MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Department of Justice Testimony on Sexual Exploitation of Children and Child Pornography

The Department of Justice has submitted the above-referenced proposed testimony. The witness and committee are not identified. The testimony reviews statistics on child pornography prosecutions since enactment of the Protection of Children Against Sexual Exploitation Act in 1977, 18 U.S.C. §§ 2251-2253 and 2423. It then discusses legislative reform proposals, focusing on sections 1502 and 1604 of the Administration's crime package. These provisions would (1) delete the commercial purpose requirement from the child pornography laws, (2) authorize the use of wiretaps in child pornography cases, and (3) delete the obscenity requirement from the child pornography statutes. The latter provision is apt to be the most controversial. In New York v. Ferber, 102 S. Ct. 3348 (1982), the Supreme Court ruled that depictions of minors engaging in sexually explicit conduct could be the basis for a criminal prosecution even if the material is non-obscene, on the theory that society has a valid interest in protecting the minor quite apart from any concern about the status of the material. The statutes on the books carry an obscenity requirement; the reform proposals would delete this to take advantage of the Ferber ruling.

I see no legal objections, and have drafted an appropriate memorandum to Greg Jones of OMB for your signature.

Attachment

THE WHITE HOUSE

WASHINGTON

May 16, 1983

MEMORANDUM FOR GREGORY JONES
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Department of Justice Testimony on Sexual Exploitation of Children and Child Pornography

Counsel's Office has reviewed the above-referenced proposed testimony and finds no objection to it from a legal perspective.

cc: Richard G. Darman

FFF:JGR:aw 5/16/83

cc: FFFielding
JGRoberts
Subj.
Chron

U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

IF YOU HAVE ANY COMMENTS

PLEASE CALL GREG JONES,

395-3802, OMB.

ID # 142965 CU

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Name of Correspondent: GREG JONES

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Subject: 18 USC §§2251-2253 and 2423. Sexual exploitation of children and child pornography.

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5/81

DRAFT

I am pleased to be here today on behalf of the Department of Justice to discuss issues surrounding the sexual exploitation of children and child pornography. In particular, I shall address the enforcement of 18 U.S.C. §§2251-2253 and 2423, known collectively as the Protection of Children Against Sexual Exploitation Act of 1977, and bills which would amend several of these provisions. Efforts to improve the federal statutes in this area and otherwise to combat the sexual exploitation of children undoubtedly deserve the attention of the Congress and the Administration. The shocking nature of the crimes involved and the indelible mark such crimes leave on their young victims are of serious concern to the Department of Justice. As one measure of the importance with which we view these crimes, the Administration has included proposals to strengthen the child pornography laws in its Comprehensive Crime Control Act of 1983, which has been introduced in the House as H.R. 2151.

Turning first to the enforcement of the federal sexual-exploitation-of-children statutes, as you know 18 U.S.C. §2251 makes it unlawful to use or induce a minor to engage in sexually explicit conduct for the purpose of producing materials depicting such conduct, provided the statute's requirements as to interstate or foreign commerce or mail are met. Section 2252 reaches the product of this and other conduct involving the sexual exploitation of children. It prohibits the transportation, receipt, and sale of obscene materials depicting sexual conduct by children, provided the transportation or receipt is

for the purpose of selling the materials or distributing them for sale. The requisite jurisdictional basis must also be shown under section 2252. Finally, 18 U.S.C. §2423 makes it unlawful to transport a minor in interstate or foreign commerce with the intent that the minor engage in (1) prostitution or (2) sexual conduct if the person transporting the minor has knowledge that this conduct will be commercially exploited.

Since May of 1977, 67 persons have been indicted under all available obscenity statutes (including obscenity statutes which are not limited to child pornography) for distribution of obscene material depicting minors; 56 defendants have been convicted; none have been acquitted; charges against ten are still pending; and one defendant committed suicide. In some of these cases, 18 U.S.C. §§1461 and 1462, which are general obscenity statutes, have been used to prosecute child pornography cases because these two provisions lack the commercial-purpose limitation found in the child pornography statutes. I shall discuss this commercial-purpose limitation of the child pornography statutes in greater detail later in my statement.

Indictments naming 28 of the above-mentioned defendants included charges under 18 U.S.C. §2252; 23 defendants were convicted of this violation; two were convicted of other obscenity violations; and cases involving two defendants charged under this section are still pending. One defendant charged under 18 U.S.C. §2252 committed suicide.

Regrettably, we have been singularly unsuccessful in developing prosecutions under 18 U.S.C. §2251. Because of the clandestine nature of the child pornography industry, it has proven extremely difficult to develop evidence that an individual was responsible for the production of mailed or shipped material. Only four individuals have been indicted under 18 U.S.C. §2251; two subsequently pled guilty to other charges under 18 U.S.C. §2252 (one of whom was sentenced to eight years of imprisonment); one pled guilty to a conspiracy charge; and one case is still pending.

We work closely with the Postal Service and the Federal Bureau of Investigation, which share investigative jurisdiction for violations of these statutes, and with the United States Attorneys, and we feel we have developed an effective program for the prosecution of these violations. In fact, all child pornography cases that have been brought to our attention by the investigative agencies here in Washington have been prosecuted except for a very few which were factually deficient for one reason or another; we are unaware of any unwillingness on the part of United States Attorneys to prosecute cases which have been brought directly to their attention. While the FBI, as an in-house investigative agency, has always directly referred these cases to United States Attorneys, coordination with the Postal Service, until recently, was maintained at the national level; that is, all Postal referrals were cleared through the Criminal Division before being sent out to United States Attorneys.

However, as a result of the considerable expertise that Postal Inspectors have developed in this area over the past couple of years, we have recently authorized the Postal Service to make direct referrals to United States Attorneys. In light of the extensive experience which Criminal Division attorneys have developed in the obscenity area, our guidelines in the United States Attorneys' Manual require United States Attorneys to consult with the Criminal Division before returning any indictments in these cases. Finally, attorneys in this Division have participated in special training seminars that have been held by both the FBI and the Postal Service dealing with the prosecution of child pornography offenses.

