

# The Burger Court Opinion Writing Database

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

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

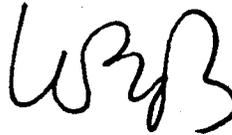
November 20, 1981

Re: No. 81-613 - Sporhase v. Nebraska

Dear Byron:

I am not prepared to join your dissent from denial of Cert. But your memo persuades me to renew the idea of a CFV/SG and I so vote.

Regards,



Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

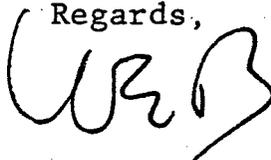
June 8, 1982

Re: No. 81-613 - Sporhase v. Nebraska, ex rel. Douglas

Dear John:

In general I agree with your memo of May 30 and will  
join an opinion along these lines.

Regards,

A handwritten signature in black ink, appearing to be 'JRB', written over the typed word 'Regards,'.

Justice Stevens

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

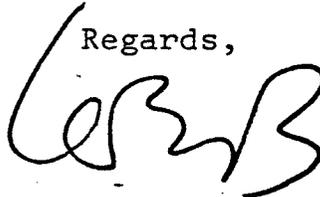
June 11, 1982

85  
Re: 81-613 - Joy Spohase and Delmer Moss, etc.,  
Appellants v. Nebraska, ex rel., Paul L. Douglas,  
Attorney General

Dear John:

I join your opinion of June 10.

Regards,



Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 20, 1981

RE: No. 81-613 Sporhase v. Nebraska

Dear Byron:

I shall vote to grant this petition.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 1, 1982

JUN 1 1982

RE: No. 81-613 Sporhase v. Nebraska, ex rel. Douglas

Dear John:

I think I could join an opinion along the lines of your memorandum. I am a little troubled by the suggestion that water is not in all circumstances an article of commerce. Perhaps this will all be worked out in the final writing.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 11, 1982

JUN 11 1982

RE: No. 81-613 Sporhase v. Nebraska, ex rel. Douglas

Dear John:

I agree.

Sincerely,



Justice Stevens

Copies to the Conference

1  
~~B/W~~  
~~Please~~  
~~you~~  
~~W~~

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: 11/18/81

Recirculated: \_\_\_\_\_

No. 81-613 -- Sporhase v. Nebraska

Justice White, dissenting.

Appellants own adjacent and contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well located on the Nebraska tract pumps ground water which is used to irrigate crops on both the Colorado tract and the Nebraska tract. The well is registered with the Department of Water Resources of the State of Nebraska, as required by Neb. Rev. Stat. §46-602 (Reissue 1978). However, appellants have not been issued a permit to transfer Nebraska ground water across state lines. A permit may be granted if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not

page 1 Stylistic

To: The Chief Justice  
Justice Brennan  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

1\$0613D-19-NOV-81—DICK—rev.

From: Justice White

Circulated: \_\_\_\_\_

20 NOV 1981

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

JOY SPORHASE AND DELMER MOSS, ETC. v.  
NEBRASKA, EL REL. PAUL L. DOUGLAS,  
ATTORNEY GENERAL

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

No. 81-613. Decided November —, 1981

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, /  
dissenting.

Appellants own adjacent and contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well located on the Nebraska tract pumps ground water which is used to irrigate crops on both the Colorado tract and the Nebraska tract. The well is registered with the Department of Water Resources of the State of Nebraska, as required by Neb. Rev. Stat. § 46-602 (Reissue 1978). However, appellants have not been issued a permit to transfer Nebraska ground water across state lines. A permit may be granted if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the transferee state "grants reciprocal rights" allowing ground water to be transferred from that state into Nebraska. Neb. Rev. Stat. § 46-613.01 (Reissue 1978). The parties conceded that Colorado forbids the transfer of ground water outside its borders and does not have a reciprocity provision. Colo. Rev. Stat. § 37-90-136 (1973).<sup>1</sup>

Nebraska brought this action in the District Court of Chase County to enjoin appellants from transferring Ne-

<sup>1</sup>The Colorado statute was amended during the course of this litigation. It now allows water to be used in an adjacent state for agricultural purposes where the owner of agricultural land in Colorado owns contiguous agricultural land in the adjacent state and the state legislature authorizes the use. Colo. Rev. Stat. 37-81-101 (Supp. 1980).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 16, 1982

Re: 81-613 - Sporhase and Moss  
v. Nebraska

Dear John,

Please join me.

