irrigation, proposals to sell water rights within
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Nebraska and to users in other states will generate strong political resistance.

Water Use and Policy

How water exports and water rights transfers affect Nebraska depends upon the state’s current water availability and use. While Nebraska is a semi-arid state, its groundwater availability has created unique water laws and policy development and has made the state a potential source of water for other states. Nebraska’s water policies have emphasized water development and use rather than resource protection. Policies encouraging water exports would be consistent with this tradition, although export policies have been vigorously opposed by agricultural groups. Policies adopting a resource protection objective would discourage water exports, but they have also been opposed in other contexts by irrigation and water development interests.

Sources and Use

Nebraska is categorized as a semi-arid state because the western two-thirds of the state needs supplemental water for row-crop production. About 90 percent of all water used in Nebraska is used for irrigation. Average annual precipitation ranges from thirty-four inches in the southeast corner of Nebraska to sixteen inches in the Panhandle. Nebraska contains thirteen river basins, about 24,000 miles of streams and rivers, and many small dams and farm ponds. Eighteen large reservoirs (each storing at least 25,000 acre-feet of water) collectively store more than three million acre-feet of water, principally for irrigation. Of the estimated seven million acres irrigated in Nebraska, approximately one million are irrigated with surface water. Surface water is the major source of water for power production, supplying all the water for hydropower generation and sixty-five percent of the water used for power plant cooling. Surface water is less important for other water uses and only provides water for approximately twenty-two percent of all municipal use, seventeen percent of rural domestic and livestock use, and

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twenty-seven percent of irrigation. Surface water is also used for fish and wildlife habitat and recreation.

Groundwater is Nebraska's hidden treasure. Nearly three billion acre-feet of groundwater underlie Nebraska; more than is found in any other state and 1,000 times the amount of water in Nebraska's large reservoirs. However, groundwater recharge rates are very low and depend on rainfall. In Nebraska, recharge rates range from less than one inch per surface acre annually in regions with heavy, tighter soils to three inches per surface acre annually in regions with lighter, sandy soils. The three billion acre-feet of groundwater represent thousands of years of recharge from rainfall. Groundwater is widely available in Nebraska: Irrigation wells are located in every county and reliable domestic wells exist in every part of the state.

At the same time, groundwater depletion is occurring in several parts of the state, notably in the Blue River Basin, Central Platte River Basin, and Republican River Basin, all intensively irrigated areas that rely on groundwater. Groundwater pollution is a recent problem, with nitrates and other agricultural chemicals being detected in most irrigated areas of the state (Exner and Spalding 1987). Groundwater accounts for seventy-eight percent of all municipal water use, eighty-three percent of rural domestic and livestock use, all self-supplied industrial uses, and seventy-three percent of irrigation use. Groundwater also supports the flow of many Nebraska streams and lakes during dry periods.

Many Nebraskans, particularly farmers, think of Nebraska as being a relatively dry state because of its recurring droughts and low precipitation. In fact the state is water rich, particularly compared to other western states. Nebraska has streamflow, particularly from the Sandhills, that would make any other western state envious. Groundwater, however, accounts for most of the water for virtually every water use. Nebraska’s groundwater resources are without parallel in the United States, both in quantity and quality. This underground treasure represents an abundant resource for instate use, a resource most citizens believe should be carefully guarded against potential exploitation by out-of-state users.

**Surface Water Laws and Issues.** Nebraska is one of the seventeen arid and semiarid western states to adopt statutory laws governing the use of surface water. In Nebraska, appropriation permits (water rights) must be obtained from the Nebraska Department of Water Resources (DWR) to secure the legal right to divert water from a lake or stream. Similar permits must be obtained to construct and to operate surface water reservoirs.

These surface water appropriations are administered by the DWR on the basis that "first in time is first in right." This means that when water is insufficient to supply the needs of all appropriators, those with the most recent priority dates (those who acquired their appropriations most recently)
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must stop withdrawing water until the needs of senior appropriators have been satisfied. The DWR issues closing orders to junior appropriators virtually every irrigation season.

The prior appropriation doctrine protects the rights of first users at the expense of later users. The most senior water rights represent the most secure water supply. This so-called rule of priority is an essential feature of the appropriation doctrine, applied by all western states to surface water and by most western states (excluding Nebraska) to groundwater.

