Inter and Intrastate Usage of Great Lakes Waters: A Legal Overview

A. Dan Tarlock
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by A. Dan Tarlock*

I. INTRODUCTION

Recent proposals to divert Great Lakes water out of the Basin for uses such as western coal production or to bail out farmers who have depleted the Ogallala aquifer have caused concern among the Great Lakes States and Canadian provinces. The diversion proposals that gave rise to the immediate concern are temporarily in abeyance due to falling energy prices or the costs of proposed projects. However, other regions of the country continue to look to the Great Lakes as a source of supplemental water. The littoral states and Ontario and Quebec have taken a first step to respond collectively to the challenges posed to the integrity of the lakes and the economy of the region posed by out-of-basin diversion proposals by signing the Great Lakes Charter,¹ but such diversion proposals raise questions beyond the necessity for immediate responses to a specific proposal. A long-run and effective Great Lakes protection strategy will require not simple anti-diversion laws, but comprehensive efforts by the individual states and provinces to manage this great commons. The Great Lakes must be managed in the context of all of the states’ and provinces’ water resources, both in and outside the basin. Both modifications of state law and regional cooperation may be required to achieve this objective.

This paper examines several possible Great Lakes diversion scenarios in the context of the existing law of water management in the Great Lakes States. The first sections discuss the common law of riparian rights, and the next section discusses legislative modifications of the common law. Diversion proposals and Great Lake States’ responses to them may involve constitutional challenges either through the exercise of the United States Supreme Court’s original jurisdiction or challenges to state laws that prohibit or make difficult a proposed diversion. To resolve these challenges, it will be necessary to look to the existing law of water

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management in the Great Lakes States to begin to define their respective rights or to measure the interests of the states in preventing diversions.

To understand the full dimensions of the "diversion issue" and possible state and regional responses, an understanding of the scope of federal water management authority and recent federal court decisions that subject state water laws to the dormant or negative commerce clause analysis is necessary. Sections four and five address the issues of federal authority over the Great Lakes, constraints on state choice imposed by the negative commerce clause and the law of equitable apportionment and appropriate state responses to these constraints in order to maximize state control over future claims on the lakes. The final section assesses the major strengths and weaknesses of possible state strategies.

II. THE COMMON LAW OF RIPARIAN RIGHTS AND ITS IMPORTANCE

All of the littoral states of the Great Lakes initially adopted the common law of riparian rights to assign rights to use water and continue to do so today. The common law of water rights define both the rights of private parties to use waters within a state and the rights of the Great Lakes States to control the use of the lakes. Thus, the common law of riparian rights is the starting point to understand the legal options open to the Great Lakes States to prevent or authorize diversions from the lakes.

Because water resources are abundant in the Great Lakes States, there have been relatively few conflicts among consumptive users, especially among users of the Great Lakes themselves. For this reason, the common law of water allocation consists of fragmented decisions and statements of general principles that yield little guidance to concrete controversies. Despite its limitations, however, the common law of riparian rights continues to structure the debate on resource use in the Midwest, and the common law is still evolving. It has already passed through two stages, and may be entering a third stage. In the first stage, the courts decided the flow of the stream had to be primarily allocated among competing users. In modern terms, all riparian rights were essentially non-consumptive. In the second, the courts decided that both non-consumptive and consumptive uses were equal and both the flow and the quantity of stream had to be shared, but the respective rights of riparians were not further defined. In the present stage, the courts are beginning to define with more precision the respective rights of riparians and to promote more efficient uses of water resources.

The common law rests on the fundamental principle that all riparians have correlative rights in common water bodies. Beyond this general idea, the law provides little guidance on how their source should be
shared among competing claimants, and the principal defect in the common law is its uncertainty. It is difficult to predict the fate of new uses of water as well as the level of protection that existing uses can expect. This uncertainty is a theoretical constraint on water use because the initiator of use or large water resources project needs a firm property right to support the use or project and it is a constraint on state water planning and conservation efforts. It is difficult to estimate how water may ultimately be allocated among competing uses within a state. This uncertainty extends to efforts to define the rights of the Great Lakes States with regard to each other and to other states outside the region. The rights of the states to the Great Lakes are guaranteed by the doctrine of equitable apportionment. This doctrine, which is discussed in section V, initially looks to the common law of riparian rights to decide how resources will be shared among interested states.

In practice, water dependent activities have been undertaken because the threats of effective challenges to water use were minimal. However, to remove some of the doubts and to promote water resources development, the common law has, to varying degrees, been modified in many of the Great Lakes states to “firm up” water rights. However, great uncertainty remains in the Lakes States concerning the scope of local (state) and regional (interstate) water rights.

The common law also poses potential barriers to public control over water allocation. The common law is primarily a law that sanctions acquisition of private rights in water, and any law of purely private rights deprives the state of control over how water should be used. Constitutional guarantees that private property shall not be taken without due process of law may constrain state power to reallocate resources should a state decide to intervene in private choices. Vested rights claims to unexercised, as opposed to exercised, riparian rights have never blocked a necessary reform of the common law, but the argument that the state lacks any power to modify effectively the common law of riparian rights is often raised. Thus, an understanding of the common law is crucial to any debate about water use policy in the region since legislative initiatives must either modify or replace the common law. In addition, efforts to firm up rights to use the waters of the Great Lakes through interstate compacts or equitable apportionment actions will be done against a background of the common law. Hence, it is important to understand what remains and what has been changed. This section examines the most important aspects of the common law of riparian and of groundwater use. It is designed to illustrate the basis and scope of riparian rights so

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the relationship among domestic law, legislative modification and inter-state sharing options can be more clearly understood.

A. The Definition of Riparian Rights

The common law of water use is the law of riparian rights. Technically, rights to use lakes are littoral rights, but for all practical purposes the law of stream and lake use is the same. Riparian rights are usufructuary private property rights that arise through the ownership of land abutting a stream or lake. That is, riparian rights are rights that are limited to the use of the water in a stream or lake. Riparians do not "own" the water of a stream or lake. There is an argument that private riparian rights attach only to land that abuts navigable but not nonnavigable waters, but this distinction has never been recognized by courts. Nothing need be done to perfect a riparian right; it exists by virtue of the ownership of riparian land and may, in theory, be exercised at any time. All riparian owners have equal rights to use the stream so that priority of use is, in theory, irrelevant to the exercise of a right. A subsequent user may be able to diminish the scope of a prior user's right. The common law of riparian rights is thus the opposite of the law of prior appropriation that prevails in the arid west. Water is allocated in the order of the acquisition of the right. First in time, first in right.

B. The Requirement Ownership of Riparian Land

Ownership of riparian land is the principal basis of a riparian right. "Riparian land" is a term of art that encompasses three separate concepts. All the concepts are designed to limit the number of users who may claim a right of access to the resource. All possible diversion scenarios propose to apply Great Lakes waters to nonriparian lands. Domestic law will not be the sole source of law relevant to the legality of a diversion, but the common law of riparian land and the related concept of the watershed limitation will influence the legal analysis of the different diversion scenarios. First, the land must abut the stream. This is a minimum physical contact test. All that is required is that the claimant's land lap the watercourse at some point. There is no required ratio between the amount of contact and the size of the tract. Riparian rights may even be seasonable, coming and going with the water level of the stream or lake. The second requirement is that the land meet one of the two principal tests of riparian land. The tests are the (1) source of the title or (2) unity of title rule. The source of the title test is a rule designed to protect the uses of other riparians on a stream or lake. This theory limits the amount of land eligible for riparian rights. Riparian rights are confined

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to the smallest tract of land in continuous ownership that abuts the stream. Under this theory land may be subtracted but not added to a riparian tract over time. The unity of title theory judges a riparian tract by its size at the time that a conflict with other riparians arises. This theory allows an owner to add nonriparian land to his tract and make it riparian. The power to expand, however, is circumscribed by the same reasonableness discussed below, which limits the exercise of all riparian rights.

There has been a considerable debate about the impact of the different rules on water use. For example, prior to 1967 the Wisconsin Public Service Commission applied the source of title rule. A study found that this reduced by sixty-four percent the amount of land that would be classified riparian compared with the adoption of the unity of title rule, but the magnitude of the impact of the source or chain of title rule on agricultural irrigation was difficult to determine.

The third requirement is that the water be used not only on riparian land but within the watershed of origin. At common law all use outside the watershed of origin was per se unreasonable. The rule is designed to preserve the flow available to other riparians below the place of diversion and has been interpreted to mean that water must be used on land that drains into streams below the place of diversion. The watershed limitation has been much criticized as inefficient but the basic idea that users in the watershed of origin should be protected from transbasin diversions is a powerful one in American water law. Western states such as California have developed sophisticated mechanisms to protect existing and future users in an area of origin from the adverse impacts of largescale transbasin diversions. The watershed limitation has been asserted in equitable apportionment actions to block transbasin diversions. Wisconsin tried to stop the Chicago diversion by urging that the limitation was part of the law of equitable apportionment, but the Supreme Court did not reach the issue. The case was not a good one to test the role of the watershed limitation in equitable apportionments actions. The case arose before the importance of ecological considerations was realized so that

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4 See, e.g. Anaheim Union Water Co. v. Fuller, 150 Cal. 327,331, 88 P. 978, 980 (1907).
5 See, e.g. Jones v. Conn, 39 Or. 30,39-41, 64 P. 855, 858-859 (1901).
today the watershed limitation may be more defensible as a means of protecting the integrity of the lakes ecosystem.

Riparian rights are ordinarily claimed in natural as opposed to artificial watercourses. The status of rights in artificial watercourses is not clear and is of considerable interest in midwestern lake subdivisions. Michigan has held that the owner of land touching an artificial watercourse that connects to a natural one obtains no riparian rights, but the access can be obtained by the use of another property interest that accomplishes the same purpose but is technically not a riparian right. Access easements to the nonriparian lots can be granted. Other states recognize that artificial water bodies treated as natural over a long period of time may generate riparian rights.

C. The Scope of Riparian Rights

What right does a riparian have to use water? Can he make a consumptive use? Can the water be used on nonriparian land? Initially the presumptive answer to these questions was no. The rules have long been criticized because they restrict agricultural and industrial development. Over time, courts and legislatures expanded the scope of permitted uses and the places where water can be used.