Prosecutions under the White Slave Traffic Act, including 18 U.S.C. 2423, traditionally have been referred by the FBI to United States Attorneys, who have been given a high degree of independence in the handling of these cases. Departmental guidelines provide that prosecution is generally limited to commercial prostitution activities, but that other violations of the statute may be prosecuted after consultation with the Division where warranted by the facts. Prosecution statistics under 18 U.S.C. §2423 are obtained from monthly reports submitted by United States Attorneys to the Department. However, these data are reported by the United States Attorneys only by reference to the principal statute involved in the case. Therefore, our statistics are limited to only those cases where 18 U.S.C. §2423 was the sole or principal violation. With this limitation

in mind, we can report that during Fiscal Years 1978 through 1981 charges were filed against 21 defendants under 18 U.S.C. §2423; 18 defendants were convicted; one defendant was acquitted; and charges against one defendant were dismissed. Once again, I would note that there may have been additional charges filed and dispositions obtained under 18 U.S.C. §2423 which were reported by United States Attorneys under other statutes and which, therefore, have not been picked up in our statistical reporting system.

Before turning to the bills which would amend the child pornography provisions in 18 U.S.C. §2252-2253, I would like to discuss an aspect of 18 U.S.C. §2423. Jurisdiction over offenses under that statute extends to offenses taking place "within the District of Columbia." This anachronistic provision is not needed since the District of Columbia has its own criminal code which sets forth a number of prostitution offenses. I would also note that similar language is included in the parallel provisions in sections 2421 and 2422 dealing with adult prostitution.

Several bills have been introduced in the House to amend the current federal child pornography provisions. Among these is the Administration's crime bill, H.R. 2151, particularly sections 1502 and 1604. The Administration's bill would strengthen the federal child pornography provisions in the following three ways: (1) most importantly, by deleting the requirement that the production, receipt, transportation, and distribution of child

pornography be for a commercial purpose; (2) by adding child pornography offenses to the list of those for which court-ordered wiretaps are authorized; and (3) by eliminating the obscenity requirement of the current child pornography law to the extent constitutionally permissible.

Two other bills, H.R. 2106 and H.R. 2432, also amend the federal child pornography laws. These bills, as well as sections 1502 and 1604 of the Administration's crime bill, H.R. 2151, are in part a response to the Supreme Court's decision in New York v. Ferber, 102 S. Ct. 3348 (1982), which held that the obscenity standard set forth in Miller v. California, 413 U.S. 15 (1973), does not apply to photographic or other depictions of children engaging in sexual conduct. Current federal law, 18 U.S.C. §2252, however, prohibits the dissemination of material depicting children engaging in sexually explicit conduct only if the material is obscene.

H.R. 2106 and H.R. 2432 would remove the obscenity requirement of 18 U.S.C. §2252 for all categories of child pornography. On the other hand, the Administration's bill would eliminate the obscenity requirement of 18 U.S.C. §2252 only with respect to a visual or print medium which visually depicts a minor engaging in sexually explicit conduct. Where the visual or print medium does not visually depict such conduct, for example, in the case of a written description without photographs, the obscenity requirement of current law would be retained.

This distinction between visual and non-visual depictions of children engaging in sexual conduct reflects the Department's position that certain language in Ferber recognized that a written depiction of sexual activities of minors that is not obscene probably continues to be protected by the First Amendment. Indeed, the New York statute upheld in Ferber only banned material which visually depicted sexual conduct by minors. As a practical matter, we point out that the distinction we are suggesting between visual and non-visual depictions of minors engaging in sexually explicit conduct has little significance with respect to potential violations of 18 U.S.C. §2252. In any case a violation can only exist if "the producing of [the] visual or print medium involves the use of a minor engaging in sexually explicit conduct." We are unaware of any instances in which such use of a minor has occurred for the purpose of facilitating a purely written description of the sexual conduct. Thus, the obscenity standard in the Administration's bill for non-visual depictions of minors engaging in sexually explicit conduct would apply to a very small category of child pornography materials.

Elimination of the obscenity requirement in 18 U.S.C. §2252 would obviously enhance the enforcement of this statute. Although we believe that few if any prosecutions have not been brought or not been successful in the past because of the obscenity requirement, in our view deletion of this unnecessary element will streamline prosecutions. Since expert witnesses and other evidence are sometimes utilized by both sides in seeking to prove

or disprove that the material is obscene, eliminating this requirement will generally expedite preparation for trial and the trial itself.

Another issue addressed by all three bills, and the one which we regard as perhaps the most important of the proposed changes, is the elimination of the commercial-purpose limitation. Utilization of 18 U.S.C. §2252 has been inhibited by the fact that the statute covers the distribution of child pornography only for commercial purposes. It is a fact, however, that many, perhaps even most, of the individuals who distribute materials covered by 18 U.S.C. §2252 do so by trade or exchange, without any commercial purpose and thereby avoid violating this provision. Moreover, those who use or entice children to engage in sexually explicit conduct for the purpose of creating a visual or print medium depicting such conduct do not violate 18 U.S.C. §2251 if their conduct is not for pecuniary profit. Nevertheless, the harm to children involved in child pornography schemes exists whether or not those who initiate or carry out these schemes have a profit motive or commercial purpose.

H.R. 2106 removes the commercial-purpose limitation of current law in a manner consistent with the Administration's bill. However, we note that H.R. 2432 deletes more language than is necessary from 18 U.S.C. §2252(a)(2) merely to eliminate the commercial-purpose limitation of that provision. Specifically, H.R. 2432 would strike from current law not only the commercial-purpose limitation applicable to the offenses of knowingly

receiving or distributing child pornography materials, but also would strike (we believe inadvertently) the underlying offenses of selling or distributing.