The protection of environmental water uses (such as for fish and wildlife) and the funding of new surface water development projects are the most visible surface water policy issues facing Nebraskans. Traditionally, Nebraska surface water laws have not recognized instream flows (water rights to leave water in a stream for fish and wildlife protection rather than to divert the water from the stream for irrigation) as a legally protected water use. Controversial legislation authorizing instream flow appropriations for fish and wildlife protection was finally enacted in 1984, but only after a bitter fight between environmental and irrigation interests (Aiken 1987). Further irrigation-environmental disputes have prevented instream appropriations from being granted.

Instream flows for fish and wildlife purposes often conflict with new irrigation projects. Federal funding for those projects has diminished substantially, raising the possibility that any major water projects in Nebraska will have to depend on state financing. This would constitute a major water policy change, requiring both a constitutional amendment to allow the state to incur debt to finance water projects and a political consensus that new water projects are needed and can be developed without disrupting the environment.

Interbasin Transfers. Interbasin water transfers represent a specific area of Nebraska's surface water laws and policies, especially water exports and water-right sales. Nebraska water right statutes were interpreted by the Nebraska Supreme Court in 1936 as prohibiting the transfer of water from one river basin to another (Osterman v. Central Nebraska Public Power &
Irrigation District, 131 Neb. 356, 268 N.W. 334 [1936]). This decision thwarted the desires of irrigators in the Blue and Republican river basins to divert water from the Platte River. The legislative representatives from regions south of the Platte River made several unsuccessful attempts to overrule the Osterman decision through legislation authorizing transbasin diversions. These transbasin diversion proposals were the major theme of several legislative sessions, from 1943 to 1953, producing bitter and divisive political battles, as the regions north of the Platte River opposed transbasin diversion and the regions to the south supported it (Oeltjen and others 1971).

The Osterman decision was overruled in the 1980 Little Blue I decision when the Nebraska Supreme Court reinterpreted Nebraska appropriation statutes as authorizing, not prohibiting, interbasin surface water transfers. Little Blue I triggered a race for Platte River water rights that is still occurring: Platte valley irrigation interests battle promoters of irrigation projects in the Republican and Blue river valleys and environmentalists who want to protect Platte River flows for fish and wildlife (Aiken 1987).

Nebraska's surface water policies may fairly be characterized as development oriented. Appropriation statutes were adopted in 1895 to legally encourage irrigation development. Those statutes have been little changed since their original adoption, although public attitudes toward resource use and environmental protection have changed dramatically. Water wars pitting irrigators against environmentalists dominate the surface water policy agenda. Nebraska surface water policies encourage resource use rather than resource protection, an attitude Nebraskans may have to change if they wish to protect Nebraska water resources from exportation to other states.

**Groundwater Laws and Issues.** As indicated, groundwater is the major source of water in Nebraska and supplies most water uses except for power production. Nebraska does not apply the doctrine of prior appropriation to groundwater; it relies instead on the courts to resolve groundwater disputes between landowners. While this common law approach falls short of comprehensive management of a vital public resource, it mirrors the experience of other western states with extensive groundwater supplies: California, Arizona, and Texas. In all other states, groundwater supplies are so limited that legislation is required to settle frequent groundwater disputes, just as appropriation statutes are required to handle the recurring disputes over surface water use.

Groundwater supplies are being depleted in several areas of Nebraska, including the Blue River basin, the Central Platte River basin, the Republican River basin, and the Alliance and O'Neill areas. Groundwater withdrawals may be reducing streamflow in the Republican River basin and may reduce Platte River flow during the irrigation season. Also, groundwater
nebraska groundwater policy is virtually a blank slate. an unusual abundance of groundwater has given nebraska policymakers the luxury of avoiding difficult political decisions to protect this critical public resource.

pollution from the use of agricultural chemicals is occurring throughout the irrigated areas of the state and may ultimately extend to the streams such groundwater feeds. but, legislation giving local natural resource districts the option of establishing regulations to control groundwater depletion and pollution from agricultural water uses generally has not led to groundwater controls. new groundwater quality legislation giving the nebraska department of environmental control authority to establish special groundwater quality protection areas is at least a year from being implemented and several years from being implemented statewide (exner and spaulding 1987). no policies exist for working with surface/groundwater conflicts, although concerns regarding how further diversions from the platte river will affect platte valley municipal well fields are a significant element of the current platte river water war.

nebraska groundwater policy is virtually a blank slate. an unusual abundance of groundwater has given nebraska policymakers the luxury of avoiding difficult political decisions to protect this critical public resource. nebraska groundwater policies are even less well-developed than nebraska surface water policies, and they are geared less to resource protection than to resource development and use. nebraskans will have to adopt new political attitudes emphasizing resource protection rather than resource development and use if they are to protect nebraska water from export to other states. alternatively, the extension of nebraska’s traditional attitudes of encouraging water development and use at the expense of resource protection is consistent with policies encouraging the export of nebraska water to other states. this possibility has already been opposed by irrigation groups, which have sought to maintain the instate development orientation in nebraska water policies.