Originally, riparian rights were claimed by competing mill owners. The most important attribute of the resource was the rate of flow of a stream, and it is not surprising that courts developed rules to promote maximum sharing of the flow among competing claimants. The rule that was developed to allocate the flow was the natural flow rule. This rule, in its pure form, gave each riparian a right to the natural flow unimpaired in both quantity and quality. The rule was never a pure in situ use rule, however. Chancellor Kent, the first commentator to state a coherent theory of riparian rights, allowed limited diversions for domestic, agricultural and manufacturing uses. However, the natural flow theory made all impoundments and largescale diversions suspect. New England legislatures solved some problems by the passage of Mill Dam Acts that allowed mill owners to flood upstream lands and to compensate the riparian who suffered damage. The natural flow theory is said to require large amounts of water to flow "unused" to the sea, and by the early nineteenth century courts began to move away from the natural flow theory. By the end of the century most eastern states, including all the Great Lakes States except New York, had rejected the natural flow theory in favor of a rule that is more tolerant of consumptive uses of

12 3 KENT COMMENTARIES 558-68 (1st ed. 1828); MASS. LAWS ANN. ch. 253, § 1 (Michie/Law. Co-op. 1959).
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water. The usual judicial response to the proclaimed inefficiencies of the natural flow theory was its rejection and the substitution of a reasonable use rule. This rule extended the duty to share to a quantity of water in the stream as well as the flow. The courts reasoned that since all riparian rights are correlative, each riparian must suffer some diminution in the quantity available in order to promote more efficient uses of water. The reasonable use does not deny other riparians of rights to the flow of a stream or level of a lake. It is more accurate to characterize the rule as one that removes per se barriers to impoundments and diversions, but does not further define the correlative rights of riparians. The reasonableness of one use can only be determined in the context of other uses. For example, in a Michigan lake level case, the court authorized a supplemental irrigator to draw down a lake one quarter of an inch as a reasonable use.

All of the Great Lakes States have adopted the reasonable use rule, at least in dictum. In some states, such as Michigan, acceptance of the rule is clear. In other states, such as Pennsylvania, the precise rule followed in the state is more uncertain because judicial opinions use both theories to resolve conflicts. New York courts never clearly chose between the natural flow and reasonable use theory, but most of the uncertainty was removed in 1966 when the state adopted a harmless use statute. This statute requires a person who complains of a riparian or nonriparian use to prove that the diversion or other causes harm or would cause immediate harm. However, as in other states, the amount of water that may be diverted remains uncertain.

The problem with the reasonable use rule is that it is in fact no rule at all. The following statement, for example, describes Indiana law, but it could describe the common law of all littoral states.

Each riparian owner is entitled to make a reasonable use of the water of a watercourse consistent with the coequal right of other users of a watercourse. What is considered to be a reasonable use is a question of fact to be determined from the facts and circumstances of each

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13 The cases are collected and summarized in National Water Commission, A Summary Digest of State Water Laws (R. Dewsnup & D. Jensen eds. 1973) [hereinafter cited as Summary Digest].
15 See Summary Digest, supra note 13, at 401-403.
A limited degree of certainty has been incorporated into the common law by the concept of preferences. In all states, by common law or statute, domestic uses have priority, and presumably the full amount of available water can be used to supply domestic needs to the exclusion of all other uses. In most states domestic uses are narrowly defined to include a household and subsistence agriculture, but in Ohio the preference extends to incorporated municipalities' water service demands. In the other states, however, most important consumptive uses are classified as "secondary" and sharing formulae are developed on a case by case basis through the use of an inclusive balancing test. The factors include size, fall, volume, velocity, the nature of the use, the present and projected uses of other riparians, the extent, duration and manner of application of the use and the established usage along the stream. The common law's "all things considered" balancing test has long been criticized as inefficient, and the Restatement of Torts (Second) has responded to the argument that the common law is both uncertain and wasteful. The new Restatement attempts to incorporate a high degree of stability into the test. Balancing was kept in form, but the drafters managed to incorporate prior appropriation principles into the common law of riparian rights. Section 850 of the Restatement of Torts (Second) makes "the protection of existing values of water uses, land investments and enterprises" a factor in the balancing. The addition of this factor is thought by many to be declarative of what common law courts in fact did in specific cases and is a major advancement over the formulation of the abstract common law rules of water allocation.

D. The Transfer of Use of Water to Non-Riparian Land

Classic riparian law restricts riparian rights to use on riparian land. Use on nonriparian land is per se unreasonable. This rule has been criticized as inefficient because it inhibits water from being applied to potential productive uses. Section 855 of the Restatement of Torts (Second) recommends that the per se rule against nonriparian use be removed. A 1980 Georgia decision illustrates the potential effect of the Restatement. Pyle v. Gilbert holds that water may be used on nonriparian land and that as between a downstream riparian and the nonriparian user, the

19 SUMMARY DIGEST, supra note 13, at 296.
21 City of Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600 (1902).
22 SUMMARY DIGEST, supra note 13, at 36.
25 245 Ga. 403, 265 S.E.2d 584.
issue is one of reasonableness. Apparently use is another factor to be thrown into the reasonableness hopper. This case seems to go beyond previous cases that allowed nonriparian uses that did not cause demonstrable injury to downstream riparians.

Any claim by a state in an equitable apportionment action that transbasin diversions should not be allowed is a common law watershed limitation claim writ large, but the status of the water limitation in the law of equitable apportionment remains unclear. All that is clear is that the Supreme Court would not apply a per se rule requiring that all water be used in the watershed of origin. Still, the existence of a watershed limitation is evidence of the state's interest in allocating its water resources to those whom it has decided need the water most especially when the state can point to strong ecological and other justifications for limiting the use of its water resources to the basin or origin. States, such as California, that have had to undertake large transbasin diversions to move water from surplus to shortage areas within the state, have developed more sophisticated watershed protection mechanisms. California has an area of origin statute that gives users in the watershed from which water is diverted some call of future uses of the water and enhanced rights to purchase water from the diversion project. The more sophisticated the state's watershed protection policy is, the easier it is to defend against claims of out-of-basin and out-of-state diverters.

Riparian rights may be transferred by a riparian, but the legal status of a transfer is unclear. A riparian cannot bind other, nonconsenting riparians by a transfer. Most courts hold that all that can be transferred is the riparian's place in the reasonableness lottery.26 That is, other riparians remain free to argue that the use being made by the transferee is unreasonable. For example, should one Great Lake State, such as Wisconsin, transfer a right to divert Lake Michigan water out of the Basin, this transfer would not bind the other littoral states. They would be free to object that the transfer violates their state or federal common law rights.

E. The Common Law of Groundwater Rights

For historical reasons, the law of groundwater is allocated by a different common law regime from that applicable to surface rights. This lack of legal integration makes it difficult to manage hydrologically related surface and subsurface supplies. For example, in many states curbs on surface uses trigger increased groundwater withdrawals and long-term aquifer mining when more rigorous conservation may be appropriate. Ground and surface law are still different in the Great Lakes States,

26 C. MEYERS & A.D. TARLOCK, WATER RESOURCES MANAGEMENT 2d (1980); State v. Apfelbacher, 167 Wis. 233, 167 N.W. 244 (1918).
but many states are taking some steps to integrate the two. Groundwater rights have an indirect but potentially important role to play in the analysis of Great Lakes diversion issues. More and more courts are coming to the realization that their allocation of a watercourse involves the allocation of all waters, surface and ground, that are part of the system. For example, Colorado recently curtailed the exercise of groundwater rights to fulfill its obligations to New Mexico and Texas under the Rio Grande River Compact. Further, comprehensive water resource management today means the uniform treatment of ground and surface water, and, as will be discussed further, comprehensive management is the key to the Great Lakes States charting their own water destiny.

The common law of groundwater classified surface water as an incident to land ownership and applied a pure rule of capture. A surface owner could withdraw unlimited amounts for any purpose without liability to adjoining landowners whose wells were dewatered. Courts adopted the absolute ownership rule because they did not understand underground aquifer mechanics and considered it impossible or too costly to attempt any allocation other than capture. An early nineteenth century Wisconsin decision carried the rule of capture or “absolute” ownership to its logical conclusion and held that the privilege to pump extended to malicious withdrawals. The rule of capture also supported the policy that land development should be encouraged which was incorporated into the common law generally in the nineteenth century.

American courts soon rubbed the rough edges off of the absolute ownership rule and replaced it with the reasonable use rule. Groundwater reasonable use is different, however, from the surface reasonable use rule because the former is not a true sharing rule. The reasonable use rule developed in response to conflicts between farmers and cities who sunk large well fields in rural areas and exported the water out of the basin. To do justice to the farmers, courts put three major restrictions on groundwater usage: (1) the use had to be on overlying land, (2) the use had to be beneficial, that is reasonable, and (3) use on non-overlying land was classified as per se unreasonable. These restrictions did not benefit pumpers in a basin because among overlying owners there was no allocation inter se and capture prevailed among these pumpers. California rejected both the absolute and reasonable use rules early in this century and dicta in a few other states approved the California approach which

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applied surface riparian rules to conflicts among pumpers within a basin. However, most states retained the reasonable use rule. This is now changing, largely as a result of the Restatement of Torts (Second), which imposes some limitations on in-basin pumping as well as out-of-basin exports. The Restatement's approach has been adopted in Michigan, Ohio and Wisconsin. Indiana, alone among the Great Lakes States, has rejected the Restatement approach. Groundwater legislation in Minnesota achieves the same objective and more, as discussed in the next section. More modest legislative reforms in other states also provide more sharing than the common law rules that the legislation replaced.

The groundwater section of the Restatement incorporates the surface rules' protection of prior users into a balancing test for the express purpose of protecting small, as against large, users. Section 858 provides:

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

(b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or

(c) the withdrawal of the groundwater has a direct and substantial effect upon a water-course or lake and unreasonably causes harm to a person entitled to the use of its water.