Amendment of the wiretap statute is also a matter that needs to be addressed if enforcement of the child pornography laws is be improved. Section 1604 of the Administration's bill would amend the wiretap law, 18 U.S.C. §2516, to add child pornography offenses to the list of those for which a court-ordered interception of a wire or oral communication is authorized. As I indicated earlier, the clandestine nature of the child pornography industry has made it extremely difficult to prosecute those who use children to produce pornographic material. Traditional investigative techniques, such as interviews and grand juries, are not always effective in making prosecutable cases. Moreover, it has been difficult to obtain the cooperation of children who have been exploited, given their age and the desire of their parents to shield them from embarrassment and from involvement in judicial proceedings. Also, the offenses of distribution and receipt of child pornography are often the subject of secret dealings. Wiretap authority for these offenses would greatly assist the Department in lifting this veil of secrecy and gathering evidence against persons responsible for the sexual exploitation of minors. The failure of H.R. 2106 or H.R. 2432 to amend the wiretap statute is in our judgment a

serious defect. We urge the Subcommittee to include such an amendment in whatever legislation it recommends to the full Committee.

Let me now turn briefly to a discussion of some additional provisions found in H.R. 2432 which are not included in the Administration's proposal. One such provision is H.R. 2432's language providing for the assertion of an affirmative defense in prosecutions brought for the production or distribution of child pornography depicting certain categories of sexually explicit conduct. The defense with regard to these categories would be that "the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value." We strongly oppose this aspect of the bill since it essentially retains the obscenity standard for certain categories of child pornography by way of an affirmative defense. Thus, it significantly undercuts the basic philosophy of Ferber, which authorized the elimination of the obscenity standard in the context of child pornography for the same categories of sexually explicit conduct to which H.R. 2432 applies this standard. Significantly, the Senate Subcommittee on Juvenile Justice, which recently considered S. 57, a bill identical to H.R. 2432, voted to delete this affirmative defense in the version of the bill it reported to the full Judiciary Committee.

Even in the absence of the affirmative defense provided in H.R. 2432, a defendant may take the position that the application of the child pornography statute to his case is unconstitutional

and falls within the "tiny fraction of the materials within the statute's reach" which the Court recognized should receive constitutional protection. 102 S. Ct. at 3363. Thus, the affirmative defense provision (which was not in the New York statute approved in Ferber) is unnecessary. Including an affirmative defense provision in the federal child pornography statute in our view would produce consequences far beyond protecting the small class of materials referred to by the Court. It may provide an appealing loophole for pornographers intent upon thwarting the purpose of the statute by placing otherwise proscribed child pornography materials within a legitimate literary or scientific work. Proving the defense -- that the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value -- would not be difficult in such cases. The affirmative defense proposed in H.R. 2432 is practically an invitation to distribute child pornography in a conviction-proof medium.

Finally, we believe that the primary purpose of the proposed affirmative defense is to address concerns raised by authors and publishers of legitimate sex education books who fear that, without such a defense, their works would be reached by the anti-child pornography law. We do not believe such works would be covered in light of the definition of "sexually explicit conduct" set out at 18 U.S.C. §2253, particularly in conjunction with the requirement that the production of the material involve the "use" of a minor engaging in such conduct. Given the

concerns expressed by publishers, however, it should be noted that the Department does not view the bills I have discussed as designed to reach legitimate sex education material. The creation of a statutory affirmative defense would, we believe, substantially undermine the basic purpose of H.R. 2432 -- to strengthen federal anti-child pornography enforcement efforts.

Another problematic aspect of H.R. 2432 is its definition of the word "simulated," a term which is used but not defined in the current child pornography provisions. The bill defines this term to mean "the explicit depiction of any ['sexually explicit conduct' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks." We believe that the bill defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions. For example, the requirement that the simulated sexual conduct exhibit any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera. H.R. 2432's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.

In light of these concerns, we believe that the term "simulated" should not be defined or that the definition should not require the exhibiting of any uncovered portion of the genitals or buttocks. The latter solution, significantly, was adopted by the Senate Subcommittee in its consideration of S. 57.

In addition to the above problems presented by H.R. 2432, the bill includes an amendment of the Racketeer Influenced and Corrupt Organizations (RICO) statutes, 18 U.S.C. Chapter 96. Specifically, the bill would make violation of the federal child pornography statutes a predicate offense for purposes of RICO.

We oppose H.R. 2432's amendment of the RICO statutes. The penalties for a violation of the federal child pornography laws are sufficiently severe (10 years for a first offense and 15 years for a second offense, in addition to the increased fines under the bill) that RICO coverage with its 20-year maximum sentence is not necessary. Moreover, in light of the complications which arise in RICO prosecutions, we believe its coverage should not be expanded except where a clear need exists. Again, we note that the Senate Subcommittee eliminated the RICO provision from the version of the bill it reported.

Finally, we mention two other aspects of H.R. 2432 which differ from the Administration's bill but on which we take no strong position. First, the bill would amend the definition of "minor" for purposes of the federal child pornography statutes by including within this term any person under the age of 18 years, rather than 16 years as under current law. Although the 16-year age limit was in essence approved in Ferber, we do not believe that the Court precluded the possibility of an 18-year age limit for minors protected by a child pornography statute. Moreover,

the retention of the 16-year age limit in the Administration's bill does not reflect a conscious rejection of a possible 18-year age limit.

The amendment to raise the age of a "minor" has some advantages from the standpoint of enforcement. Some obscene material depicts children who are clearly under the age of sixteen; however, the age of the child is not so readily apparent in other obscene material. In the latter cases it may be necessary to identify the child and offer proof of age in order to establish this element of the offense. In light of the clandestine fashion in which such obscene films and magazines are produced, this is often extremely difficult. Unless we have such proof of age, we may be forced, as a practical matter, to limit prosecutions to cases where the subjects depicted in the material are clearly younger than sixteen. If the law were amended to protect minors under the age of 18, rather than 16, it would be easier to prosecute cases in which 14 or 15-year olds have been sexually exploited, but regarding whom actual proof of age is not available.