water transfers and exports

to understand the legal and political dimensions of the sporhase decision, an understanding of water transfers and water export policies is needed. western states, including nebraska, have traditionally restricted
water exports pursuant to U.S. Supreme Court decisions authorizing water embargoes. Most western states, excluding Nebraska, have allowed the buying and selling of water rights principally to allow municipalities and industries to obtain needed water supplies from irrigators. The Sporhase decision has forced western states, including Nebraska, to modify their water export restrictions. The Sporhase decision may also force Nebraska to modify its policies regarding water right transfers.

Water transfers refer to instate interbasin transfers of surface water and instate transfers of groundwater. An interbasin surface water transfer is a transfer from one of Nebraska's thirteen river basins to another. The movement of surface water within a river basin is not legally considered to be a transfer, whereas an interbasin transfer is legally subject to additional requirements and conditions before approval of such a transfer is given.

What legally constitutes a transfer of groundwater is not clear under Nebraska law. The most narrow possibility is that any groundwater pumped off the tract of land from which the water was withdrawn is considered a transfer. The broadest possibility is that all the land overlying a groundwater basin or aquifer is considered overlying land, which would allow groundwater to be transferred over large areas. Neither Nebraska statutes nor Nebraska Supreme Court decisions address this issue, although groundwater transfers for municipal, rural domestic, and industrial purposes are authorized if a Department of Water Resources permit has been obtained. Thus, irrigation is the only major use for which groundwater transfers is not defined.

Water exports refer to the transfer of surface or groundwater out of Nebraska. Water right transfers refer to the sale of water rights from one user to another. In the typical transaction a municipality or industry purchases the water rights of an irrigator and uses the water formerly used by the irrigator for municipal or industrial purposes. The seller loses the right to continue water use, while the buyer obtains the right to use water with the seller's relatively senior priority date. Water rights are typically purchased when there is little or no unappropriated water available for new municipal or industrial uses. Water right transfers may be instate water right sales or interstate (that is, export) water right sales.

The distinction between water transfers, water exports, and water right sales is important because the Sporhase decision may be interpreted as requiring the same rules for each type of activity, whether instate or interstate. Currently, a state is likely to have different legal rules governing water transfers, water exports, and water right sales. Occasionally the term water transfers will be used to refer collectively to instate water transfers, water exports, and water right sales.

Western Water Export Policies. Western states generally have restricted or prohibited water exports in order to reserve water for instate uses.
Common restrictions have included: requiring legislative approval before an export water right could be granted; requiring that the state seeking to import water reciprocally authorize the export of its water into other states; or flatly prohibiting exports. These legislative restrictions made the movement of water between states difficult to accomplish.

Resolution of Interstate Water Use Conflicts. While western states traditionally have discouraged water exports, interstate water use conflicts have nonetheless arisen. The typical dispute involves the diversion of water in an upstream state, which reduces streamflow into a downstream state. Such conflicts have been resolved either through interstate compacts, where states negotiate water use agreements, or through litigation, where the U.S. Supreme Court equitably apportions the disputed water between states.

Coal Slurry Pipeline. A new element in interstate water use arose in the late 1970s when South Dakota announced a plan to sell 20,000 acre-feet of water from federal Missouri River reservoirs to the Energy Transportation Systems, Inc., (ETSI) coal slurry pipeline company. ETSI proposed to grind Wyoming coal into dust, combine the coal dust with South Dakota water, and pipe the resulting coal slurry to electric utilities in Arkansas. South Dakota received $2 million for the initial water appropriation, with subsequent annual payments of $3 million until major pipeline construction began, at which time payments would increase to $12 million per year. The money received from ETSI would be used to fund water development projects in South Dakota, including rural water system development. The coal slurry pipeline project was abandoned when delays resulting from lawsuits filed by downstream states, including Nebraska, made the project impractical. The ETSI case was ultimately decided by the U.S. Supreme Court in 1988, the court ruling that ETSI had sought water use permits from the wrong federal agency.

In analyzing the water sale agreement between South Dakota and ETSI, one fact becomes clear: South Dakota was selling ETSI more than just water; it was also selling its political support for the coal slurry pipeline

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The millions of dollars South Dakota would have received for selling water, had the pipeline been constructed, led some in Nebraska to perceive selling water as a financial opportunity, particularly to fund water project development.
project. While ETSI needed state water rights to withdraw water from the federal Oahe Reservoir for the pipeline, it also needed federal approval. However, states generally do not require cash payments as a condition for issuing new water rights. The cash payments made to South Dakota represented compensation for state political support of a controversial water-use project.

