

A state law prohibits the withdrawal of groundwater from any well within the state for use in another state. The express purpose of the law is to safeguard the supply of water for state citizens. Adoption of this state law followed enactment of a federal statute providing that "the transport of groundwater from one state to another may be restricted or prohibited in accordance with the laws of the state in which the water originates."

An association of water users in a neighboring state has filed suit to have the state law declared unconstitutional and enjoined on the ground that it violates the negative implications of the commerce clause.

Which of the following is the best argument supporting a motion to dismiss the lawsuit?

- A. Groundwater located within a state is not itself an article of interstate commerce, and therefore state regulation of the withdrawal of such groundwater does not implicate the commerce clause.
- B. The federal statute explicitly consents to a state's regulation of its groundwater in a way that would otherwise violate the negative implications of the commerce clause.
- C. The law promotes a compelling state interest that outweighs any burden on interstate commercial activity that might result from this state regulation of its groundwater.
- D. The Tenth Amendment reserves to the states plenary authority over the regulation of the natural resources located within their respective borders.

Explanation:

Under the negative implications of the commerce clause (ie, the **dormant commerce clause**), states are generally prohibited from unduly burdening interstate commerce. An **undue burden** can arise when a state **discriminates against interstate commerce** by favoring in-state over out-of-state economic interests. But such discrimination is permitted when **Congress explicitly consents** to the state's regulation.

Here, the state law discriminates against interstate commerce by prohibiting the withdrawal of in-state groundwater for out-of-state use. But since this law was adopted after the enactment of a federal statute that *explicitly* consents to such a regulation, the state law does not violate the negative implications of the commerce clause. Therefore, this is the best argument supporting the state's motion to dismiss the lawsuit.

(Choice A) An article of interstate commerce is anything that can be sold, exchanged, or transported between states—including natural resources like groundwater.

(Choice C) A *nondiscriminatory* state law is justified if the burdens on interstate commerce do not clearly exceed the law's local benefits. But a *discriminatory* state law (as seen here) cannot be justified on this basis.

(Choice D) The Tenth Amendment reserves to the states all powers that the Constitution does not expressly grant to the federal government—including the power to regulate in-state natural resources. But this power is not plenary (ie, absolute) since states must comply with other constitutional provisions (eg, the dormant commerce clause).

Educational objective:

A state law that would ordinarily violate the dormant commerce clause is valid if an exception exists—eg, when Congress explicitly consents to such a law.

References

- U.S. Const. art. I, § 8, cl. 3 (commerce clause).
- *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (asserting that states can discriminate against interstate commerce when Congress authorizes such action).

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Dormant commerce clause analysis