(2) The determination of liability under clauses (a), (b) and (c) of Subsection (1) is governed by the principles stated in 850 to 857.

The reference to section 850 sweeps in the limited prior appropriation principle discussed earlier. The comments make it clear that the Second Restatement envisions a rule of capture among large pumpers who enter the basin at the same time, but contemplates a rule of prior appropriation between preexisting smaller and subsequent larger pumpers. Section 858's principal change is to extend the protection that overlying owners have enjoyed from large nonoverlying uses to include protection from some large overlying uses as well. Wisconsin was the first state to apply section 858, and that state's adoption of the section was significant in light of the state's long adherence to the English rule. In *State v. Michels Pipeline Construction Co.* a sewage contractor de-watered the soil around a sixty-inch diameter sewer line that he was constructing, and as a result, certain landowners suffered subsidence and decreased well capacity. *Michels* reversed the leading Wisconsin case.

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31. *Id.*
which had applied the full English rule, and adopted section 858 because "[w]ater users with superior economic resources should not be allowed to impose costs on smaller water users that are beyond their economic capacity."\textsuperscript{33}

Michigan has also applied section 858 in a case where the extractor would win at common law. In \textit{Maerz v. United States Steel Corp.},\textsuperscript{34} a quarry dewatering operation caused nearby domestic wells to fail. The Michigan Court of Appeals reversed a partial summary judgment for the quarry owner, stating that section 858 is "more fair and just than the English rule or lesser modifications of the English rule, and should be followed in Michigan."\textsuperscript{35} The Ohio Supreme Court recently decided a similar case and rejected the common law rule of absolute ownership in favor of the Restatement approach.\textsuperscript{36} An intermediate Indiana appellate court adopted the Restatement, but the Supreme Court reversed and held that Indiana law prohibits only malicious and gratuitous pumping so long as the water is applied to a beneficial use.\textsuperscript{37} The concept of malicious pumping is well understood, but the concept of gratuitous pumping is not. In a conflict between a large supplemental irrigator and a number of small farmers, a federal district court equated gratuitous with wasteful pumping and enjoined certain pumping practices as wasteful.\textsuperscript{38} The Seventh Circuit reversed the injunction but allowed the farmers to proceed to trial on the damages issue.\textsuperscript{39} Therefore, the possibility that large scale pumping that injures surrounding smaller landowners might be classified as gratuitous remains open in Indiana.

It is important to realize that the cases adopting Restatement section 858 make only a limited change in the common law. The cases fall far short of mandating groundwater conservation. The cases applying section 858 also do not integrate ground and surface rights. They merely establish equity between small and large pumpers. Nonetheless they represent a first step in the recognition of the basic principle that there is no unlimited right to pump groundwater and that groundwater law should be aligned with broader water conservation objectives. On a broader level, these cases reinforce the basic principle that rights in shared resources are inherently less certain than rights in exclusive resources such as land, and thus rights in shared resources are more vulnerable to judicial and legislative change.

\textsuperscript{33} \textit{Id.} at 303, 217 N.W.2d at 351.
\textsuperscript{34} 116 Mich. App. 710, 323 N.W.2d 524 (1982).
\textsuperscript{35} \textit{Id.} at 720, 323 N.W.2d at 530.
\textsuperscript{37} Wiggins v. Brazil Coal & Clay Corp., 452 N.E.2d 958 (Ind. 1983).
\textsuperscript{39} Prohosky v. Prudential Ins. Co. of America, 767 F.2d 387, 393-94 (7th Cir.1985).
III. LEGISLATIVE MANAGEMENT

The legislatures of almost every Great Lakes State have modified the common law to some extent. The early modifications responded to a specific problem, such as uncertainty over whether flood control and multipurpose reservoirs could be challenged by downstream riparians. Until recently, only Minnesota had accepted the argument that the common law should be replaced by a permit system. Wisconsin has now adopted a strict permit system to regulate new large scale consumptive withdrawals in and out of the Great Lakes Basin, and other states are considering legislation to implement the Great Lakes Charter. The Great Lakes Charter is a cooperative regional strategy agreed to by the eight Great Lakes governors and the premiers of Ontario and Quebec in 1985. The Charter provides for a regional water information data base, and it has two major legal ramifications. The signatory governments agreed to coordinate state and provincial regulatory legislation to implement the Charter and to provide a regional consultation procedure to review all proposals to divert or to consume more than five million gallons per day of basin water. This section describes the legislative modifications of the common law of ground and surface rights that currently exist in the Great Lakes States. Other states are beginning to consider legislation to implement the Great Lakes Charter.

A. CONSTITUTIONAL AUTHORITY TO MANAGE WATER RESOURCES

State power over water resources stems from two sources: (1) the general police power and (2) the power to determine the ownership of beds underlying navigable waters. The states own the beds of the Great Lakes under the equal footing doctrine. State ownership of the beds of the Great Lakes gives the littoral states an additional interest to assert control over Great Lakes water use, although the power to allocate all waters within their jurisdiction is inherent in the states' quasi-sovereign powers within the federal system. Other aspects of water resources management, such as waste assimilative capacity and recreational carrying capacity, have historically been perceived as scarce and, therefore, management programs have been instituted to deal with these problems. Water management for these purposes is very important in the Great Lakes States, and these programs have an impact on water quantity considerations. This paper, however, does no more than recognize this rela-

40 1985 Wis. Acts 29 § 60.
41 Barney v. Keokuk, 94 U.S. 324 (1876).
42 Pollard v. Hagen, 44 U.S. 212 (1845).
tionship. State power to control water resources is subject to four basic constraints:

1. State powers are subordinate to paramount federal authority.
2. Interstate waters must be shared among littoral or riparian states by the law of equitable apportionment which is enforced by original actions in the Supreme Court.
3. State regulation is subject to federal and state constitutional guarantees against the taking of property without due process of law.
4. The special history of navigable waters has led to the recognition of public rights, "trust" rights, that may constrain inconsistent state allocations.

Federal constraints are covered in section IV. This section addresses the last two constraints.

State water resource allocation usually eliminates or modifies common law riparian rights and substitutes new rights in their place. Riparians and landowners inevitably argue that any change in the common law is a taking of property without due process of law. In addition, statutes that require common law right holders to take some affirmative action to preserve rights deemed to be vested before the enactment of the legislation also raise questions of procedural due process.

The determination of when a government action is or is not a taking is one of the most intractable problems of modern jurisprudence and on which little consensus exists. Fortunately for state regulation of water, the issues are easier than they are with respect to land use regulation. States that have switched to legislative property rights have usually preserved preexisting water rights to the extent that they were based on actual use rather than claims to future but undefined uses of the water. Western water legislation that has switched from the common law to prior appropriation or a hybrid permit system has universally been upheld against taking arguments. The issue was recently decided in Texas, and Arizona's groundwater conservation legislation, which is designed to shift water from agricultural to urban uses, has been held constitutional. The Supreme Court of Washington recently held that it is reasonable to give holders of common law riparian rights fifteen years to put them to actual beneficial use in order to preserve them against a statute that shifted from riparian right to prior appropriation. The Arizona precedents are especially important because the Arizona legislation actu-

ally prohibits the initiation of new groundwater uses in some areas; it does not merely trade common law for permit rights.

B. Planning Authority

A first step toward legislative modification of the common law is the creation of a state agency with the authority to develop statewide water plans. These plans are often inventories of existing uses, projections of future demand and the identification of problem areas such as flood control or supply shortages. The legal effect of these statewide plans is often nil but they can be a first step toward raising public consciousness about water issues. Minnesota, New York, Indiana and Pennsylvania have statutes that authorize state inventories, plans, and other research on water needs. New York’s 1984 legislation is perhaps the most advanced. It authorizes the creation of a statewide water resources planning council and charges the council with the development of a state water management strategy. Michigan has also recently implemented the Great Lakes Charter through legislation that mandates the development of a comprehensive state water plan and specifies the relevant issues that must be addressed by the plan. Resource inventories and plans are an important first step toward more comprehensive management because they provide the factual basis for subsequent hard management choices. Ultimately, the legal effect of these plans could become significant. As more and more states tie withdrawal permits to plans, consistency with a state water plan could become the deciding factor in permit application proceedings.

C. Modification of the Common Law

The common law of riparian rights poses substantial constraints on major impoundments and diversions because it provides the basis for an argument that any alteration of flow is per se illegal. One of the early forms of water rights regulation is a statute to remove constraints to allow multi-purpose project development. A 1955 Indiana statute is typical. The statute allows impoundments for irrigation and other purposes subject to state approval. A riparian or group of riparians may impound water for irrigation and other purposes “when the flow of the stream is in excess of existing reasonable uses” at the time of the impoundment.

Public and private hydroelectric and irrigation reservoirs were further facilitated by confining downstream riparian rights to the normal flow of the stream. The major purpose of reservoir construction in the Midwest is for flood control. Indiana expressly authorizes flood control reservoirs provided that riparian rights are not impaired and provides the state with the authority to sell the stored water. Ohio has similar legislation to authorize the disposal of water conservancy district reservoirs. Michigan's major common law modification is the Surplus Waters Act which allows the impoundment of flows above a state set optimum flow.

D. Regulatory Authority

(1) Waters Regulated

Regulatory jurisdiction may be asserted broadly or narrowly state by state. Historically, the common law classification of waters has been fragmented, and this fragmentation may be reflected in state legislation. Some states adhere to traditional classifications; others collapse traditional classifications in favor of more functional categories of jurisdiction. Minnesota is an example of the former. Minnesota subjects "all public waters and wetlands" to state control. Public waters are defined as waters adjudicated as navigable or public by a state court or the United States Supreme Court. The statute does not define wetlands, but it creates an elaborate procedure for the development of a county by county inventory of public waters and wetlands. Indiana has a similar broad, functional definition of waters subject to the state's regulatory jurisdiction. The state subjects all water in any natural stream, natural lake or other water body to state regulation. Both surface and groundwater, which are further defined, are included in this definition. Diffused surface water is the major excluded category of water. Until 1985, Wisconsin asserted state control only over surplus surface waters, "any water of a stream which is not being beneficially used," and surface and groundwater withdrawals for prospecting and mining, primarily for mine dewatering.

