

Director of Water Resources finds the benefits to the state from approving an application outweigh its adverse impacts after considering economic,

environmental, and other impacts, the impacts on Nebraska uses of water, and other factors.

TRANSFERS OF GROUNDWATER

The Nebraska Supreme Court has ruled that groundwater, like surface water, belongs to the public. The United States Supreme Court has also made it clear that public ownership of groundwater is not the same as state government ownership. The state acts as a trustee for the public and is responsible for management of the water.

Groundwater rights are not like mineral rights. Landowners do not own the groundwater, but they are authorized to make reasonable use of it on their overlying land. However, in times of shortage, users are required to share the available supply and all uses are subject to regulatory measures authorized by the state. For example, under present law the amount of groundwater that is withdrawn can be restricted by allocations and new groundwater uses can be prohibited in groundwater control areas.

Under current Nebraska law, groundwater can only be transferred off the overlying land if the Legislature has explicitly authorized it. This authority has been granted for only the four types of transfers described in the following paragraphs.

Since 1963, public water suppliers have been able to obtain permits from DWR to transport groundwater off the overlying land for municipal use. That authority was later extended to suppliers of water for rural domestic purposes. Permits are to be approved if, among other things, the

proposed use will not be detrimental to the public welfare. Thirty-two public water systems had obtained permits under this Act by July 1988.

Groundwater may also be transferred for large-scale industrial use, over 3,000 acre-feet per year, if approved by DWR. Industrial transfers must be found by the director to be in the public interest after considering many factors, including adverse impacts on existing water users and the economic benefits of the transfer. No applications have been filed for industrial transfers of groundwater since the authority was granted in 1981.

Water which has been intentionally stored underground can be used just like surface storage in a water exchange to compensate surface water users downstream for the out-of-priority withdrawal of water upstream. There is some question about whether water stored underground is subject to other rules governing groundwater use.

Nebraska law also authorizes transfers of groundwater out of the state. Before the Director of Water Resources may approve a groundwater export permit a variety of factors must be weighed, including the impact of the transfer on in-state uses of water. Eight groundwater export permits have been issued by DWR since 1982, all involving transfers for agricultural uses in Colorado.

WESTERN STATES LAWS ON TRANSFERS

All western states in the continental U.S. allow transfers of water or water rights in one or more of the ways discussed in this study. However, their policies governing transfers vary greatly.

INTRASTATE TRANSFERS OF SURFACE WATER

Only two of the other western states have special regulatory provisions that may apply to some intrastate, in-basin transfers of surface water. Kansas requires a special permit for any transfer of 1,000 acre-feet or more outside a ten mile radius of the point of diversion. The state

legislature can reject any permit approved by the state water administrator. In Nevada, if surface water will be transported out of the county of diversion, the state engineer must obtain recommendations from the affected county boards on whether to approve the transfer. Those recommendations are not binding on the state engineer, however.

Eight of the other western states have specific statutory provisions that apply to intrastate, interbasin transfers of surface water. In California and Oklahoma, inhabitants of the basin of origin have a right to water for their future needs which is superior to the right of any exporter of

water. In California and Colorado, water exporters can be required to construct facilities to supply water for the basin of origin before any water export can be approved. Idaho and Wyoming laws provide that the state engineer must consider the impact of an interbasin transfer on the area where the diversion will take place when deciding whether approval of the transfer is in the public interest. In Wyoming, project plans must include recommended measures to mitigate any adverse impacts from an interbasin transfer.

Kansas applies the same policy summarized in the discussion of intrastate, in-basin transfers to intrastate, interbasin transfers. In Montana, the state is responsible for undertaking any interbasin transfer. Water is then leased to users. In Texas, interbasin transfers are prohibited if they would "prejudice" any person or property in the basin of origin. State water development funds cannot be used for any project that would remove water necessary to supply the reasonably foreseeable water needs of the basin of origin for the next fifty years, except on a temporary basis.

INTERSTATE TRANSFERS OF SURFACE WATER

Eleven of the other western states have regulatory provisions that apply to interstate transfers of surface water. Some of these provisions precede the Sporhase opinion which is discussed in the following section, and are constitutionally suspect.

In Arizona, the state engineer is simply granted the discretion to deny an application for the export of surface water if it is determined such action is appropriate. California, Idaho, Nevada, and Washington generally allow interstate transfers if the other state grants reciprocal rights.

In Colorado, interstate transfers can only be approved if the proposed use is authorized by an interstate compact, credited as a delivery of water under an interstate compact or decree, or the use does not impair the ability of the state to meet its obligations under any decree or compact, among other conditions. Interstate transfers in Kansas are subject to the same regulatory provisions as intrastate transfers and, in addition, are subject to the condition that the appropriation can be revoked, modified, or suspended if that water should ever be needed to protect the public health and safety of the people of Kansas.

