



**Senate Counsel, Research, and Fiscal Analysis**  
State of Minnesota

# **Existing Authority for DNR to Deny an Application to Appropriate Groundwater for Transfer Out-of-State**

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**Senate**

**State of Minnesota**

TO: File

FROM: Ben Stanley, Senate Counsel (651/296-4793)

DATE: November 8, 2019

RE: Existing Authority for DNR to Deny an Application to Appropriate Groundwater for Transfer Out-of-State

This memorandum was written in anticipation of questions about the authority of the Minnesota Department of Natural Resources' (DNR) to deny an application to appropriate groundwater for transfer and use out-of-state.

Those questions are anticipated to arise in response to concerns generated in the wake of a proposal to annually appropriate roughly 500 million of gallons of water from the Mount Simon-Hinckley aquifer near Cannon Falls for shipment to drought-prone communities in the Colorado River Basin.<sup>1</sup> The DNR said in a preliminary assessment of the proposal that it is "unlikely we would issue a permit to appropriate water" for the project, but the uniqueness of the proposal raises questions about whether DNR has sufficient legal authority to deny similar proposals in the future.

This memorandum concludes that DNR has sufficient legal authority to deny future requests to appropriate groundwater for transfer out-of-state where the proposed transfer threatens the sustainability of Minnesota groundwater supplies. It does not, by contrast, have authority to deny those requests simply because the permit applicant proposes to transfer and use the water out-of-state.

**UNIQUE ASPECTS OF THE RECENT PROPOSAL LEAVE UNANSWERED QUESTIONS ABOUT DNR'S BROADER AUTHORITY**

The DNR's preliminary assessment of the recent proposal noted several relatively routine conditions that would need to be satisfied before the project could move forward, including preparation of an environmental assessment worksheet, possible preparation of an environmental impact statement, and payment of a service fee to cover DNR's costs of evaluating the proposal and conducting environmental review.

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<sup>1</sup> <http://www.startribune.com/minnesota-dnr-commissioner-sarah-strommen-virtually-no-scenario-in-which-the-state-would-ok-shipping-water-to-the-southwest/564237522/> (last visited on November 7, 2019).

However, the proposal also faced a more direct obstacle in that it would have appropriated water from an aquifer that has enhanced statutory protections: Minnesota Statutes § 103G.271, subdivision 4a prohibits DNR from issuing permits to appropriate water from the Mount Simon-Hinckley aquifer in a metropolitan county unless the appropriation is for potable water use, there are no feasible or practical alternatives to this source, and a water conservation plan is incorporated with the permit. Although DNR's preliminary assessment did not explicitly say that the proposal would have violated this subdivision, the agency presumably concluded that this was likely.

No other Minnesota aquifer is statutorily protected in this manner, which raises the question of whether DNR has adequate statutory authority to deny similar proposals for appropriations from other, unprotected aquifers.

### **DNR HAS BROAD STATUTORY AUTHORITY TO DENY PERMITS TO APPROPRIATE WATER IF DOING SO WOULD BE UNSUSTAINABLE**

DNR has a broad statutory mandate to deny water use permits for unsustainable groundwater appropriations. Specifically, Minnesota Statutes § 103G.287, subdivision 5 provides as follows:

Subd. 5. **Sustainability standard.** The commissioner may issue water-use permits for appropriation from groundwater only if the commissioner determines that the groundwater use is sustainable to supply the needs of future generations and the proposed use will not harm ecosystems, degrade water, or reduce water levels beyond the reach of public water supply and private domestic wells constructed according to Minnesota Rules, chapter 4725.

Minnesota Statutes § 103.265, subdivision 1 similarly provides:

Subdivision 1. **Assurance of supply.** The commissioner shall develop and manage water resources to assure an adequate supply to meet long-range seasonal requirements for domestic, municipal, industrial, agricultural, fish and wildlife, recreational, power, navigation, and quality control purposes from waters of the state.

In addition to these general statutes, other statutory provisions specifically require DNR to affirmatively find that a proposed diversion of water or consumptive use in excess of 2,000,000 gallons per day over a 30 day period will leave an adequate amount of water in the basin to meet the basin's water resources needs.<sup>2</sup> This requirement applies to both intrastate interbasin transfers as well as out-of-state transfers.

These statutes confer broad authority for DNR to reject water appropriations permits that threaten the sustainability of the state's groundwater supplies, whether the water appropriated would remain in Minnesota or would be transferred for use out-of-state.

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<sup>2</sup> Minnesota Statutes § 103G.265.