Illinois asserts jurisdiction only over two classes of water, Lake Michigan diversions, discussed elsewhere in this paper, and large public and private groundwater withdrawals. The Water Use Act of 1983 ap-

52 IND. CODE. ANN. § 13-2-1-7 (West 1983).
53 IND. CODE. ANN. § 13-2-1-7(2) (West 1983).
56 MINN. STAT. ANN. § 105.38 (West 1977).
57 MINN. STAT. ANN. § 105.37(14) (West 1985).
58 MINN. STAT. ANN. § 105.391 (West 1985).
59 IND. CODE. ANN. § 13-2-1-3 (West 1983).
60 WIS. STAT. ANN. § 144.855 (West Supp. 1985).
plies the "reasonable use rule" to groundwater withdrawals and creates a procedure that requires private and public entities proposing to withdraw in excess of 100,000 gallons per day to give notice to the applicable county soil and water conservation district. Reasonable use is defined as "the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously." Ohio regulates only the use of water from conservancy districts which have been a major force in Ohio water resources development.

(2) Permit Requirements

States transform common law property rights into state created property rights through permit systems. The usual rationale for state permit systems is that they allow the state to exert greater control over water use and in return create firmer property rights compared to the common law for those who acquire a state permit. In practice, however, the major use of eastern permit systems today is for data collection.

Until recently, Minnesota was the only state with comprehensive permits for ground and surface water, but the system is still used primarily for data collection. In public utility terms, Minnesota has invested in "standby capacity" for future emergency situations. Minnesota requires a state permit to appropriate or use public waters. The state has established minimum withdrawals and withdrawals below that rate are exempt from the requirement. Minnesota's statute is not a classic prior appropriation regime, despite the use of the term "appropriate." Beyond the collection of data, its long range function is to provide a basis to allocate waters should conflicts occur. The crucial decision, the standards to choose among competing claimants, has been left to administrative regulation. The statute creates five classes of priorities among permits which range from domestic use to industrial, commercial, and other uses. Technically these priorities are preferences that must be used to rank competing applications. Beyond this allocation mechanism, the statute provides no guidance about how water should be shared among permit holders in times of shortage. Eastern states have been influenced by several model water codes that prefer administrative allocation in times of shortage to the western state model of allocation by

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preestablished property rights. Thus, it is not surprising that allocation among permit holders does not seem to be the principal function of the statute. The legislation does contemplate shortages, but it deals with them as shortterm emergencies. The statute authorizes public authorities to promulgate rules to allocate water in times of drought.

Increasingly, states are beginning to integrate environmental considerations into traditional state water allocation schemes. Minnesota, for example, provides a series of restrictions on use designed to preserve minimum flows and lake levels throughout the state. For example, protection elevations may be set for waterbasins and all permits to appropriate water from designated trout streams are temporary.

New York requires all new sources of potable water supply, multipurpose projects and agricultural irrigation to obtain a permit. The state has extensive authority to approve, deny or condition permits. For example, it may consider watershed protection issues in deciding whether to issue a permit. The state has a long and active regulatory tradition in administering this statute.

Groundwater regulation in the Great Lakes States displays the same diversity as does surface water regulation. At the present time, only Minnesota has a statute that resembles a comprehensive permit program, but other states are beginning to impose restrictions on large withdrawals with substantial drawdown effects in the surrounding area.

In Minnesota, groundwater withdrawal permits are subject to standards that more closely resemble but still fall short of classic prior appropriation. Areas are divided between those in which adequate groundwater data exist and those in which they do not. More data is required from permit applicants in the latter, Class B, areas. Minnesota has applied the same rule for groundwater use that many western states use. The state restricts entry into the basin, but once a pumper is allowed in, the law does not further allocate the available supply among pumpers. No permit may be issued unless an adequate supply is available and well levels for wells in the vicinity constructed in accordance with state codes are not reduced.

Typically, eastern and midwestern states do not regulate all withdrawals above a minimum amount, but regulate only withdrawals in emergency situations. These statutes are a perfect example of the theory that most important legislation is a direct response to a specific crisis. Restricted use groundwater areas may be declared in Indiana where "the

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withdraw of groundwaters exceeds or threatens to exceed its natural replenishment . . ."71 A special law for two counties in northern Indiana with center-pivot irrigation was passed in 1982 and became the basis for an order reducing irrigation withdrawals in the summer of 1984.72 The special legislation was repealed in 1985 and replaced by a procedure that now allows a groundwater emergency to be declared in any area of the state. If an emergency is declared, restrictions may be ordered on wells in excess of 100,000 gallons per day. Wisconsin, as previously discussed, regulates surface and groundwater withdrawals for mining.

E. Out-of-State or Basin Diversions

The Great Lakes have passed a number of first-order responses to the possibility of out of state or basin diversions. The responses vary from a virtual ban on exports to legislation permitting out of state diversions under rigorous conditions. Indiana passed a statute in 1984 that prohibits the diversion of water from the Lake Michigan Basin unless the Governor of each Great Lakes State consents.73 Minnesota officially discourages out of state uses. In 1983 the legislature amended the water act to prohibit state approval of an out-of-state ground or surface diversion unless there is a finding that there is sufficient water in the state to meet the state’s water resources needs during the life of the project and the legislature approves the diversion.74 New York requires a permit for out-of-state diversions but the statute contains no criteria for evaluating the merits of any proposed diversion. Illinois, as mentioned, regulates the diversion of water out of the Lake Michigan Basin. The primary function of this regulation is to comply with the decree in the Lake Michigan diversion case. Wisconsin’s new water management legislation is designed primarily to give the state maximum possible leverage over out-of-basin diversion proposals, and other states are moving in the same direction.

IV. Federal Power Over The Great Lakes

The federal government could probably do anything it wants with the Great Lakes, from draining them to reestablishing a sea in the Great Basin in Idaho, Nevada, and Utah to dedicating their use exclusively to the Great Basin States, the rights of Canada and Ontario and Quebec aside. The real issues are not, however, on what Congress could do but

what it has done and is likely to do. Such a bald statement of federal power, however, is useful to focus on the sources and scope of federal authority.

A. Source of Federal Authority

It is a fundamental premise of United States constitutional law that the national government must find the authority to legislate or act within the enumerated powers of the Constitution. This theory prevails today in form but the Supreme Court and most constitutional lawyers have come to accept the argument that the Constitution intended a broad delegation of authority to Congress within the areas of national rather than local interest. The regulation of access to and the use of interstate waters has long been recognized as a matter of national concern. The enumerated power on which most federal regulation of water rests is the commerce power. Other sources of authority such as the spending, war and treaty powers have been used to support federal activity, but today the commerce clause alone is an adequate basis for all direct federal regulation of the Great Lakes. The federal government can also assert its influence through the approval of interstate compacts.

The use of the commerce clause to regulate water resources allocation is now virtually without limitation, but some understanding of the history of the evolution of this power is necessary to understand the current scope of federal power. The Constitution gives Congress the power to regulate commerce among the several states. Historically, congressional power over water resources was restricted to the protection of navigation. Federal power originally was confined to tidal waters and later extended to waters that were links in the chain of interstate commerce. Federal power over the Great Lakes has never been in doubt after the Supreme Court extended federal jurisdiction to fresh as well as tidal waters in the mid-nineteenth century, but tributaries to interstate waters that have or can sustain marginal commercial navigation were the source of much litigation, and exercises of federal authority over these waters continue to be challenged today.

In the last forty-five years Congressional power over water resources has been expanded to be coextensive with the full commerce power. The full reach of the commerce clause is exemplified by a 1963 Supreme Court decision confirming congressional power to allocate interstate wa-

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75 The development of federal jurisdiction, which is now thought to be based on an overly narrow reading of English common law, is traced in MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, And Some Doctrines That Don't Hold Water, 3 FLA. ST. U. L. REV. 511 (1975).

ters among riparian or littoral states. This can be done directly by a congressional apportionment, as the Supreme Court held was done on the Colorado and, or by approval of an interstate compact. The Court currently has an original action petition by the State of South Dakota which alleges that there is a congressional apportionment of the waters impounded in the Oahe Reservoir as a result of the 1944 Pick-Sloan Act.

Congress has seldom chosen to exercise the full scope of its authority. Federal regulation of the Great Lakes was long limited to the promotion and protection of their historic primary use, commercial navigation, although since the 1970's federal efforts have been expanded to the promotion of water quality. The federal government has established navigation rules for the states and has established mechanisms to screen potential interferences with navigation. The historic limitations on congressional power remain significant because they are incorporated into federal statutes such as the Rivers and Harbors Act of 1899, which controls the United States Army Corps of Engineers' jurisdiction over the use of navigable waters. The current exercise of congressional power over navigable waters makes the federal government an important player in any Great Lakes diversion proposal. The government currently asserts no direct domestic interest in the allocation of the Great Lakes, but any diversion project will have to be screened as a navigation impairment. The precise scope of federal review of the nonnavigation impacts of a proposed structure in a navigable waterway is undefined but the necessity of a federal permit gives the permit-granting agency a powerful handle on diversion proposals. Recent cases confirm the Corps' discretion to consider the indirect water quantity impacts of alterations in a watercourse. The Great Lakes are both domestic and international waters. All statements about domestic federal power must be qualified by any international obligations that it has to Canada by the Boundary Waters Treaty and international law generally.