The coal slurry pipeline proposal raised many legal and policy issues regarding interstate water uses, most of which remain unanswered. Significantly, the millions of dollars South Dakota would have received for selling water, had the pipeline been constructed, led some in Nebraska to perceive selling water as a financial opportunity, particularly to fund water project development.

**Nebraska Water Export Policies.** Prior to the 1981 *Sporhase* decision, Nebraska statutes required legislative approval for surface water exports and reciprocity for groundwater exports. Reciprocity means that the state that would receive Nebraska groundwater would be required to authorize the export of its groundwater into Nebraska. Nebraska prohibited instate interbasin transfers of surface water for any purpose prior to the 1980 *Little Blue* I decision, authorized instate groundwater transfers only for municipal purposes, and did not authorize water right sales. Thus Nebraska law prior to *Sporhase* was very restrictive regarding the movement of water instate and interstate.

**Water Right Transfers**

The second major legal issue raised by *Sporhase* is water right transfers, or the buying and selling of water rights. In virtually every western state any entity may purchase water rights and change both the location and the purpose of water use. This means the seller is selling the right to use water. Most water right sales are from irrigators to industries or municipalities. Industries and municipalities are interested in purchasing irrigation appropriations because water supplies have been fully appropriated (that is, there is no water left for allocation to new water users). And even if the industry or municipality acquired a new appropriation, it would be the first junior appropriator issued a closing order when streamflow (or groundwater supplies) could not meet all appropriative needs. Therefore, industries or municipalities that need water purchase rights from irrigators and convert those water rights to municipal or industrial uses in different locations. Typically, irrigation water rights are purchased because more irrigation rights are available for purchase than any other kind. Also, the appropriations with the earliest priority dates tend to be irrigation rights, and
appropriations with early priority dates are the most valuable because they represent the most secure water supply.

**Effect on Irrigation.** Water rights transfers are controversial among irrigators, because irrigation water sales result in irrigation (and irrigators) being displaced by municipal and industrial water uses. Farmers and ranchers see their industry being diminished to satisfy the water needs of municipalities and industries. This concern is probably misplaced, because even if western municipal and industrial water uses doubled, only about ten percent of western irrigation water rights would need to be transferred to them. Thus, although massive purchases of water rights by municipalities and industries could significantly affect irrigation, they would not displace irrigated agriculture.

**Return Flows.** Water rights transfers are also controversial because of the return flows issue. When water is diverted for irrigation, less than half the amount diverted is actually consumed in crop production. The remaining water returns to the stream or groundwater aquifer as return flows and is available for reuse by other irrigators and water users. When irrigation water rights are sold, only the amount of water that has been consumed in irrigation can be transferred to the new use; the return flows must be maintained. However, local irrigators and the municipality or industry proposing to purchase the irrigation water rights usually disagree about the quantity of return flows, with the irrigators claiming higher return flows and the water rights purchasers claiming higher water consumption and lower return flows. Resolving this issue in water right transfer administrative proceedings is expensive (lawyers and engineers must be employed), time consuming, and controversial. Nonetheless, water rights sales are an efficient method for reallocating limited water supplies as economic conditions change.

**Water Exchanges.** The purchase of irrigation water rights by a municipality or industry needing additional water supplies is the typical water rights transfer setting. Another example is a water exchange, where water in one location is substituted for water in another location. For example, a municipality may construct a storage reservoir and then trade the water stored for water controlled by an irrigation district in another location. The municipality is, in effect, trading new stored water for the old irrigation water. Such water exchanges sometimes allow water to be acquired at a lower cost than would otherwise be possible.

**Water Marketing.** An emerging aspect of water rights transfers is water marketing. Reservoirs are expensive to build and are often controversial because of their adverse environmental impacts. Some suggest that purchas-
ing water rights allows new water uses to be accommodated at a lower cost than would be possible with reservoir construction, and does so with virtually no adverse environmental impact. Those promoting water marketing seek to make the process for buying or leasing water rights more expeditious to facilitate these market transfers.