However, there is the countervailing consideration that, as amended by H.R. 2432, the federal child pornography statutes would also extend their reach under the new constitutional standard to 16 and 17-year olds, whom for some purposes society regards as adults. On balance, therefore, we believe the

appropriate definition of the term "minor" for purposes of the federal child pornography provisions is a moral judgment best left to a determination by Congress.

Finally, H.R. 2432 would increase the fines applicable to violations of the federal child pornography statutes from $10,000 to $75,000 for the first offense and from $15,000 to $150,000 for any subsequent offense. While we support increasing fines as a greater deterrent to the commission of crimes involving the sexual exploitation of children, we believe that the fines applicable to many other criminal offenses should also be increased. Current fine levels generally reflect monetary values of prior decades and are too low to be a realistic measure of the gravity of the offense committed. Title II of the Administration's crime bill takes a comprehensive approach to increasing maximum fine levels applicable to criminal offenses and to specifying the criteria to be considered in the imposition of fines. Moreover, the Administration's bill would increase maximum fines to a higher level than would H.R. 2432.

Again, thank you for the opportunity to present the views of the Department of Justice on federal efforts to combat the sexual exploitation of children and bills currently under consideration in this regard. I would be pleased at this point to try to answer any questions that you or other members of the Subcommittee may have.

THE WHITE HOUSE

WASHINGTON

May 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Testimony of Assistant Attorney General Dinkins on S. 267

The above-referenced testimony, to be delivered tomorrow before the Senate Committee on Environment and Public Works, concerns S. 267, a bill to extend federal eminent domain to coal slurry pipelines. The testimony reiterates Administration opposition to such authority, expressed in the last Congress, while noting that the issue is being reviewed. The bulk of the testimony considers whether S. 267 adequately preserves the primary of state water law, concluding that it does. Much of the testimony is devoted to an analysis of the recent decisions by the Supreme Court in Sporhase v. Nebraska and by a federal district court in City of El Paso v. Reynolds. Both cases struck down state water restrictions on the basis of the Commerce Clause. Dinkins concludes that Sporhase and El Paso require express statements of Congressional intent to preserve state water laws that would otherwise constitute an impermissible burden on interstate commerce, and that S. 267 contains such an express statement.

I see no legal objection.

ID # _____ CU

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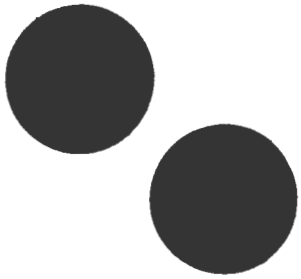

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Subject: Statement re: S. 267: Coal Distribution and Utilization Act of 1983

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DRAFT

MAY 12 1983

Roberts

STATEMENT

OF

CAROL E. DINKINS

ASSISTANT ATTORNEY GENERAL

LAND AND NATURAL RESOURCES DIVISION

BEFORE

THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

REGARDING

S. 267: COAL DISTRIBUTION AND UTILIZATION ACT OF 1983

MAY 17, 1983

Thank you for the invitation to discuss state water issues related to S. 267: the Coal Distribution and Utilization Act of 1983. At the outset of my testimony, I need to stress that the Administration's opposition to the extension of federal eminent domain authority to coal slurry pipelines, provided for in S. 267, remains presently unchanged from the last Congress, although it is now under review. Therefore, my testimony will focus exclusively on the Committee's concern that S. 267 adequately safeguards the primacy of state water law. At the Chairman's request, my statement addresses first the Department's view of the trend in recent court decisions involving state water law, in particular, the Supreme Court's decision last Term in Sporhase, et al. v. Nebraska ex. rel Douglas and the more recent district court decision in City of El Paso v. Reynolds. Next, my remarks address the approach taken by S. 267, the bill presently under consideration by this Committee, and consider whether it achieves its stated goal of safeguarding the historic primacy of state law in the field of water allocation. This includes a discussion of the possible impact of Section 5 of S. 267 on other water uses.

I. Recent Case-Law

As the Committee is aware, in Sporhase the Supreme Court, in a 7 to 2 decision, declared ground water to be an article of commerce and therefore susceptible to regulation by Congress. In reaching this result, the Court rejected the theory that states "own" the water. The Court further declared that the provision of a Nebraska statute which absolutely prohibits the export of water to any state that does not provide reciprocal rights violates the Commerce Clause of the United States

Constitution. In El Paso, a federal district court in New Mexico early this year struck down New Mexico's embargo on interstate transfer of ground water located within its borders, similarly holding this New Mexico law to be in violation of the Commerce Clause.

The Sporhase Opinion

The Sporhase case arose when the Nebraska Attorney General brought an action in state court to enjoin the owners of contiguous tracts of land in Nebraska and Colorado from transporting ground water across the border without a permit. Although the owners of the land had not applied for a permit, the Nebraska statute would have banned the export of water for use in Colorado because Colorado law prohibits the export of water outside its borders. The Court viewed this portion of the Nebraska law as an undue burden on interstate commerce.

As outlined by Justice Stevens, the Court's holding was based on its resolution of three separate issues:

> (1) whether ground water is an article of commerce and therefore subject to congressional regulation; (2) whether the Nebraska restriction on the interstate transportation of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

The Court first held that water is, in fact, an article of commerce. The Court specifically rejected Nebraska's argument that water is owned by the State in its sovereign capacity and, accordingly, is not an article of commerce. The Court discarded

this argument as being based on the "legal fiction" of state ownership of natural resources which the Court had recently repudiated in the context of other analogous natural resources cases. Congressional power, according to the Court, cannot depend on whether a given state's property law asserts state ownership of water.

Rather, the Court concluded, ground water should be considered an article of commerce because of its substantial interstate dimension. In this regard, the Court pointed out the worldwide agricultural market for products supplied by irrigated farms. In addition, the Court stressed the multi-state character of many aquifers and the fact that ground water overdraft is a national problem.

Addressing the second question -- whether the Nebraska restriction amounts to an undue burden on commerce -- the Court also answered in the affirmative. The Court applied the traditional Commerce Clause test of a regulation described in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> 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.