The main screening mechanisms are the Rivers and Harbors Appropriation Act of Rivers and Harbors and section 404 of the Clean Water Act. The 1899 Act gives the Corps of Engineers the authority to approve structures in navigable waters. The Clean Water Act gives the Corps (with EPA approval) the power to review dredge and fill proposals. This gives the federal government an important handle on any diversion efforts because the intake structure must be approved by the federal government. The Rivers and Harbors Act was the basis on which the federal government was able to enjoin the Sanitary District of Chicago

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from withdrawing Lake Michigan water in excess of amounts approved by the Secretary of War.80 Federal jurisdiction under the Rivers and Harbors Act is circumscribed by the historic test of navigability. This standard does not limit U.S. Army Corps of Engineers' authority over the Great Lakes or any major tributaries, but it does limit their power over modifications of smaller, inland waterways. Section 404 jurisdiction, by contrast, is much broader.81 Section 404 authorizes the Corps of Engineers to issue permits for the discharge of dredged or fill material into “the waters of the United States.” Federal jurisdiction under section 404 extends to wetlands in addition to small inland lakes and rivers.82 Section 404 is an important federal handle over a variety of activities that can affect water quantity and quality. For example, land development activities in defined wetlands require a section 404 permit.83

In addition to section 404 jurisdiction over general dredge and fill, two other acts impose special fisheries resources protection duties on the Corps of Engineers. The Fish and Wildlife Coordination Act requires consultation with the Fish and Wildlife Service although the duties of the agency, other than to listen with respect to the biologists, are not clear. If, however, a project affects the survival or the habitat necessary for survival, of a listed endangered or threatened species, the Endangered Species Act requires that agency to take actions to preserve the species. This requires water project managers to operate projects in such a way that a threatened or endangered species is brought back from the brink of extinction.84 The Endangered Species Act triggers expansive section 404 duties when a project for which a permit is required may threaten the survival of a species by depriving it of adequate water.85 The recent decision imposing expansive species protection duties on the Corps of Engineers is an important national precedent because the case holds that the Corps of Engineers must now consider the downstream quantity as well as quality impacts of a proposed diversion.86

Federal screening of structures and other activities that may effect the navigable capacity of the Great Lakes may give the federal government a veto over any major diversion project. Thus, a diversion project may not proceed without some sort of affirmative federal authorization. The necessity for either administrative or legislative approval, in effect, gives the Basin States a veto over any major diversion project since federal power must be exercised with regard to its effect on interested states.

81 See Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979).
82 United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979).
83 Avoyelles Sportmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).
84 Carson Truckee Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).
85 Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).
86 Id.
Once the federal government exercises the commerce power, inconsistent state laws may be preempted. In the era of judicial expansion of federal authority, 1940-1960s, the Court erected a conclusive presumption that congressional exercise of the commerce power evidenced an intent to preempt state law despite statutes that seemed to require deference to state law. The era of automatic deference to federal authority ended however, in a 1978 Supreme Court decision interpreting the Reclamation Act of 1902.\(^{87}\) Section eight preserves state law relating to the "control, appropriation, use or distribution of water" used in irrigation."\(^{88}\) The Court held that section eight requires that the federal government operate a proposed project in a manner consistent with state law unless so doing would frustrate the objectives of the project.\(^{89}\) *California v. United States* is consistent with the Court's current attitude toward federal preemption. Recent cases require a high showing that state law is inconsistent with federal objectives,\(^{90}\) and therefore the case may have implications beyond the arid West. Recent cases may signal a judicial willingness to tolerate more state control of federal projects unless Congress affirmatively decides that state control is too costly and inconsistent with the federal objectives.

These cases have no immediate applicability to likely state efforts to protect the Great Lakes. However, these decisions may give states more control over the allocation of their resources against other federal regulatory agencies such as FERC which licenses hydroelectric facilities.\(^{91}\) More generally they underline the principle that the Great Lakes States should have the first option to control the allocation of this commons, and any decision that littoral state allocation is inconsistent with the "national interest" should come after a full congressional debate.

The federal government has two main options when it chooses to allocate the rights to interstate waters. These are:

1. Legislation
2. Approval of a State Compact

Both of these options would require affirmative congressional action. The first would require the formulation of a Great Lakes diversion policy. Congress could either delegate the basic allocation choices to the Great Lakes States or make them itself. The substantive choices are many. Congress could legislate an area of origin protective scheme that


\(^{88}\) *Id.* at 675.

\(^{89}\) *Id.* at 674.


would prohibit diversions, subject diversions to cost/benefit criteria, give the basin states a veto over proposed diversions or provide compensation to the state of export or all of the Basin States. The option has potential benefits to the Great Lakes States as well as costs. For example, legislation that prohibited diversions objected to by Basin States would remove the major obstacle to state diversion regulation. However, if the issue is opened to national debate, potential "user" states might insist on a federal diversion policy that would downgrade the role of the Great Lakes States. The second option, an interstate compact, is discussed in the next section.

V. STATE OPTIONS

This section surveys a range of Great Lakes protection strategies that may be open to the states. All possible strategies from the "reasonable and successful" to the "unreasonable and unlikely to be successful" are displayed and discussed so that decisionmakers will have a better idea of the range of choice open to them and the legal and other constraints that may circumscribe a given choice.

A. Export Embargos

A state could enact a simple law that forbids the export of surface or groundwater from the Great Lakes. The objective of such a law would be to reserve the Great Lakes for the littoral states exclusively. Indiana has virtually done this by a statute that prohibits exports unless all Great Lakes governors agree. Export prohibitions have great political appeal and are relatively easy to enact, but they are presumptively unconstitutional after Sporhase v. Nebraska, which subjects state water allocation choices to the dormant or negative commerce clause. Export prohibitions are intended to discriminate against interstate commerce, and therefore alone they offend the fundamental policies underlying the dormant or negative commerce clause. Thus, export prohibitions are not an effective strategy as they are unconstitutional and deprive the states of any control over Great Lakes diversions.

Sporhase has had such a substantial impact on state water resource protection strategies that an extended discussion of the case and its implications is warranted in order to understand the extent to which state water allocation choices are now circumscribed by federal law. Federal authority over state water allocation has recently been indirectly asserted by the federal judiciary through the application of the dormant or negative commerce clause. This is a reactive assertion of federal power because the dormant or negative commerce clause only applies to suits

brought by a party challenging a state law. The impact of this assertion of federal authority will be uneven, and less comprehensive and less fair than an affirmative act of Congress. Nonetheless, the threat of a lawsuit can have a substantial impact on the exercise of state legislative and administrative power. The Supreme Court’s extension of the dormant or negative commerce clause to water has caused great concern among the states because many water laws and policies that explicitly prefer in-state users may be unconstitutional or at least subject to judicial challenge.

That the negative or dormant commerce clause could be applied to western groundwater came as a great surprise to the western states. They had long thought themselves immune from the dormant or negative commerce clause because they claimed to own their waters in “trust” for the public. State declarations of trust are no more than declarations of the police power inherent in every state, but the states sincerely believed, with some precedential justification, that state ownership immunized their water laws from dormant or negative commerce clause scrutiny. An early Supreme Court opinion *Hudson County Water Co. v. McCarter* held that state ownership in trust immunized legislation that would otherwise discriminate against interstate commerce from invalidation. In that case Justice Holmes applied the earlier holding, but not the reasoning, to water. He sustained a New Jersey export ban on the broad principle that the state’s interest in water allocation allowed it to prefer its own citizens to those of other states.

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.

Justice Holme’s theory was fatally flawed from the start. The “ownership in trust” theory was originally invoked by the states as fiction for the police power in an era when state regulation of the acquisition of property was seriously debated. Now the negative commerce clause is directed precisely against the use of state police power to distort interstate markets in the name of a higher local public interest. Soon after *Hudson County*, with Mr. Justice Holmes dissenting, the Court held that a natural gas embargo was unconstitutional and laid down the basic theory that the Court continues to follow today: The national common market must be protected from economic balkanization.

States continued to argue that trust resources that had not yet been

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93 Id. at 945-954.
95 Id. at 356.
reduced to private ownership, as opposed to oil and gas that had been produced, were not articles in interstate commerce. In 1979, the Court rejected decisively the trust theory as applied to game\textsuperscript{97} and laid to rest the distinction between owned and unowned resources as a basis for negative commerce clause immunity.

Hughes was applied to water in Sporhase v. Nebraska. A farmer whose land straddled Colorado and Nebraska wanted to withdraw water from his Nebraska land and apply it to land across the border. The rub was that Nebraska required a permit to export water and one of the statutory requirements was that the host state have a reciprocal export privilege. For good reasons, Colorado groundwater law had no reciprocity. Colorado, in contrast to Nebraska, has a stringent law of groundwater use to conserve its share of the Ogallala aquifer.

The Nebraska Supreme Court upheld the permit requirement by concluding that the dormant or negative commerce clause did not apply to Nebraska groundwater. Since the state followed a unique mix of correlative and reasonable use rules to allocate water, and since many statements in the Nebraska cases seemed to restrict groundwater use to overlying land, the state supreme court construed Nebraska law as limiting use to overlying land. Therefore, groundwater was not a marketable commodity and there was no discrimination against interstate commerce.

In a 7-2 opinion the United States Supreme Court reversed. Sporhase held that groundwater is a commodity in interstate commerce, regardless of state rules of ownership. Furthermore, state efforts to prefer in-state residents must pass judicial muster under the Supreme Court’s balancing test used to determine if the state law is an unreasonable restraint on interstate commerce. The result is correct but the Court’s reasoning is less than clear.

For this inquiry, however, the Court’s reasoning is less important than the result. State water laws that prefer in-state residents are now subject to the Court’s two-tiered constitutionality test. Facial discriminatory legislation is almost conclusively presumed unconstitutional. The state has a very high, if not impossible, burden of showing that (1) the state’s interest outweighs the traditional federal interests in a free national common market, and that (2) the state used the least intrusive means to achieve this interest. Non-facially discriminatory legislation must meet a balancing test. The test gives more weight to countervailing state interests, but still weighs federal interests heavily. It asks whether the state regulation is the least intrusive means, in terms of a burden on

\textsuperscript{97} Hughes v. Oklahoma, 441 U.S. 332 (1979).
interstate commerce, available to achieve its means. Most crude protectionist legislation will fail under either test.

Although it seems clear that courts will invalidate straight export bans, there is respectable scholarly argument that Sporhase is wrong. The eminent western water lawyer, Frank J. Trelease, argues that courts should recognize a distinction between appropriated and unappropriated water; that is between water allocated and unallocated. Sporhase should not, he argues, apply to unallocated water because states are deprived of sovereignty over a vital resource: "Unless a state can deny an application for export, it has no way to exact a quid pro quo that equals or exceeds the opportunity costs of lost instate development." Ultimately this argument savors too much of the tenth amendment, which the Court has declared unenforceable, to offer much hope to states experimenting with simple export bans.