Montana and New Mexico require the state engineer to consider, among other things, whether there are present or projected water shortages within the state and whether the water proposed for export could feasibly be transported to alleviate those shortages, when deciding whether to

approve an interstate transfer permit. In Oklahoma and Oregon; legislative approval is required for all interstate transfers. Utah law simply requires that the state engineer evaluate and make public the advantages to the state before approving any interstate transfer of surface water.

SURFACE WATER EXCHANGES

Seven other western states have statutory provisions regarding surface water exchanges and substitutions. These states are California, Colorado, Idaho, New Mexico, Oregon, Utah, and Wyoming. Generally, water exchanges can be carried out as long as no other appropriator is injured.

California actively encourages voluntary exchanges of surface water to promote efficient use by maintaining a list of parties interested in entering into exchange agreements and providing an expedited procedure to enable water right holders to enter into temporary water exchanges. Under Colorado law, the Water Conservation Board is specifically authorized to enter into exchange agreements to obtain water to maintain flow for instream uses.

SALE OR LEASE OF SURFACE WATER RIGHTS

All of the other western states in the continental U.S. authorize the sale of existing surface water rights. Some also provide for leases of existing rights. Generally, sales or leases of water rights are allowed as long as no other appropriators are injured and the transfer is in the public interest. However, a number of the western states have noteworthy, special restrictions or programs.

Under Arizona law, legislative approval is required to convert a water right from agricultural, municipal, or domestic use to power production under certain circumstances. In addition, irrigation districts and certain other districts must consent to transfers of water rights from within their boundaries or from within a watershed from which they derive their water supply.

In California, voluntary sales or leases of water rights are encouraged by the state. This includes maintaining a state information center for technical and other assistance regarding water right transfers. In Colorado, Oregon, Utah, and Wyoming, state agencies are explicitly authorized to buy or lease water rights in order to maintain instream uses. However, in Utah, legislative approval is necessary before the Wildlife Division can buy or obtain a long-term lease of a water right.

Under Idaho law, transfers of water rights cannot be approved unless it is in the local public interest and would not significantly affect the agricultural base of the area. Under certain circumstances, transfers of rights to large amounts of water must be approved by the legislature. The Idaho legislature has also created the State Water Supply Bank to facilitate transfers of water rights by allowing the state and local water districts to serve as an intermediary between persons desiring to lease and those desiring to rent water rights.

In Montana, the Department of Natural Resources and Conservation is authorized to buy, sell, and lease water rights, and arrange transfers of water rights between others. The Department can lease up to 50,000 acre-feet of its water for a period of 50 years. The intent of the Legislature is that the state act as a proprietor of water. Legislative approval is required for certain large scale water right transfers.

Under South Dakota law, it appears water rights for irrigation can only be sold or leased for irrigation or domestic use and fire protection. Wyoming law requires consideration of the economic loss to the community and the state if the existing use is discontinued before a transfer can be approved. Generally, transfers of water rights are to be to a use which is higher in the statutory order of preferences than the existing use.

SALVAGED WATER

Three western states allow the sale or lease of surface water which is saved through the use of conservation practices. In California, the state encourages voluntary transfers of conserved water by providing technical assistance in the identification and implementation of water conservation practices which will make additional water available for sale or lease.

The official state policy in Oregon is to aggressively promote conservation by allowing the sale or lease of water saved through conservation. The state can claim 25 percent of any water conserved, which it can then allocate to instream uses such as fish, wildlife, recreation, pollution abatement, or navigation. Texas law also authorizes persons who have conserved water to sell or lease that water.

GROUNDWATER TRANSFERS

Intrastate transfers of groundwater are permitted in all the other western states. Most have adopted the prior appropriation doctrine for the allocation of groundwater. Groundwater

transfers are usually permitted as long as no prior appropriator is injured and the public interest is not affected adversely. If a groundwater right is transferred, no other appropriator, junior or senior, can be harmed, and it generally must be found to be in the public interest.

Several states do not follow the prior appropriation doctrine, and others have special provisions in their law which are worth noting. Arizona law contains a complex system for regulating transfers of groundwater. Transfers of groundwater within designated groundwater basins are generally not restricted while transfers of water across basin lines may have to pay damages to other landowners within the basin. More specific restrictions apply to transfers of groundwater within and from Active Management Areas.

In California, the legislature has prohibited the export of groundwater from certain basins unless the pumping is in compliance with groundwater management plans adopted by the county board and approved by local voters. In other parts of the state, groundwater which is surplus to the needs of the overlying landowners can be transferred out of the basin.