**Western State Water Rights Transfer Policies.** Virtually all western states authorize the sale of water rights. Several western states are taking additional steps to make water rights transfers easier through water marketing programs. This is particularly true in states that are experiencing urban or industrial growth. Water marketing programs include: establishing a state clearinghouse for water rights sales to provide potential water rights buyers and sellers an opportunity to obtain information regarding water rights sales; adopting new procedures to streamline the water rights transfer process; and streamlining the sale of water rights from state and federal irrigation projects. A new type of professional, the water broker, has emerged as one who can assist municipalities and industries in buying water rights.

**Nebraska Water Rights Transfer Policies.** Traditionally, Nebraska has been one of the few western states that does not allow water rights to be transferred. If a municipality or industry needs a secure water supply, it can usually obtain one through a well or well field in most areas of Nebraska with little difficulty and relatively low cost. Thus, although most streams are overappropriated, abundant groundwater supplies have made it unnecessary to reallocate water rights through market transfers to accommodate new municipal and industrial uses.

In 1983, the longstanding prohibition against selling water rights was modified to allow surface-water appropriations to be sold for use within the same river basin and for the same purpose as the original appropriation. But, although water rights transfers are allowed, prohibiting the purchase of irrigation water rights for municipal or industrial purposes severely restricts the water rights market in Nebraska.

**Summary.** Nebraska's pre-**Sporhase** water export policies were similar to those of other states in making water exports difficult to accomplish. Nebraska's water rights transfer policies differ from those of other western states in that Nebraska statutes do not allow the buying and selling of water rights except within the same river basin, for the same use. This restrictive policy has not hampered economic development in Nebraska, as ample groundwater supplies are generally available throughout the state to supply new municipal or industrial uses. Other western states do not have this luxury, and therefore must allow municipalities or industries to purchase water rights from irrigators in order to obtain water needed for economic
development and population growth. Water right transfers reduce the quantity of water used in irrigation, reducing potential agricultural production. Administrative proceedings for approving water rights transfers are often expensive and controversial, as irrigators and water rights buyers dispute the effect of the proposed change in use on return flows.

The Sporhase decision has forced western states, including Nebraska, to modify restrictive policies on water exports. Because water export is a politically sensitive issue, this effect of Sporhase has been controversial in the West. The impact of Sporhase on water rights transfers also means that in states where water rights can be transferred, those water rights can now be purchased for use out of state. In Nebraska, where water rights transfers are tightly restricted, more liberal water rights transfer policies could lead to Nebraska surface water rights being purchased for out-of-state use.

The Sporhase Decision

The Sporhase decision began simply, although its results would revolutionize western water law and politics. Mr. Sporhase owned a farm straddling the Nebraska-Colorado border in southwestern Nebraska and used a well located in Nebraska to irrigate his land in both states. Legally, Sporhase was required to obtain a permit from the Nebraska Department of Water Resources to import Nebraska groundwater into Colorado. Sporhase did not seek a groundwater export permit, however, because he knew the permit would be denied on the grounds of reciprocity: the Nebraska statute required that Colorado allow groundwater exports from Colorado to Nebraska, and Colorado statutes explicitly prohibited all water exports.

_The Sporhase decision began simply, although its results would revolutionize western water law and politics._

The state of Nebraska sued Sporhase for failing to obtain a groundwater export permit. Sporhase argued that the reciprocity provision of the export statute violated the commerce clause of the U.S. Constitution. Under the commerce clause, courts may invalidate state legislation restricting interstate commerce unless the restriction is only incidental to accomplishing a legitimate local purpose. The state of Nebraska argued that the export statute was constitutional. The Nebraska Supreme Court ruled in 1981 that groundwater was publicly owned, that groundwater was not an article of commerce because it could not be transferred freely, and therefore groundwater was not subject to the commerce clause. The court also ruled
that Sporhase could not continue to export water into Colorado without a state permit, in effect requiring Sporhase to stop his interstate irrigation until Colorado adopted a reciprocity provision. Chief Justice Krivosha dissented on the basis that the reciprocity requirement did violate the commerce clause.

**U.S. Supreme Court Decision**

The U.S. Supreme Court reversed the Nebraska Supreme Court decision in 1982, reversing earlier decisions of its own that water export bans were constitutional as well (Nebraska ex rel Douglas v. Sporhase, 458 U.S. at 941 [1982]). In prior decisions, the U.S. Supreme Court had ruled that state water export bans did not violate the commerce clause, but this rule was discarded in Sporhase as being inconsistent with more recent court interpretations of the commerce clause. The court ruled instead that water was an article of commerce, and therefore any export prohibitions were subject to the commerce clause.

The U.S. Supreme Court indicated the legal test it would use to determine whether a state statute restricting interstate commerce was constitutionally valid was as follows:

> 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 with a lesser impact on interstate activities (458 U.S. at 954 [1982]).