In addition to this argument, Sporhase did suggest a limited defense of export bans. Justice Stevens opined that a demonstrably arid state might be able to demonstrate that it had a shortage and thus required all of its water to supply its inhabitants. This defense in all likelihood cannot be invoked by the Great Lakes States for two reasons. First, no state in the region is demonstrably arid; they are demonstrably humid. Second, the defense has been narrowed to the point of nonexistence. The Supreme Court has not yet heard a case that requires it further to define Sporhase, but an important federal district court decision has done so. To fight off an ongoing effort by El Paso, Texas, to export groundwater from New Mexico to Texas, New Mexico tried to justify an export prohibition statute (since repealed) by "proof" that the state will suffer a statewide water shortage in the future because of out-of-state exports. A district court rejected the demonstrably arid defense as inconsistent with the policies of the dormant or negative commerce clause. Only if a state could prove that there was an imminent shortage of water for health and safety needs as opposed to economic needs might the defense be valid. No state, arid or humid, will ever experience water shortages of this magnitude. The conclusion that one must draw from El Paso I is that courts are likely to equate state conservation arguments with assertions of state sovereignty or "ownership."

There are, however, many issues about the relationship between state quasi-sovereign interests and the dormant or negative commerce clause that are yet to be resolved. Justice Steven's opinion in Sporhase

101 Id.
recognized, but did not fully articulate, the principle that states have a higher interest in the allocation of their water resources than in the allocation of commodities such as oil, gas and coal which have traditionally been allocated by interstate markets. The major relevant unresolved issue of interest to the Great Lakes State is the weight to which the Court would give to a state environmental interest in deciding whether an anti-diversion statute serves a compelling state interest. There is some precedent for the argument that courts will tolerate a high degree of interference with interstate commerce in the interests of environmental protection.

Historically, state environmental statutes were thought to be immune from the dormant or negative commerce clause. State quarantine laws were upheld against dormant or negative commerce clause challenges and there was some suggestion that the immunity extended to environmental protection generally. However, in City of Philadelphia v. New Jersey,\(^\text{102}\) the Court invalidated a statute banning the import of out-of-state wastes, and federal circuit courts have applied this analysis to state efforts to protect themselves from environmental hazards through import bans.\(^\text{103}\) These cases make it harder for states to defend state environmental statutes that discriminate against interstate commerce from a dormant or negative commerce clause attack. But they do not foreclose the possibility that a state could demonstrate that, in the case of the Great Lakes, the only way to maintain the ecological integrity of the system was to preserve the status quo.\(^\text{104}\)

B. Even-Handed Application of Restrictions

The major issue raised by Sporhase is the extent to which the court will invalidate state regulatory and conservation schemes that are applied equally to in and out-of-state users. All state laws that regulate use are based on the assumption that the primary beneficiaries of the state's bounty will be state residents. All state regulatory schemes limit access to available supplies to some extent. Otherwise why regulate? There is a strong argument that so long as in-and out-of-state users may compete equally for the supply, there is no discrimination against interstate commerce. The issue, however, is not that simple, since a state could devise an anti-export strategy in the form of even-handed use restrictions. Judicial scrutiny might still be triggered as courts will look behind seemingly nondiscriminatory legislation when a discriminatory effect is proved and

\(^{102}\) 437 U.S. 617 (1978).

\(^{103}\) See, e.g., Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982) (Illinois cannot bar the disposal of nuclear wastes in the state that were generated out-of-state while allowing the disposal of instate generated wastes).

when there is some question about discriminatory motive. Since a court has some discretion to probe the motives behind legislation alleged to be discriminatory, a state cannot cloak a discriminatory purpose in a seemingly neutral regulation and expect the legislation to be upheld without question. To be useful, this option would require state legislation, like Wisconsin's, that subjects all users to equal and substantial conservation restrictions.

The objective of post-Sporhase legislation is to develop a state water allocation strategy that is consistent with the dormant or negative commerce clause. This may not be possible in some states. Since both in and out-of-state users would be subject to equal restrictions, such legislation tends to be more politically controversial. The benefit of this option is that state allocation discretion is preserved; the cost is that it may be politically impossible either to pass the legislation or to run an effective regulatory program.

The recent efforts of New Mexico to negotiate around Sporhase to maintain control over the future allocation of its groundwater illustrate some of the possible ranges of post-Sporhase strategies. A groundwater basin in southeastern New Mexico was selected by El Paso, Texas, as the source of future supplies for the rapidly growing city. El Paso estimated that local supplies will start to become inadequate around 1995 and it filed for a number of New Mexico appropriative groundwater rights to meet its anticipated needs. New Mexico's simple anti-export statute was held unconstitutional immediately after Sporhase. New Mexico responded to Sporhase and El Paso's pending water rights application by enacting a new statute that authorizes the state engineer to grant applications for out-of-state uses subject to statutory standards. The new statute was tested in the second round of the litigation.\textsuperscript{105} El Paso II has both good and bad news for states experimenting with legislation that gives in-state users a strong preference to use its waters. The court held that parts of the statute were constitutional and parts were not.

The good news is that the court upheld the even-handed requirement that the state engineer consider the "conservation of water within the state" in granting permits. El Paso argued that this requirement discriminated against out-of-state users because it effectively denied them access, but the court held that the standard was constitutional because the state had a history of public interest review of new appropriations. In short, the court warned New Mexico that it had to play the pending administrative proceedings straight and apply the same standards to in- and out-of-state permit applicants. This holding provides some basis for concluding that the state's power to make fundamental allocation choices

is not impaired by *Sporhase*. For example, state withdrawals or reservations of water from consumptive use to preserve minimum in-stream flows would seem to be constitutional because the state interest is high and in-and out-of-state residents are equally denied access to the resource. The dormant or negative commerce clause need not be applied to require that all the state's resources be put on the auction block; it merely prohibits the state from discriminating once it makes the decision to allow the acquisition of private rights.

The court expressly held that once the taint of protectionist motive is removed from legislation, a state may exercise its police power to prefer its own citizens in the distribution of the resource. There is, of course, a tension between the recognition of a preference for in-state users and the policies underlying the dormant or negative commerce clause that cannot be avoided by characterizing legislation as either protectionist or non-protectionist. *Sporhase* itself recognized the historic preference, but its scope has barely begun to be delineated so too much cannot be read into *El Paso II*.

New Mexico's new legislation was held partially unconstitutional because it required that the state engineer consider six criteria in out-of-state transfer applications that he was not required to consider for in-state applications. Strict scrutiny was triggered by the facial discrimination, and the statute was invalidated because out-of-state users were required to shoulder the entire burden of furthering state conservation. This is a burden that the Constitution requires all users to share equally.

The deeper lesson of *El Paso II* is that the exercise of state power to make long term and fundamental allocation choices must be based on more than assertions of a strong state interest. The necessity to preserve the Union through the prevention of economic discrimination places some burden on states to justify preferring in to out-of-state users. The state must initiate a process that forces them to face the hard choices about water allocation and to begin to make those choices. The Arizona Ground Water Management Act is an example of such legislation. Arizona has made the decision to phase out economically unsound irrigated agriculture and to hold all water users to progressively higher water conservation duties. Its house is in order and there is less need for judicial intervention to oversee its water policy.

C. Equitable Apportionment

In 1907 the Supreme Court asserted original jurisdiction over suits between states for the apportionment of interstate waters. Original jurisdiction is the only constitutional avenue of relief for states, absent an

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106 *Id.*

express agreement, to vindicate their interests in interstate waters. The
limited powers of the states in a federal system requires a federal com-
mon law of interstate waters. Thus, states may assert their quasi-sov-
ereign interests in interstate waters within their borders by suing parens patriae, to represent the interests of all the citizens of the state, in the
Supreme Court's original jurisdiction.

An equitable apportionment is the result of the Supreme Court's
exercise of original jurisdiction. A state must file an original action in the
Supreme Court, and the Court must accept jurisdiction. The objective is
to secure a decree that quantifies the respective rights of the states. The
major benefit is that a state now knows what share of the waters it is
entitled to and what share belongs to other states, and may plan accord-
ingly. The disadvantage is that the Court will not exercise its jurisdiction
until it is absolutely necessary to resolve a dispute among states. This
makes equitable apportionment an unlikely short run strategy for the
Great Lakes States. However, an understanding of the law is important
because it influences other strategies.

Each state has a federal common law right to use interstate waters
to the exclusion of other states, but the right, especially in riparian juris-
dictions, is even more uncertain than common law riparian rights. The
Court has articulated the theory that all states have an equal right to use
the shared resources, but the decided cases do not allow a state to
predict how its "equal" right will prevail against competing "equal" claims by other states. The Court has historically been reluctant to exer-
cise its jurisdiction without a high showing of injury by a state affected by
a use or a proposed use. These are vague standards, and the Court has
expressed a preference for interstate compacts as a means of sharing in-
terstate waters. Fear of what the Court might decree has stimulated
many states to compromise their interests and enter into a compact. As
a result, the standards for apportionment have remained general and it
remains difficult for a state to estimate the amount of its share or its
ability to stop a diversion for use in another state in advance of litigation.
And, there is a Catch-22: a state cannot bring an equitable apportion-
ment action until the threat of deprivation of its fair share is relatively
clear.

In trying to resolve the tension between exclusive state claims of
sovereignty and the correlative rights of other states, it is not surprising
that after announcing the principle of equality among states, the Court
tried to accommodate these inconsistent state interests through extensive
use of procedural barriers. The ripeness barrier, for example, attempts to

108 This analysis is adapted from Tarlock, The Law of Equitable Apportionment Revisited, Up-
resolve a tension between the Court's historic reluctance to exercise its jurisdiction in the absence of a sharply focused dispute and the recognition that states need to have their rights defined in advance of taking specific actions. State police power over water resources extends to the protection of future allocation options. A state suing *parens patriae* is not simply another right holder claiming that the proposed diversion will interfere with the exercise of a prior right. The police power encompasses the power to anticipate the risks to present and future in-state users presented by out-of-state diversions and to try to minimize them before actual harm occurs by asserting that the diversion exceeds the diverter's fair share of the river. The problem with this logic is that if it were carried to its conclusion, downstream states would have a virtual veto over an upstream state's diversions. This would destroy the principle of equality among states announced in *Kansas v. Colorado*. The concept of ripeness, derived from the equity doctrine of imminent irreparable harm, has been used to set high standards of proof of injury and to dismiss many apportionment actions because the initiating state failed to prove sufficient injury. The ripeness doctrine performs the same function as the vague standards. Both encourage the use of interstate compacts. In a series of cases beginning in 1906, the Court developed this concept to screen apportionment actions.