In this case, the expressed purpose of the challenged Nebraska restriction was the conservation and preservation of diminishing ground water supplies. The Court did agree with Nebraska that this is a legitimate and highly important governmental objective.

The Court then held that several restrictive aspects of the challenged Nebraska law, apart from the reciprocity requirement, furthered this legitimate purpose and therefore are not facially violative of the Commerce Clause. The Court did not find the restrictions to be fatally defective simply because they applied only to interstate transfers. Such heightened restrictions, the Court reasoned, may usually implicate Commerce Clause concerns, but they are justified in this case for four reasons: (1) state regulation of the use of water is at the core of its police power; (2) states, including Nebraska, have had a legal expectation, fostered by congressional acts and judicial decrees, that they may restrict water within their borders; (3) state ownership claims may be "fictitious" but they are sufficient to support a limited preference for a state's own citizens; and (4) states have acquired additional rights for water within their borders due to their continuing conservation efforts.

Nebraska's reciprocity requirement did not, however, pass the Court's Commerce Clause scrutiny. First, the Court held that the restriction was "facially discriminatory" because the requirement acted as a complete ban on exporting water to Colorado. Under the Court's precedent, such a facially discriminatory restriction must have a "close fit" with its purported

purpose in order to remain within the strictures of the Commerce Clause. In the Court's view, however, Nebraska's reciprocity requirement was not shown to be adequately related to the purpose of conservation and preservation of ground water. The Court strongly suggested that if Nebraska had presented evidence that it was a particularly arid state requiring a rough equivalence between import and export of water, and that intrastate distribution was feasible regardless of the distances involved, the reciprocity requirement might have survived the test. In the absence of such evidence, however, it could not pass constitutional muster.

Finally, the Court considered Nebraska's contention that its reciprocity requirement did not violate the Commerce Clause because the requirement had been authorized by Congress. It is well settled that Congress has the power to authorize a state regulation which would otherwise run afoul of the so-called negative implications of the Commerce Clause. See, for example, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). In making this aspect of its argument, Nebraska relied on several interstate compacts and on 37 federal statutes in which Congress has deferred to the application of state water law. The Court found this showing inadequate, however, because although it demonstrated Congress' desire to defer to state water law in myriad circumstances, it did not evince a sweeping intent to remove all federal constitutional constraints on all state water laws. The Court clearly stated that a more clear and express statement of congressional intent would be necessary for it to conclude otherwise.

Although the Supreme Court's holding on the Commerce Clause question appears, at first glance, to be extraordinary and unprecedented, a dispassionate reading of recent case law suggests that the holding is consistent with the Court's approach to Commerce Clause questions generally. The Court has held that activities within states, including purportedly "wholly local intrastate activities," may have a substantial effect on interstate commerce and are therefore within Congress' Commerce Clause authority. The Court has also held that a state claim of sovereign ownership of natural resources, such as minnows in state waters, did not immunize state regulation of the resource from Commerce Clause scrutiny. Hughes v. Oklahoma, 441 U.S. 322 (1979). Thus, the fact that the Court rejected the theory of state ownership and instead held that ground water as an article of interstate commerce is not an aberration, but instead, a logical extension of existing precedent. It follows, therefore, that the probability of the Court reversing its position on this fundamental issue is very remote.

The Court's treatment of the second issue in the case -- whether the Nebraska restriction amounted to an "undue burden" -- is the more enlightening and significant portion of the opinion. For despite the Court's formal rejection of the ownership theory, the Court did note that states historically do have special sovereign interests in water, and left the states wide latitude to fashion statutes which regulate the use of water and which promote its conservation, even when such regulation may restrict the export of such water. The thrust of the Court's holding, however, is that such restrictions cannot be arbitrarily imposed; instead,

such restrictions must be clearly based upon an articulated and permissible state objective, such as to promote conservation.

It is in this vein that the Court struck down Nebraska's reciprocity requirement. It did so because it found no evidence to prove that the requirement was related to a conservation objective. The Court freely offered that Nebraska might have "credibly" supported its reciprocity requirement. And the Court even suggested that a "demonstrably arid state" could "conceivably" support a total ban on exportation of water by showing a "close means-end relationship" between the ban and the objectives of water conservation and preservation.

In short, although the Court formally rejected the legal doctrine of state ownership of water, it recognized that states have sufficient interest in water use to support regulation of waters within their borders. In particular, the Court in Sporhase contemplated that each state may, in appropriate circumstances, provide preference to its own citizens and needs. For the purpose of upholding export restrictions, the Court requires that the states support their regulations in terms of legitimate governmental objectives such as conservation and preservation of ground water. The Court has made it clear that such a showing is indeed possible. The Court, in our view, has left the states considerable constitutional latitude within which they may fashion legislation that regulates the export of water from their borders. Indeed, it is quite possible that given the impetus of the Sporhase decision, many if not most of the states will be able

to justify their existing restrictions in terms of the legitimate governmental objectives described by the Court.

The last aspect of the Court's decision -- its ruling that Congress has not expressed an intention to authorize state water regulation that would otherwise violate the Commerce Clause -- appears legally sound. Even the dissent does not take issue with this portion of the majority opinion. It is apparent that the Court simply reaffirmed Congress' power to regulate interstate commerce and even to modify the result of the Sporhase decision.

The El Paso Opinion

The City of El Paso in western Texas, bordering on the State of New Mexico, filed several years ago with the New Mexico State Engineer 320 applications for permits to appropriate 296,000 acre-feet annually of water from portions of aquifers located within New Mexico. The State Engineer denied all the applications because the New Mexico Constitution (Art. XVI, §§2,3) prohibits utilization of New Mexico ground water outside of the state's borders. Other attempts by El Paso to use New Mexico ground water in Texas, either pursuant to New Mexico ground water rights associated with property El Paso owns in New Mexico or contractual arrangements it has made for the purchase of New Mexico ground water, have been similarly frustrated by a New Mexico statutory prohibition on export. See § 72-12-19 N.M. Stat. Ann. (1978). The City of El Paso brought suit in federal district court seeking a judicial declaration of the invalidity of both the New Mexico constitutional and statutory embargo laws.