Sincerely yours,



Justice Stevens

Copies to the Conference

cpm

95 1111 1111

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 18, 1981

Re: No. 81-613 - Sporhase v. Nebraska

Dear Byron:

Please join me in your dissent.

Sincerely,

*JM*  
TM.

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 9, 1982

Re: No. 81-613 - Sporhase and Moss v. Nebraska

Dear John:

If your memorandum ever in the near future becomes an opinion, I will more than likely join it.

Sincerely,

*T.M.*  
T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 11, 1982

Re: No. 81-613 - Sporhase and Moss v. Nebraska

Dear John:

Please join me.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 19, 1981

Re: No. 81-613 - Sporhase v. Nebraska

Dear Byron:

I am now in a join three posture for this case. I suspect there will be three to join.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 3, 1982

Re: No. 81-613 - Sporhase v. Nebraska

Dear John:

I go along with your memorandum.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 11, 1982

Re: No. 81-613 - Sporhase v. Nebraska

Dear John:

Please join me in the proposed opinion you circulated  
on June 10.

Sincerely,



Justice Stevens

cc: The Conference

.85 9/11/82

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

81-613 S-101 S8\*

June 2, 1982

81-613 Sporhase v. Nebraska

Dear John:

I agree with your memorandum.

Sincerely,

*Lewis*

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1982

81-613 Sporhase v. Nebraska

Dear John:

I indicated previously my agreement with your memorandum. I now join your opinion for the Court.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

85 JUN 17 1982

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 22, 1982

Re: 81-613 Sporhase v. Nebraska, Ex Rel. Douglas

Dear Sandra:

I will undertake the dissent in this case.

Sincerely,

*WJW*

Justice O'Connor

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: 6/24/82

Recirculated: \_\_\_\_\_

Re: No. 81-613, Sporhase v. Nebraska ex rel. Douglas

JUSTICE REHNQUIST, dissenting.

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of § 46-613.01 of the Nebraska Revised Statutes, which relates to groundwater. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of

pp. 1, 2, 6

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

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1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS  
*v.* NEBRASKA, EX REL., PAUL L. DOUGLAS,  
ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[June —, 1982]

JUSTICE REHNQUIST, *dissenting.*

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of § 46-613.01 of the Nebraska Revised Statutes, which relates to groundwater. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

*With whom Justice O'Connor joins,*

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but activities which affect interstate commerce, including wholly intrastate activities. See, *e. g.*, *Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942); *United States v. Darby*, 312 U. S. 100 (1941); *Houston & Texas Ry. v. United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate com-

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: MAY 30 '82

Recirculated: \_\_\_\_\_

JPS

*in the near future*

*If your memorandum ever becomes an*

*order I will more than amply justify it.*

1st DRAFT *my*

**SUPREME COURT OF THE UNITED STATES**

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS  
v. NEBRASKA, EX REL., PAUL L. DOUGLAS,  
ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[June —, 1982]

Memorandum of JUSTICE STEVENS.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:<sup>1</sup> (1) whether ground water is an article of commerce and therefore subject to Congressional regulation; (2) whether the Nebraska restriction on the interstate transfer 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.

Appellants, who are partners, own adjoining tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered

<sup>1</sup> Article I, § 8, cl. 3 of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." For general explanations of Commerce Clause analysis, see, e. g., *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U. S. 648, 652-653 (1981); *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766-770 (1945).

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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Recirculated:      10 '82

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 9, 11, 14-16

*Footnotes renumbered*

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS  
*v.* NEBRASKA, EX REL., PAUL L. DOUGLAS,  
ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[June —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:<sup>1</sup> (1) whether ground water is an article of commerce and therefore subject to Congressional regulation; (2) whether the Nebraska restriction on the interstate transfer 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.

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with

<sup>1</sup> Article I, § 8, cl. 3 of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." For general explanations of Commerce Clause analysis, see, *e. g.*, *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U. S. 648, 652-653 (1981); *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766-770 (1945).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 24, 1982

Re: 81-613 - Sporhase v. Nebraska

Dear Bill:

In response to your dissent, I am making the changes in the text on page 11 as indicated by the attached photostat.

Respectfully,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 4, 1982

No. 81-613 Sporhase and Moss v. Nebraska

Dear John,

It appears you have a Court for the views expressed in your memorandum. I will plan to wait for the dissent before finally deciding what to join.

Sincerely,



Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 24, 1982

No. 81-613 Sporhase v. Nebraska ex rel. Douglas

Dear Bill,

Please join me in your dissent.

Sincerely,

*Sandra*

Justice Rehnquist

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