Thus, some regulation of water exports is legally permissible, but the regulation must be for a legitimate local public purpose and the effects on interstate commerce must be only incidental.

The court then suggested some circumstances in which export restrictions might be valid. First, the court recognized that states may regulate the use of water in times and places of water shortage to protect public health. Second, the court suggested that the public ownership of groundwater in Nebraska may support a limited water use preference for its citizens. Unfortunately, the court did not expand on this limited instate preference, so its meaning is unclear. Finally, the court stated that citizens' use of water saved through regulatory efforts (for example, to control groundwater depletion) may be preferred during times of shortage. The court stated that three parts of Nebraska's export statutes met these standards. These requirements were that the proposed export of groundwater was reasonable, not contrary to the
conservation and use of groundwater, and not otherwise detrimental to the public welfare.

However, the U.S. Supreme Court ruled that while some restrictions on exports might be consistent with the commerce clause, the Nebraska reciprocity requirement could not be justified legally unless Nebraska could demonstrate that: (1) the state as a whole suffered a water shortage; (2) instate water transfers from areas of abundance to areas of shortage were feasible without regard to distance; and (3) water imports from adjoining states would compensate for water exports to those states. Nebraska made no attempt to argue that this was the case, and therefore the reciprocity clause was invalidated.

The court further suggested that an arid state might be able to legally justify a ban on all exports if it could demonstrate that all water resources were needed for instate use, although the court also declared that states cannot practice economic protectionism in making water allocation decisions. Finally, the court determined that any restrictions a state imposes on instate water uses may also be extended to water exports, such as controls to prevent groundwater depletion.

Justices Rehnquist and O'Connor dissented on the basis that Nebraska law does not allow transfer of groundwater to adjoining land for irrigation purposes, and, therefore, that the reciprocity clause did not result in different treatment of export uses and instate uses in this case. However, that was an incorrect legal premise. While Nebraska court decisions on this point are not clear, the Upper Republican Natural Resources District, within which Sporhase's well was located, did and continues to allow irrigation transfers to adjoining land with NRD approval as part of its local groundwater control regulations.

After the Sporhase decision, the Nebraska Supreme Court ruled that the remainder of the export permit statute was still in force, although the reciprocity provision had been invalidated by the U.S. Supreme Court. Mr. Sporhase obtained a groundwater export permit from the Nebraska Department of Water Resources and is irrigating his Colorado field from his Nebraska well.

In response to Sporhase, the Nebraska Unicameral in 1984 amended the export statute to require the DWR director to consider in each export case:

- Whether the proposed groundwater export is a beneficial use of groundwater,
- The alternative surface or groundwater supplies available to the applicant,
- Any negative impacts of the export on local surface or groundwater supplies to meet reasonable future local water demands, and
- Any other factors to protect the interest of Nebraska and its citizens.
In addition, the groundwater export must comply with local natural resource district groundwater regulations.

Commentary

The purposes of the commerce clause were best expressed by Justice Robert Jackson in 1949:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise every consumer may look to free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality (H.P. Hood & Sons Inc. v. DuMond, 336 U.S. 535 [1949]).

The purpose of the commerce clause, then, is to ensure that states do not embargo, unfairly tax, or otherwise discriminate against the products of other states to protect instate producers.

Under a literal reading of Sporhase, the state could not limit or prohibit the export unless the restrictions or prohibitions applied to similar instate uses, were the result of local water shortages, or fell within the U.S. Supreme Court's undefined "limited instate preference."

In the water rights context, the commerce clause seems to require states allowing water or water rights to be bought and sold within a state to allow them to be bought and sold across state lines on the same basis. If the Sporhase decision were so limited, it would still have a major impact on western water rights but a lesser impact on Nebraska, where water rights generally cannot be transferred. However, the U.S. Supreme Court went beyond this and ruled that when a state is making an initial water allocation (that is, initially granting the water right), it cannot discriminate economically against out-of-state water users. This part of the Sporhase decision seems to extend beyond the requirements of a strict reading of the commerce clause.

The principal disadvantage of the Sporhase decision is that it gives faster developing states an advantage over slower developing states. For example, a growing city may seek additional water supplies from a neighboring state to
supply an expanding population and economy. Prior to *Sporhase*, the neighboring state could have prohibited or limited the water export, reserving the water for use by its future expanding population and economy. Under a literal reading of *Sporhase*, however, the state could not limit or prohibit the export unless the restrictions or prohibitions applied to similar instate uses, were the result of local water shortages, or fell within the U.S. Supreme Court’s undefined "limited instate preference."