*Missouri v. Illinois* was the first case to set a high standard of injury as a prerequisite to Supreme Court relief. In an epic environmentally unsound public works project, Illinois reversed the flow of the Chicago River to flush Chicago's sewage into the Illinois River, a tributary of the Mississippi, instead of treating and discharging it into its front yard - Lake Michigan. Alarmed, Missouri sued to protect the health of residents of St. Louis and other riparian cities. Missouri invoked the common law rule that a riparian had a right to the flow of a stream unimpaired in quality and quantity. To dismiss Missouri's suit, a higher standard of proof than would be applied to a suit for equitable relief between private parties was articulated: "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side."

Relief was not warranted on the facts.

The Court applied *Missouri v. Illinois* in 1931 when it dismissed Connecticut's attempt to prevent a Massachusetts transbasin diversion to benefit Boston. Connecticut relied on the strict common law rule that all uses outside of the watershed were per se unreasonable, but the Court

110 200 U.S. 496 (1906).
111 Id. at 521.
found at least three reasons to dismiss the action. Connecticut, the lower riparian state, failed to prove any injury and thus the case arguably fell within the more "modern" common law rule that only transwatershed diversions that actually caused injury to downstream riparians were actionable. Connecticut is an important precedent because it illustrates that the Supreme Court will not adopt the common law of riparian rights as the sole basis for an equitable apportionment. The restrictive rules of water usage inherent in the common law violate that principle of equality of access which the Court has consistently tried to follow.

Although the Court has been quite consistent in its reluctance to exercise original jurisdiction where ripeness is not demonstrated, there have been and continue to be dissenters. In his opinion in *Nebraska v. Wyoming*, Justice Douglas took the occasion to articulate his view, over a strong dissent, that if all claims, perfected or not, on a stream exceed the dependable flow then a conflict exists and injury should be presumed:

What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been over-appropriated, claims based not only on present uses but on projected additional uses as well. The various statistics with which the record abounds are inconclusive in showing the existence or extent of actual damage to Nebraska. But we know that deprivation of water in arid or semi-arid regions cannot help but be injurious. If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient. But *Wyoming v. Colorado* . . . indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. Justice Douglas' definition of ripeness is a limited extension of the concept. It would not help any state seeking an equitable apportionment to fend off future diversion proposals. There would have to be, at a minimum, a diversion project that posed some immediate threat to the interests of other states.

Once the Court accepts original jurisdiction and appoints a master to take the evidence, the issue becomes what law to apply. The Court initially rejected local law as the basis for an apportionment, then accepted it as the basis among states that followed the same law, and finally downgraded local law to a "guiding principle." Fair allocation rather than consistency with locally generated expectations ultimately became the touchstone of equitable apportionment. Although the Court has

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113 Four years later, the Court applied its high standards of injury to a familiar western water law doctrine, and dismissed a suit by Washington against Oregon because the former's call would be futile. *Washington v. Oregon*, 297 U.S. 517 (1936).

114 325 U.S. 589 (1945).

115 Id. at 618.
never been very precise about the source of the law of equitable apportionment, its early decision makes it clear that the grant of original jurisdiction requires a federal common law and a federal statutory law that will not allow one state to use its law to gain an unfair advantage over another.\footnote{See Wyoming v. Colorado, 259 U.S. 419 (1922).} The use of local law as a basis for allocation is thus not compelled by the Constitution, and it might be unconstitutional to rely exclusively on local law. Local law may, however, serve as a source of principles to apply since a federal common law must, of course, examine the most relevant sources of substantive law, and in our federal system that will be state law.\footnote{See Tarlock, supra note 108, at 394-402.}

In the 1920s and 1930s, the Court seemed to adopt a simple rule or set of rules: Appropriation among prior appropriation jurisdictions and riparian rights among prior riparian jurisdictions.\footnote{See Wyoming v. Colorado, 259 U.S. 419 (1922); New Jersey v. New York, 283 U.S. 336 (1931).} But, this was an overly simplistic assumption in light of the decisions that the Court was rendering. The cases consistently made it clear that the Court was not bound by local law and could refuse to apply local laws in situations where it determined that other states would be deprived of water to protect excess claims. The Court first refused to follow the strict common law rules of riparian rights in situations where proposed consumptive uses would have been flatly prohibited. Finally, in Nebraska v. Wyoming,\footnote{352 U.S. 589 (1945).} the Court adopted the current open-ended standard of equitable apportionment:

So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise for an informed judgment of consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors.\footnote{Id. at 618.}

Nebraska v. Wyoming is usually cited for the proposition that equality among states does not permit adherence to local law even among states that have basically the same water law. Actually, the doctrine was formally originated in the earlier case of Connecticut v. Massachusetts. However, read carefully, Nebraska v. Wyoming represents a sensitive effort to fashion a law of equitable apportionment that gives great, but not
controlling, weight to local water law. The Court’s function is not to depart from local law and divide the waters by judicial fiat, but rather to rub off its rough edges in situations where substantial prejudice to another state would result from the application of a local law, even if both states follow the same rule. The doctrine seems to contain the root principle that “a State may not preserve solely for its own inhabitants natural resources located within its own borders.” In short, the Supreme Court has now linked the policies underlying equitable apportionment to those underlying the dormant or negative commerce clause.

The Court has recently announced a decision in an equitable apportionment case that has significant implications for state efforts to prevent water raids. The opinion can be read both as a reaffirmation of Nebraska v. Wyoming or as an indication that the Court is willing to break new ground to increase the conditions that must be met before a state can refuse to share common resources. Colorado v. New Mexico arose from an attempt by the state of Colorado to bump the priorities of a marginal irrigation district in New Mexico in favor of new industrial development upstream on an interstate stream. The special master rejected a strict application of prior appropriation and balanced the equities in favor of the new, upstream use. In its initial opinion, the Court agreed with the master in theory and added a new standard to the law of equitable apportionment. If the upstream state can demonstrate by clear and convincing evidence that the equities favor bumping existing uses, it may be able to prevail because “an important consideration is whether the existing users could offset the diversion by reasonable conservation measures to prevent waste.” The case was remanded to the master for more specific findings to determine if the new conservation duty should be invoked.

The requirement that a state take reasonable conservation measures to preserve its priority is not part of either the law of prior appropriation or riparian rights in any meaningful way. Many argue that the law should encourage conservation, and Colorado v. New Mexico I broke new ground by applying the argument that conservation duties must be incorporated into the law of equitable apportionment. The radical nature of the decision was apparently too much for a majority of the Court. Colorado v. New Mexico II returned to the rule of Wyoming v. Colorado and protected New Mexico’s priority. Writing for the majority, Justice O’Connor concluded that Colorado had failed to demonstrate by clear and convincing evidence that the diversion should be allowed. The

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123 Id. at 188.
Court had announced this standard in the previous opinion, but Justice O'Connor tightened the standard by requiring a guarantee that the diverting state will bare all of the risks of an erroneous diversion. On one level, the Court's placement of the burden of bumping existing uses on the initiating state returns the law of equitable apportionment to pre-

*Nebraska v. Wyoming* standards. On another level, however, the decision opens up new possibilities for states wanting to claim water for new uses and places new risks on states seeking to protect existing uses. *Colorado v. New Mexico II* did not reject the possibility that the conservation duty imposed in *Colorado v. New Mexico I* might be applied in more appropriate cases. In the end, Colorado seems to have lost because it had not done the comprehensive planning necessary to justify the new use. The lesson of the cases is that states must undertake extensive studies to justify the water uses claimed in an equitable apportionment action and must make some showing that they are taking steps to manage their resources efficiently. As previously mentioned, the Court has recently joined the law of equitable apportionment with the policies underlying the dormant or negative commerce clause. The end result is that states may not only have to justify the need for the water, but now must show that they have and are taking reasonable steps to allocate available supplies fairly and efficiently.

All in all, *Colorado v. New Mexico II* read with prior equitable apportionment cases is good news for the Great Lakes States. It contains the basis for an argument that existing *in situ* uses should be preserved. Under the common law of riparian rights, water need not be put to a beneficial use to exercise a right. Thus, the Great Lakes States have, in effect, a prior *in situ* use. The use takes on a further justification from the realization that the Great Lakes ecosystem requires to a large extent preservation of the status quo. States and other users that seek to use Great Lakes water out of the Basin will have a high burden. They may have to demonstrate that they had exhausted all efforts to conserve existing resources and may, perhaps, be required to defend out-of-basin diversions by at least a rough cost-benefit analysis - something that will not be easy to do. The Court has previously realized that the highest value of a stream may be for *in situ* use so there is a precedent upon which future Great Lakes preservation efforts can build.125

D. Interstate Compacts

Article I, section 10, clause 3 of the United States Constitution allows states to enter into interstate compacts with the consent of Congress. Compacts have been frequently used as a substitute for equitable apportionment actions or to supplement them. They offer two major ad-

vantages over adjudication. First, water may be allocated in advance of demand in situations where a court would dismiss the action as not ripe. Compact negotiations offer some states a better chance to protect their interests. Second, there are no limits on the relevant factors that may be taken into account compared to an equitable apportionment action which focuses primarily on the scope of existing uses. Compacts require a negotiation among all potential signatory states and approval by Congress. Thus, compacts that touch on sensitive issues may be difficult to negotiate. Compacts are usually negotiated only to avoid a worse fate (an adverse equitable apportionment action) or to gain a major advantage (federal funding of storage reservoirs, for example.)