In Idaho, Kansas, Montana, and South Dakota, transfers of groundwater over a specified amount are subject to legislative approval or rejection, as well as being subject to approval by a state agency. Nevada law provides that if competing applications to appropriate groundwater are filed, the state engineer is to give preference to overlying landowners. In addition, if water will be transferred across county lines, the boards of the affected counties must be allowed to make recommendations on whether the transfers should be approved.

In North Dakota, groundwater cannot be transported to non-overlying land if overlying landowners would be injured. In Oklahoma, overlying landowners are entitled to a proportionate share of the maximum annual yield of the underlying groundwater basin which is equal to the percentage of land overlying the basin which they own or lease. Transfer of this water away from the overlying land is not prohibited, however.

In Texas, groundwater is owned by the overlying landowner and there are no statutory restrictions on transfers. Wyoming law authorizes the state engineer to consider whether the water will be transferred out of the area when deciding whether a proposed groundwater appropriation is in the public interest.

Eleven of the other western states have statutory provisions governing interstate transfers

of groundwater. In Colorado, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, and Washington, such transfers are subject to the same statutory provisions as interstate transfers of

surface water. In Idaho, groundwater exports over a certain amount, and all groundwater exports in Wyoming, are subject to legislative approval.

FEDERAL LAWS AFFECTING TRANSFERS OF WATER IN NEBRASKA

Federal laws and regulations have varying impacts on water transfers in Nebraska and the way the state can regulate or implement them. The U.S. Constitution, international treaties, federal laws authorizing water projects and regulating environmental conditions, and regulations made by federal agencies can all affect the transfer of water and water rights. One case showed very dramatically the effects of the constitution and federal law on state actions.

The U.S. Supreme Court has held that state laws regulating transfers of water out of the state are subject to the commerce clause of the U.S. Constitution. This clause prohibits states from imposing unreasonable burdens on interstate commerce. To conform to the commerce clause, state statutes must regulate interstate transfers in an evenhanded manner, and the regulations must be intended to effectuate a "legitimate local public purpose". Also, the effects of the regulations on interstate commerce must only be incidental. If those requirements are met, a statute will be upheld unless the burden imposed on interstate commerce is clearly excessive when compared with the local benefits of the regulation.

"Evenhandedness" does not require that intrastate and interstate transfers be treated exactly the same. A state may provide its own citizens a limited preference in the allocation of water in times of shortage. However, the preference must serve a "legitimate local public purpose." The U.S. Supreme Court has made it clear that protecting local economic interests is not a legitimate local public purpose, but protecting health and safety is. In addition, a preference for a state's own citizens can only be exercised when there are realistic expectations of actual shortages occurring.

Nebraska's laws regulating interstate transfers of water could conflict with the commerce clause on a number of grounds. When evaluating applications for the export of surface water the Director of Water Resources is required to consider the adverse economic impacts of a transfer and the economic benefits of rejecting the application and preserving the water for in-state use. Denial of an application on either of these grounds would be inconsistent with the

requirement that state regulation of interstate commerce serve a legitimate local purpose.

Nebraska law treats intrastate, in-basin transfers of surface water differently than interstate, in-basin transfers. Intrastate, interbasin transfers are also treated differently than interstate, interbasin transfers. This discrimination could only be upheld if it served a legitimate purpose, the statutes were narrowly tailored to that purpose, and adequate non-discriminatory alternatives were not available.

Although in some respects Nebraska law treats interstate transfers of groundwater more favorably than intrastate transfers, one portion of the groundwater export statute is of some concern. The Director of Water Resources is required to evaluate the impact of a withdrawal on future demands for water in the area of a proposed withdrawal. Denial of a groundwater permit based on indefinite future economic uses of water in the area of withdrawal or based on vague concerns over future shortages could be an unconstitutional application of state law.

Another action of the U.S. Supreme Court implementing a provision of the Constitution affects transfers in Nebraska. To settle a dispute between the states of Nebraska, Wyoming, and Colorado over the water in the North Platte River, the Supreme Court issued a decree in 1945. This decree apportions the water supply among the states and requires that the states regulate water use according to its terms. Future interstate transfers might be affected by that decree.

Interstate compacts that Nebraska has entered into according to another provision in the U.S. Constitution could also have some effect on transfers in Nebraska. Nebraska is a party to compacts on the Big Blue, Little Blue, Republican, South Platte, and Niobrara rivers. The provisions of each one are different, so they could affect proposed transfers in different ways.

Several different types of laws enacted by Congress could affect transfers. Regulatory acts, such as those controlling pollution and protecting wildlife resources, can and will have an effect on the types of structures that can be used and