**The New Mexico Response**

The only further court interpretation of the *Sporhase* decision involves efforts of El Paso, Texas, to import water from New Mexico. New Mexico’s original water export statute was invalidated on the basis of *Sporhase*, but new export legislation was sustained as meeting the *Sporhase* requirements. New Mexico has gone further than any other state in attempting to comply with the *Sporhase* decision. An examination of the New Mexico experience is worthwhile in evaluating Nebraska’s water export policy alternatives.

**El Paso I.** El Paso determined that it needed additional water supplies to meet the needs of a growing population, and it applied in 1980 for water appropriations to install 326 wells in New Mexico to annually withdraw 296,000 acre-feet of groundwater. The appropriations were initially denied by the New Mexico state engineer, based on New Mexico’s statutory groundwater export prohibition. El Paso appealed that decision in federal court, arguing that New Mexico’s water export prohibition was unconstitutional.

After the *Sporhase* decision was handed down, the federal district judge ruled in *El Paso I* that the New Mexico water export prohibition statute was unconstitutional, as it interfered with interstate commerce (*El Paso v. Reynolds*, 563 F.Supp. 379 [1983]). The court noted that while New Mexico had long been engaged in state regulatory efforts to manage and conserve groundwater supplies (regulations much more stringent than those found in Nebraska), that alone was not sufficient to justify the export prohibition. The court ruled that *Sporhase* allowed a state to discriminate in favor of its citizens in water allocation only to the extent necessary to protect human health and safety needs; beyond that, water must be treated as any other natural resource. New Mexico did not argue that its embargo was necessary to protect human health and safety but rather that its purpose was to make maximum beneficial use of the water in New Mexico. Despite the fact that state water officials projected a significant statewide water shortage by 2020, the court noted that the uses contributing to the deficit included industry, irrigation, energy production, fish and wildlife, and recreation, and
determined that water could not be reserved for these purposes beyond the state’s health and safety needs.

The court suggested that New Mexico could engage in water planning and that export uses could be regulated on the same basis as instate uses. New Mexico could condition export permits with reporting or other requirements to determine whether the water was being used properly. The court stated that if El Paso violated any permit conditions, New Mexico could revoke the export permits and shut down El Paso’s well field.

Among the difficulties with *El Paso I* are the ambiguities inherent in *Sporhase*. Parts of the *Sporhase* decision seem to indicate that states may favor their citizens in water allocation decisions only to protect water uses necessary for human health and safety, but not for economic development. Other passages of *Sporhase*, however, suggest that states may engage in a limited preference for instate water uses; but these passages do not define what this limited preference encompasses. The strictest interpretation of the limited-preferences language was adopted by the *El Paso I* court to mean a preference limited to human health and safety needs but not economic development. However, the limited preference language could also mean a limited preference for instate economic development. Commentators have criticized *El Paso I* for interpreting the limited preference language so narrowly (Trelcase 1987; Liepas 1984).

*Sporhase* at least admits the possibility that a state may economically discriminate in favor of local economic development, so long as that discrimination does not unduly burden interstate commerce. This could include considering the economic benefits to the state of proposed uses and authorizing only those uses resulting in a net state economic benefit. Water exports would have few economic benefits in the exporting state and therefore would be expected to fail such an economic benefits test. The extent of this type of limited preference has not been addressed by the Supreme Court, although the federal district court did acknowledge its existence in *El Paso II*.

**SB 295 and the Export Study Commission.** After *El Paso I*, the 1983 New Mexico legislature enacted Senate Bill (SB) 295, which incorporated the features of Nebraska’s export statutes found permissible in *Sporhase*. Specifically, in considering surface or groundwater export appropriation applications, the New Mexico state engineer could grant the permit only if the proposed export would not:

- Impair existing rights,
- Be contrary to the conservation of water within the state, or
- Be otherwise detrimental to the public welfare of New Mexico citizens.
In making these determinations the state engineer's considerations were specified to include:

- The availability of water in New Mexico,
- Demands for water in New Mexico,
- New Mexico water shortages,
- Whether the water proposed to be exported could be transferred to alleviate shortages in New Mexico,
- Alternative water supplies available to the applicant, and
- The demands placed on the applicant's local water sources.