A year after trial, the district court ruled on January 17, 1983, that both New Mexico laws violated the Commerce Clause of the Federal Constitution and that nothing in either the Rio Grande Interstate Compact or the congressionally-enacted Act of 1905 authorizing the Rio Grande Project dictated a different result.

Before addressing the Commerce Clause issue, the district court first disposed of New Mexico's threshold jurisdictional defense that it was actually the Rio Grande Interstate Compact, not the challenged New Mexico state laws, that prohibited the export of water to El Paso. The court held that this argument failed because the Rio Grande Interstate Compact did not apportion the surface water of the Rio Grande between New Mexico and Texas and, in any event, certainly did not purport to determine the allocation of ground waters between the two states, the subject matter of this litigation. The court similarly held that the federal legislation authorizing the Rio Grande Project did not empower the Secretary of the Interior to effect an equitable apportionment binding on Texas and New Mexico. Finally, the court held that even assuming that under either the Compact or the Project, allocations of surface waters to each state had been set, neither would justify the challenged embargo because New Mexico had not established that such a harsh restriction was necessary to the retention of these allocations and that other offsetting measures were not available.

Reaching the Commerce Clause question, the district court next found the New Mexico ground water embargoes infirm.

At the outset, the court held that the Supreme Court's decision in Sporhase disposed of New Mexico's threshold arguments that the state laws were not subject to Commerce Clause scrutiny either because:

(1) water was not an article of commerce;

(2) Congress had authorized the western states to impose otherwise impermissible burdens on commerce in ground water; or

(3) exercise of state authority over internal waters is a "traditional government function" beyond the reach of the Commerce Clause.

Next, the trial court considered the validity of the New Mexico restrictions, noting that because they were facially discriminatory, the laws would need to pass the "strictest scrutiny": "the embargo [must] serve[] a legitimate local purpose, * * * it [must be] narrowly tailored to that purpose [,] and * * * there [must be] no adequate non-discriminatory alternatives." Slip op. 26, citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

After reviewing New Mexico's entire ground water regulatory program, the district court agreed that it reflected a genuine effort to promote "optimum utilization" of scarce water resources capable of justifying some non-discriminating burden on interstate commerce, but not a total ban on interstate transport of ground water. According to the district court, the Supreme Court in Sporhase held that facial discrimination in favor of its own citizens can be justified "only to the extent that water is essential for human survival." Slip op. 28. In other contexts, the court reasoned, water is like any other natural resource and burdens on its use in commerce should be subject to the same

level of Commerce Clause scrutiny appropriate for any other natural resource. According to the court, moreover, New Mexico did not justify its embargo in terms of promoting the health and safety of its citizens. Nor did the State maintain that it is experiencing a shortage of water for health and safety needs.

The district court next rejected New Mexico's argument that the embargo was justified because it responded to the prospect of a shortage in the year 2020. Such a potential shortage, the court noted, is based on the uses of water the State deems are necessary to satisfy "public welfare" needs. The court described these uses as including economic activities and on that basis concluded that any embargo necessary for their promotion constituted the type of economic protectionism strongly disfavored in Commerce Clause analysis.

The district court discounted New Mexico's contention that, without embargo laws, the State could not control El Paso's use of its waters in Texas because its other laws are without extraterritorial effect. Citing Sporhase, the court stated that New Mexico would have ample authority to condition El Paso's water permits to ensure adequate authority to enforce New Mexico water regulations.

In the alternative, the district court held that even were the purpose of the embargo to promote the health of New Mexico's citizens and not its economy, these particular embargoes were not sufficiently tailored to that purpose to be constitutional. More particularly, even assuming that there was an actual water shortage in New Mexico which the embargo was intended to

alleviate, it failed to do so because New Mexico law places no restrictions on in-state use. Consequently, any water reserved by the embargo for the State would be subject not to preservation under state water law, but to immediate appropriation.

The district court noted that in Sporhase the Supreme Court had in comparable circumstances held that Nebraska's reciprocity requirement lacked the necessary "close fit" because it prevented export even though water was locally abundant and could be put to better use in another state. Here too, the federal district court concluded, the most productive use of the water would be in El Paso, and there is no shortage in southern New Mexico.

Finally, the district court ruled that New Mexico had not successfully shown that its embargo was justified because it was an arid state in which intrastate transfer was feasible regardless of distance from areas of plenty to those where water was scarce. According to the court, not only were there presently no plans for intrastate transportation of southern New Mexico ground water to more arid areas of the State, but New Mexico has not shown that such an endeavor would be economically feasible.

As I noted earlier, El Paso is a district court decision and I am not aware that the Tenth Circuit has yet considered an appeal of the ruling. As the first significant decision in the wake of Sporhase, however, it bears careful study. The significance of the federal district court's El Paso decision depends, for the most part, on its development of the Supreme Court's rationale in Sporhase and whether it represents an extension of

that ruling. Analysis of the decision on this basis suggests that although some of the alarm over the opinion may not be fully justified, it is a significant ruling.

To be sure, the initial portion of the district court's opinion (slip op. 25-27) represents a straightforward application of Sporhase which should be relatively non-controversial. The Supreme Court in Sporhase clearly did hold that none of the three threshold contentions offered by New Mexico immunized a state embargo law from Commerce Clause scrutiny. Similarly, the Commerce Clause test, articulated by the district court for state regulation generally (slip op. 26, quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)), and for facially discriminatory embargo laws such as New Mexico's, followed Sporhase closely. See slip op. 26-27.

The portion of the district court's opinion concerning the distinction between promoting "health or safety" and "economic" considerations, however, was not, in our view, compelled by Sporhase. The only time the Supreme Court expressly made this distinction in its opinion (slip op. 14), was when it suggested four possible rationales for justifying state water conservation measures which favored a state's own citizens. As I mentioned earlier, health/safety (police power) regulation was but one of these four possible justifications. The other three included: (1) "the legal expectation that * * * each State may restrict water within its borders has been fostered over the years * * * by * * * equitable apportionment decrees [and] interstate compacts"; (2) "a State's claim to public ownership of * * * ground water

cannot justify a total denial of federal regulatory power [,but] it may support a limited preference for its own citizens * * *"; and (3) "given [a State's] conservation efforts, * * * 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."