## **DNR MAY NOT DENY A WATER APPROPRIATIONS PERMIT SOLELY BECAUSE THE WATER WILL BE TRANSFERRED AND USED OUT-OF-STATE**

Although DNR has broad authority to administer water appropriation permits in a manner that ensures sustainability, the United States Supreme Court has held that a state may not impose an explicit barrier to transfer of water out-of-state that is not narrowly tailored to further the state's conservation purposes.

This was the holding in the 1982 case of Sporhase v. Nebraska, ex rel. Douglas.<sup>3</sup> That case concerned the owner of farmland that straddled the border between Colorado and Nebraska. The owner irrigated the land on both sides of the border with groundwater obtained from a well on the Nebraska side. At the time, Nebraska had a state statute that prohibited the transportation of groundwater obtained within the state to anywhere outside of the state unless four conditions were satisfied. Specifically, in order to be approved, a requested withdrawal of groundwater was required to be:

- (1) reasonable;
- (2) not contrary to the conservation and use of ground water;
- (3) not otherwise detrimental to the public welfare; and
- (4) for use in a state that grants reciprocal rights to withdraw and transport groundwater from that state to the state of Nebraska.

The first three of these criteria were directly related to the conservation of groundwater; the fourth inquired into the content of the laws of the state to which the water would be transferred. This distinction is important because the court proceeded to analyze the first three criteria separately from the fourth.

After concluding that groundwater is an article in commerce and that therefore the Nebraska statute was subject to commerce clause analysis<sup>4</sup>, the court restated the applicable test that should be used to assess the validity of the state statute under the commerce clause:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>5</sup>

At the risk of oversimplifying, this test can be summarized as one that asks two questions: (1) does the state statute further a legitimate local public interest? (2) does it regulate in an evenhanded manner that does not impose an excessive burden on interstate commerce?

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<sup>3</sup> 458 U.S. 941.

<sup>4</sup> U.S. Constitution art. I, sec. 8, clause 3 (“The Congress shall have power to...[t]o regulate commerce with...among the several states,...”).

<sup>5</sup> Id. at 954 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

The court quickly concluded that conservation and preservation of diminishing sources of groundwater was “unquestionably legitimate and highly important”<sup>6</sup> and that the statute’s first three conservation-focused criteria furthered that interest.

Having concluded that the conservation-related criteria furthered a legitimate local public interest, the court then proceeded to examine whether it did so in an evenhanded manner that was not excessively burdensome on commerce. In concluding that the criteria were in fact evenhanded and not excessively burdensome, the court cited five factors:

- Although the statute applies only to interstate and not intrastate transfers, state statutes imposed burdens of comparable weight on both interstate and intrastate transfers.<sup>7</sup>
- A state’s powers to regulate water use during times and places of shortage for the purpose of protecting the health of its citizens is at the core of its police powers.
- “The legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years....by the negotiation and enforcement of interstate compacts.”<sup>8</sup>
- A state may enjoy “a limited preference for its own citizens in the utilization of the resource.”<sup>9</sup>
- To the extent that state efforts have fostered the continuing availability of groundwater, “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.”<sup>10</sup>

The court then performed a separate analysis of the Nebraska statute’s fourth requirement, that the appropriate state official find that the laws of the state in which the transferred water would be used provided reciprocal rights to withdraw and transport groundwater from that state to the state of Nebraska.

The court noted that “the reciprocity provision operates as an explicit barrier to commerce between the two States” and that this consequently meant that the state “therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose.”<sup>11</sup>

In concluding that the reciprocity requirement “fails to clear this initial hurdle,” the court noted that there was no evidence that it was narrowly tailored to further the conservation rationale:

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<sup>6</sup> *Id.* at 954.

<sup>7</sup> *Id.* at 955-956 (“Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation.”)

<sup>8</sup> *Id.* at 956.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 957.

<sup>11</sup> *Id.* As an aside, it is not entirely clear why the court did not see the first three conservation-related criteria as similarly constituting an explicit barrier to commerce between the two states because the entire statute is directed only at interstate transfers.

Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. . . . we therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State’s legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the “strictest scrutiny” reserved to facially discriminatory legislation.<sup>12</sup>

## **CONCLUSION**

The rule that emerges from Sporhase is that states are free to enact limitations on groundwater appropriations so long as they do so in a way that legitimately and evenhandedly furthers conservation and does not overly burden interstate commerce. The Minnesota statutes cited above either do not distinguish between in-state and out-of-state water use or do so in a way that imposes burdens of similar weight regardless of which side of the border the water will be used on. Where a proposed water appropriation threatens sustainability, therefore, DNR has adequate, constitutionally valid, authority to prohibit it. DNR does not, by contrast, have authority to prohibit a proposed groundwater appropriation for out-of-state transfer and use that does not actually threaten sustainability.

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<sup>12</sup> Id. at 958.