In 1983, the New Mexico legislature also established a water law study committee to make recommendations regarding water exports law and policy. The committee presented its report to the legislature January 1, 1984. The committee report noted that New Mexico was facing a water shortage, but that surrounding states (Texas, Arizona, Colorado and Oklahoma) were facing much greater water shortages. Thus, New Mexico likely would have to contend with export requests from these states. The committee recommended several alternatives:

- Request federal legislation giving states the legal authority to restrict exports (essentially repealing *Sporhase*),
- Enter into an interstate compact with Texas to apportion New Mexico's groundwater between the two states,
- Study the possibility of New Mexico's appropriating all unappropriated water to itself in order to make the water unavailable for export, or
- Enact a five-year moratorium on groundwater appropriations to study the available supply and provide a basis for better groundwater management.

Based on the study commission's recommendations, another statute was enacted in 1984 establishing a two-year moratorium on groundwater appropriations from the aquifer in which El Paso was interested. The moratorium would provide time to develop additional information regarding the groundwater supplies, thus permitting a better evaluation of the impact of the proposed export appropriations.

**El Paso II.** El Paso challenged the constitutionality of the revised New Mexico groundwater export statute and moratorium statute in federal court. In *El Paso II*, the court ruled that the state engineer's consideration of the welfare of New Mexico's citizens in evaluating water exports was not inherently discriminatory (*El Paso v. Reynolds*, 597 F.Supp. 694 [1984]).
Citing Sporhase, the court declared that states could not limit exports merely to protect local economic interests, although the health of a state's economy has a direct bearing on its public welfare. However, the court further stated that in Sporhase the U.S. Supreme Court did not equate health and safety requirements with the public welfare. This suggests that there may be some latitude to protect instate water uses other than simply protecting public health and safety on the one hand and blatant discrimination in favor of local economic water uses on the other.

The court also suggested that a state need not wait until water shortages have occurred to begin conservation efforts. An export statute could take potential shortages into account and be constitutional. The real test would be whether the administrative application of that statute by the state engineer was constitutional.

Perhaps the most significant aspect of El Paso II is that the court recognized that a state's limited preference for instate uses could extend beyond health and safety considerations.

The court then considered the groundwater appropriation moratorium and concluded that it applied only to the groundwater basins for which El Paso was seeking export appropriations. The court also concluded that the purpose of the moratorium was to block those export appropriations rather than to gather information to improve groundwater administration. Accordingly, the court invalidated the moratorium as interfering with interstate commerce.

Perhaps the most significant aspect of El Paso II is that the court recognized that a state's limited preference for instate uses could extend beyond health and safety considerations. The court did not recognize this in El Paso I. El Paso II also warns that actions taken to prevent water from being exported will be closely scrutinized to determine whether they comply with Sporhase, and will be invalidated if they have no justification other than protectionism.

After El Paso II, the New Mexico state engineer considered the El Paso export appropriation application. On December 28, 1987, the state engineer denied the application on the basis that El Paso did not have a need for the water within the next forty years. El Paso has appealed this ruling to federal court, where the case is now pending.
The Nebraska Response

The immediate reaction in Nebraska to the 1982 Sporhase decision was to modify the groundwater export statutes to give the director of the Department of Water Resources greater discretion in making groundwater export permit decisions. A more controversial response came in the 1987 legislative session, when two bills were introduced to study water exports and to authorize the state to encourage water transfers, water rights transfers, and water exports. These bills were controversial and were opposed by agricultural and environmental groups alike. As a compromise, the export study provisions were enacted and the more controversial water transfer and sale provisions dropped. The water transfers study will propose legislation to the 1989 Unicameral on how best to implement the more controversial features of the original water transfer and sale bill.

LB 146 and LB 151. In 1987, two water transfer and exports bills were sponsored by Senator Loran Schmit, chairman of the Unicameral’s Committee on Natural Resources and leading water resources senator in the Unicameral. The first bill, Legislative Bill (LB) 146, would have:

- Directed the Nebraska Water Management Board, an interagency board responsible for reviewing and promoting large water projects in Nebraska, to identify and pursue water projects involving instate water transfers, water exports, instate water rights sales, and export water rights sales.
- Directed the board to prepare a study of water sales, water rights transfers, interbasin transfers, and exports for legislative consideration. The study was to:
  - Identify potential sources of water and water rights for transfer and export;
  - Identify potential buyers and markets for Nebraska’s water; and
  - Suggest alternatives for handling damages resulting from water sales, interbasin transfers, water rights transfers, and exports.
- Made surface water rights freely transferable between river basins and among uses, including instream uses. (Currently surface water appropriations may not be transferred between river basins or among different uses.)
- Repealed the requirement of legislative approval for surface water export appropriations and replaced it with considerations similar to those added to the groundwater export statute. Surface water export