Consequently, the district court was applying in our view an unduly narrow reading of Sporhase when it characterized the Supreme Court as having held "that a state may discriminate in favor of its citizens only to the extent that water is essential for human survival." Slip op. 28. The Supreme Court's Sporhase opinion can be read in a broader fashion, to the extent of permitting facial discrimination so long as it is narrowly tailored to promote conservation, even if the rationale is economic. Thus, Sporhase did not compel the district court's conclusion (slip op. 29-30) that a projected shortage in the year 2020 could not justify the conservation of water for public welfare needs of New Mexico when such needs included economic activities such as industry, agriculture, energy production, fish and wildlife, and recreation. Sporhase nowhere deemed such interests as totally illegitimate if a State faced serious shortages. To be sure, health and safety needs must be paramount in any judicial weighing of competing interests, but nothing in Sporhase necessarily compels the El Paso court's conclusion that they are exclusive.

Nevertheless, in its alternative ruling that in any event, the challenged embargo laws were not "narrowly tailored" to conservation and preservation goals (as required for such facially discriminatory laws), the district court did follow more

closely the Supreme Court's Sporhase ruling. First, the district court was correct to point out that New Mexico law does not ensure that embargoed water is conserved for the future. Slip op. 33. I am not familiar with the evidence in the record and therefore cannot comment on this finding. Second, although the court may have reached its conclusion a bit hastily, it found that El Paso probably represented the most economically productive use of the excess water in the area. Such a finding is likely relevant to the Commerce Clause inquiry set forth by the Sporhase Court.

Finally, the district court did not part significantly from Sporhase in dismissing New Mexico's contention that it fit within the Supreme Court's caveat that an arid state might justify a total ban if "the intrastate transfer of water from areas of abundance to areas of shortage is feasible regardless of distance." The district court's reasoning that "feasible" must include economic considerations was entirely sensible. So too was the court's judgment that it was not enough for New Mexico to argue that it "could" physically be done, when the State could not demonstrate that there were any plans, present or future, to do so. On the other hand, the district court may have been more restrictive than Sporhase in ruling that a ban must be justified narrowly in terms of both time and place of shortage. If the water shortage, though distant in time, is actual and foreseeable and the State's plan for intrastate transportation sufficiently concrete, the existence of a time lag should not by itself render it infirm under the Commerce Clause. Or at least Sporhase does not appear to dictate that result.

In sum, a ruling that New Mexico's embargo laws violate the Commerce Clause of the Federal Constitution does not require a significant extension of the Sporhase Court's holding. Moreover, such a ruling based upon Sporhase does not leave New Mexico without any power to regulate waters in ways which prefer in-state users. As the district court noted, even a total ban may be permissible if the state fashions the law so that there is a "close fit" between its legitimate preference for in-state uses and the operation of the law. The State of New Mexico is in the process of trying to implement such legislation now. Still, the precise reasoning used by the El Paso court in striking down the New Mexico laws did go beyond Sporhase, even if it did so unnecessarily. In particular, Sporhase did not compel the district court's narrow conclusion that discriminatory restrictions could only survive Commerce Clause scrutiny if justified in terms of health or safety needs; or that a foreseeable future water shortage (as opposed to an immediate shortfall) could not serve a legitimate basis for restrictive state action. These portions of the opinion may or may not be reviewed by the Tenth Circuit, but are currently of legitimate concern to western states.

II. Coal Slurry Pipeline Legislation

At the Chairman's request, we have reviewed the provisions of S. 267, the Coal Distribution and Utilization Act of 1983, in particular section 5, to consider whether, in light of the Sporhase and El Paso decisions and other precedent, the bill adequately safeguards the historic primacy of state water law in

the field of water allocations while facilitating the development of interstate coal pipeline distribution systems (commonly known as "coal slurry pipelines") by conferring federal eminent domain authority on persons constructing coal slurry pipelines. In S. 267 federal eminent domain authority would be available only if the Secretary of the Interior determines that construction of the pipeline would be in the national interest, good faith negotiations with landowners fail to provide the slurry line with a needed right-of-way, and nondiscriminatory state eminent domain law practices and procedures are followed in any condemnation proceedings.

At the outset of my comments on S. 267, however, I must stress that, as the Committee is well aware, the Administration has previously reported its views on legislative proposals to confer federal eminent authority on coal slurries. In brief, the Adminstration supports competition in the field of energy transportation and believes coal slurry pipelines should be allowed to compete. The Administration's position to oppose the extension of federal eminent domain authority for coal slurry pipelines remains unchanged, yet is presently under review.

Thus, although I can respond to this Committee's inquiry concerning the effects of the legislation on state water law, these comments should not be construed as departing from the Administration's position on the merits of this legislation.

In addition, I must reemphasize that of course, one can never predict with certainty whether the courts will ultimately determine that the expressed intent is sufficiently clear to

immunize state water laws affecting coal slurries from Commerce Clause scrutiny or from federal preemption.

In our evaluation of the adequacy of S. 267 to safeguarde the primacy of state water law, we viewed the inquiry from two perspectives: first, whether the bill effectively removes the obstacle to state water regulation presented by the negative implications of the Commerce Clause, and second, whether the law will be read as implicitly preempting state water law in any respect. For purposes of this analysis, we do not read the state primacy issue as encompassing other possible constitutional issues which might be raised in the context of state water regulation -- for example, due process, taking, equal protection challenges. Those issues are beyond the possible scope of legislation of this sort in any event.

With respect to the Commerce Clause question, Sporhase and El Paso both clearly stand for the now established proposition that in the absence of express congressional intent to allow state water laws that would otherwise amount to impermissible burdens on interstate commerce, those laws are infirm. There now exists a legitimate concern that unless such express congressional authorization is included in federal legislation, their laws restricting the export of water for their state for use in coal slurries may not survive Commerce Clause scrutiny.