The Great Lakes States negotiated a compact in 1955.126 The Great Lakes Basin Compact creates a commission with the power to collect data, develop Basin plans, recommend water resources policies and requires that each state “consider” any commission recommendations on a diversion of waters either into or out of the Basin. However, the compact provides no binding regulation of proposed diversions.

The law of interstate compacts is still evolving as there has not been much litigation over them. Although there is some debate about the issue, the consensus is that congressional approval of a compact makes interpretation of the compact a federal question.127 There remain many unresolved issues about compacts. One consequence is clear: state water rights holders are bound by compact allocations and may have to forego amounts of water perfected under state law so that the state can satisfy its compact obligations.128 This rule has been applied in both prior appropriation and riparian jurisdictions.129

Compacts offer a major advantage to states that want to limit exports but they also have drawbacks. The advantage is that Congress has the power to consent to state laws that would otherwise discriminate against interstate commerce. Consent to a compact has recently been held to be an exercise of this power. In Intake Water Co. v. Yellowstone River Compact Comm.,130 the court upheld a compact provision that required the consent of all signatory states for any transbasin diversion.

The major disadvantages of a compact are that they are only as good as the standards of apportionment and the enforcement mechanisms that they adopt. A vague standard may lead to a lawsuit, and the court may resolve it by applying the law of equitable apportionment. The Court has

128 Hinderlider v. LaPlata & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
recently held that state entry into a compact is presumed to forestall an equitable apportionment action, but the Court will not presume that the state waived the right to bring an action if it disagrees with the way in which the compact is interpreted. The case also illustrates the problems of a weak enforcement mechanism. Texas and New Mexico apportioned the Pecos River by a commission on which the states have an equal vote and the third member, the federal representative, has no tie breaking vote. The Court refused to reform the compact to break the resulting deadlock because a compact is an exercise of Congressional power to apportion interstate waters. It reasoned that the Court lacks equitable jurisdiction to reform the compact; it can only interpret what Congress did. However, the Court allowed Texas to continue its original jurisdiction action and rejected New Mexico’s argument that the compact commission was the exclusive forum for the resolution of disputes. In contrast, the experience of Delaware River Basin Commission shows that a combination of a compact that contains stronger enforcement powers coupled with pressures for interstate cooperation can be effective.

There are other disadvantages to a compact. For example, the issue has arisen whether a state may agree to a compact that contains powers that are inconsistent with its state law. The Supreme Court has held that this is a federal question and it overruled a state court’s decision that West Virginia lacked the authority to enter into the Ohio River Sanitary Compact, but the issue is still in doubt.

E. Water Marketing

In a series of recent decisions the Court has opened up a new anti-export strategy as a way around Sporhase. The strategy is water marketing. The theoretical foundation is a series of cases holding states immune from the dormant or negative commerce clause when they are market participants as opposed to regulators. The market participation doctrine is open to challenge because the risk of state exercise of monopoly power is greater when they enter the market directly than when they legislate and regulate, but the Court continues to adhere to the doctrine. The doctrine has only been applied to state produced goods made from raw materials; there is a question of whether it applies to natural re-

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sources such as water. Language in one opinion would suggest not, but Justice Stevens’ opinion in Sporhase suggests that “the natural resource has some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage.” The issue, however, remains as to whether any state control over its water resources, even if expressed as “water-marketing” is in fact regulation and thus not immune from the negative or dormant commerce clause. The Court recently rejected a half-hearted attempt by New Hampshire to justify a preference for in-state consumers of power generated from the Connecticut River because the state “owned” the river and hence the power. New Hampshire had not generated the power itself and thus its relationship to the privately generated power was only regulatory. This case suggests that the Court will review carefully the state’s relationship to the resource when it invokes the market participation doctrine, especially when the potential impact on interstate commerce is likely to be substantial.

South Dakota invoked the market participation doctrine when the state entered into a contract to sell water stored behind a federal reservoir on the Missouri River to a joint venture seeking to construct a coal slurry pipeline in Wyoming. The Supreme Court of South Dakota has questioned the state’s ownership of the resource, and its resulting power to sell, but the issue became moot before judicial resolution when the project was abandoned.

Montana, however, is moving ahead with an aggressive water marketing program. A recent report defines water marketing as “the transfer of the use and/or title of water from a willing seller to a willing buyer for a consideration paid.” Montana House Bill 680 takes large, but not small, scale diversions and out-of-basin diversions, out of the traditional appropriation system and provides that water in excess of 4,000 acre feet must be leased from the state.

Water marketing is not unknown in the Midwest. The Corps of Engineers has long sold water from its flood control reservoirs, and, as previously discussed, Indiana and Ohio have express statutory authority for intrastate water marketing. The question, of course, is whether a market exists to support an aggressive statewide marketing program, questions of ownership and constitutionality aside.

136 458 U.S. at 957.
F. Comprehensive Management Legislation

The first lesson of Sporhase is that simple "me-first" legislation is not an effective means of preserving state waters from out-of-state uses. In addition to federal protection, states can take unilateral action through the enactment of water management programs that make Great Lakes preservation an integral part of state water management. This is the deeper lesson of Sporhase and Colorado v. New Mexico II. A properly drafted state management program will allow a state to (1) develop a comprehensive allocation plan for a reasonable time horizon such as twenty or thirty years, (2) tie applications for all new major water uses to the allocation priorities established in the plan, and (3) assert the power to deny water use allocations which are not consistent with the plan.

Comprehensive planning and management legislation is an effective exercise of the state's police power to allocate supplies for the present as well as the future. Although the power has not been exhaustively tested, it is assumed that a state may prefer future to present uses by denying present water use applications to reserve the water for future needs. When this power is combined with the power to protect the state's physical environment from degradation, a state has wide discretion to chart its resource destiny. Many of the Great Lakes States have a long tradition of public water management. For example, they have long established the state holds its major water resources in trust for the public. The trust is an assertion of the police power. Traditionally, the police power has been used in the Great Lakes States to recognize public rights of navigation and recreational use in streams, to preserve the scenic beauty of special waterways and more recently to promote environmental quality. This tradition establishes that water resources must be shared both among private claimants and between private users and the state as representative of the public generally. It is a rich foundation on which new water management efforts can be built.

VI. CONCLUSION

This paper has reviewed the legal strategies available to the Great Lakes Basin States to chart the future use of the Great Lakes. The decision in Sporhase v. Nebraska coupled with the possibility that the federal government will exercise its constitutional power to allocate interstate waters effectively deprives the states of the exclusive authority to decide who can have access to the Great Lakes for consumptive withdrawals. The actual possibility of a congressional apportionment contrary to the

desires of the Basin States is remote, but the possibility of judicial invalidation of state legislation that does little more than to prohibit exports from the Basin is a real possibility.

To chart the destiny of the Great Lakes, littoral states, in cooperation with Canadian provinces, must unite to develop a common management strategy. Section II of this article provides the starting point for the development of this strategy. All states and provinces follow the common law of riparian rights. A core concept of riparianism is that those in the watershed of a watercourse are entitled to benefits of the waters in the watercourse. The common law initially expressed this policy in the rule that diversions outside the watershed are per se unreasonable. This rule is softening in response to the arguments that (1) it promotes inefficient allocation of resources, and (2) there is no case for following the rule to its logical conclusion. However, the watershed limitation provides the conceptual underpinning for state and provincial efforts to regulate withdrawals for out-of-basin use. It expresses the valid idea, especially at the state level, that littoral states have the primary interest in the allocation of Great Lakes waters. Section III supports the argument by demonstrating that there are no due process limitations on the power of states to redefine water rights and to subject the use of water to conditions which further the public interest. Water management legislation is always challenged as an unconstitutional taking of common law property rights, but as long as rights based on pre-existing uses are protected and access to water is not completely foreclosed by the new schemes, states have great discretion to substitute rights based on permits for common law water rights.

Section IV describes the federal constraints that state regulatory legislation may face. The federal government has the power to make a congressional apportionment of the Great Lakes, but the major constraint is the negative commerce clause. This clause may be invoked by public and private parties with the standing to object to a state water management decision. Federal policy is articulated by judges, not by elected representatives, and the results reached may be contrary to those that Congress would reach. In addition, apportionment actions also pose a threat to state regulatory programs designed to conserve the waters of the Great Lakes Basin. For example one littoral state might use the Court's original jurisdiction to secure a decree that would legitimate out-of-basin exports.

Section V describes five options open to the states to conserve the Basin waters in a manner consistent with federal law. These are (1) export embargos, (2) even-handed use restrictions, (3) equitable apportionment actions, (4) interstate compacts, and (5) comprehensive management legislation. These strategies are not mutually exclusive and in fact they should be combined. No one alone is likely to be effective.
Export embargos are per se unconstitutional. Even-handed legislation is less likely to be invalidated, but the scope of state power to prefer in-state residents remains undefined. Equitable apportionment actions recognize state rights that must be protected, but the ripeness doctrine precludes the use of an equitable apportionment action to clarify the rights of the respective states absent a threat of immediate injury, an unlikely possibility for the foreseeable future. Interstate compacts are superior to equitable apportionment actions, but it generally takes a long time for states to reconcile the inevitable differences among themselves and agree to a compact.

For the immediate future, the states must continue to concentrate on implementing the Great Lakes Charter by enacting management legislation that gives states the power to review all major withdrawals, in- and out-of-basin, and to either condition them or prohibit them when they would interfere with clear state objectives. States that regulate in the context of comprehensive state water management plans stand a better chance of defending water access restrictions than those that do not. A consistent theme that emerges from recent cases involving interstate waters is that courts are becoming less willing to defer to abstract expressions of state interest (especially when it used to block access to interstate waters) and are increasingly requiring that the state "demonstrate" through a planning or other process how it came to define its interest. However, unilateral state action can never immunize the action from negative commerce clause scrutiny. Ultimately, the states may consider seeking congressional approval of their export restrictions either in the form of congressional legislation or congressional approval of an interstate compact that recognizes state power to veto out-of-basin diversions.

The approval of the Great Lakes Charter is the first step in the process. Negotiation and approval of an interstate compact can await the unilateral implementation of the Charter among the Basin States.