Viewed from this perspective and applying the strict standard stated in Sporhase that congressional desire to immunize state water laws from Commerce Clause scrutiny must be "expressly stated," we believe that S. 267, if enacted, would accomplish

its goal of securing the primacy of state water law with respect to the allocation of waters for coal slurry pipelines. As the Committee is undoubtedly aware, last September I testified on S. 1844, the predecessor of this bill during the last Session. At that time, we stated our view that, if enacted, the courts would recognize congressional intent in the bill to remove state water laws affecting coal slurry development from the strictures of the Commerce Clause. We also commended the drafters of the bill for following a narrowly drawn approach in response to Sporhase, believing that a broad-based approach is fraught with ambiguity and could have adverse unintended consequences. We warned, however, that the language of the bill itself was not without some ambiguity and that it was only by way of the ample legislative history provided in the accompanying report that congressional intent was made truly clear. In addition, we cautioned that enactment of any federal legislation in the field of water allocation, even including legislation designed to safeguard state law, might undercut the traditional deference given to state water law by suggesting congressional disfavor for areas of state water law not addressed by the bill. I am pleased to observe that these prior concerns are addressed by this Session's version of the bill, S. 267, as reported by the Senate Committee on Energy and Natural Resources.

The language of S. 267 leaves no doubt that Congress intends to insulate state water regulations affecting coal slurry development from Commerce Clause challenges. Section 2 of the bill makes numerous reference to congressional endorsement

of such state water laws notwithstanding any burdens on interstate commerce. The definition of state water law in section 3(7)(B) reiterates this intent. Section 5 of the bill also utilizes similar express language, leaving no doubt as to Congress' intent. Finally, the report on S. 267 of the Committee on Energy and Natural Resources ably underscores this clear intent. We note only that page 22 of that report refers to the clear intent of Congress expressed in sections 4(e)(2), 4(e)(3), and 4(e)(5), to safeguard the primacy of state water law, yet we do not readily perceive the relevance of those provisions to the Commerce Clause issue. The other portions of the bill referred to on page 22 are clearly relevant to the issue. Accordingly, you may want to eliminate the references to sections 4(e)(2), 4(c)(3), and 4(e)(5) in this portion of the report.

In addition, we do not believe that section 5 of the bill will affect water uses apart from coal slurry pipelines. Most importantly, the bill is narrowly drawn. The language of the bill (sections 3(7)(B), 5(b)) and the accompanying Senate Report (pp. 15, 17, 20) make clear that it is only the validity of state water laws <u>as applied to coal slurry pipelines</u> that are affected by the proposed law. As written, the bill is clearly not intended to affect the validity of state water laws under the Commerce Clause in other areas and for other uses and affects otherwise invalid laws only insofar as they are applicable to coal slurries. In this regard, we also commend the drafters of the Senate Report for making it clear that enactment of the bill should neither be viewed as suggesting, by negative implication,

congressional disfavor for other areas of state water law affecting interstate commerce (pp. 24-25) nor should it be read as evidence of expanding federal jurisdiction in the area of water allocation (p. 25). Both these matters had been concerns we expressed last Session with respect to S. 1844; we perceive no similar problem here with S. 267.

We also believe that S. 267 safeguards state water law by ensuring that, if enacted, the bill would not provide a basis for unintended implicit preemption of state water law. The Supreme Court decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), has been cited by those concerned that the courts might read federal coal slurry legislation as broadly preempting state control over water for pipelines. The language of S. 267, buttressed by the accompanying Senate Report should avoid the First Iowa result. Section 5(c) states in no uncertain terms that nothing in the Act should be construed as preempting any provision of state water law. Similarly, in an apparent abundance of caution, section 6(a) provides that nothing in the Act should be read as preempting the application of state water law to coal slurry pipelines. The Energy and Natural Resources Committee report of the bill, moreover, clearly expresses (p. 20) the desire to eliminate the possibility of the type of implicit preemption found by the Supreme Court in the First Iowa case. Since the Supreme Court's recent decision in Pacific Gas & Electric v. California State Energy Commission, No. ___ (decided April 13, 1983), upholding in the face of a preemption challenge California's nuclear moratorium law may well

mark a revision of the First Iowa approach to preemption analysis, the preemption issue may be of less concern than originally contemplated.

There are, however, two more subtle preemption issues presented by the language of S. 267 deserving of comment. First, section 5(a) not only provides that it is state, not federal, law which must be followed in the allocation of water for coal slurry pipelines, but it dictates which state law governs that issue -- "the State granting or denying the export or use of water in [a coal slurry pipeline]." According to the Committee report, this language "is intended to mean the State water law of the State where the diversion takes place, not where the water resource originates, unless they are one and the same." By so providing, the bill is preempting any state laws other than those in the state of diversion which attempted to affect the decision whether an allocation should be made to a coal slurry line.

Second, the bill also makes clear that nothing in it should be read as upsetting the allocation scheme established by either interstate compacts or judicial decrees. As the accompanying report makes clear (pp. 23-24), the Committee on Energy and Natural Resources strongly endorses such methods of resolving interstate conflicts. Such an endorsement of interstate compacts, however, must include the recognition that occasions may arise where the requirements of the interstate compact conflict with an application of a particular state water law. In those circumstances, preemption of such a state law might be appropriate. Notably, such preemption would be by virtue of the interstate

compact and not a coal slurry bill such as S. 267, should it be enacted.

Finally, with respect to the preemption issue, I would like to comment on section 5(c)(1) of S. 267 because it explicitly provides that nothing in S. 267 should be construed as modifying or eliminating any federal law dealing with water quality or disposal. We do not believe that such an explicit statement is necessary in the bill, because it is clear from the general language and structure of the proposal that no such intent exists to modify or limit otherwise applicable federal water quality or disposal laws. Nevertheless, we commend the drafters for its explicit inclusion.

Thank you for the opportunity to comment on this significant legislation.