

## WATER RIGHTS TRANSFER ISSUES IN WESTERN STATES

*Water Right Transfer – A legal transfer of a right to use water so that either the place of use, place of withdrawal, or purpose of use are changed.*

### Types of Water Right Transfers

	Transfer Source of Water	Transfer Location of Use	Change Type of Use	
Physical Water Transfer	Surface Water	Movement of the Point of Diversion	Acres Irrigated in Different Area	Permanent Temporary
	Ground water	Moving Withdrawal Rights from One Well to Another	Acres Irrigated in Different Area Municipal Industrial	Permanent Temporary
Transfer of Paper Rights Only*	Retiring a surface water right in one area and transferring it to another area. (May also want to do this to maintain a senior priority date)			
	Moving an allocation from one well to another			

\*These types of transfers are necessary only if there is a cap on new uses

### EXAMPLES OF MAJOR WATER TRANSFER ISSUES THAT RECEIVE VARYING TREATMENT BETWEEN STATES

1. Level of protection for other water rights
2. How to deal with impacts to third parties, environment, economy and public interest
3. Water banks
4. Salvage water
5. Transfer programs specifically for instream flow
6. Temporary transfers
7. Large scale interbasin and out of state export
8. The degree of transferability between uses
9. Storage of surface water underground (especially practiced in Arizona and California)

#### Level of Protection for Other Water Rights

All western states have language providing protection for other existing water rights. However, the exact degree of protection, the protecting language, and process/type of analysis required vary.

Two key examples, Colorado and Kansas only allow the transfers of consumptive use. *In Colorado there is a both a requirement that only consumptive use from a valid water right be transferred and a requirement that timing, quantity and location of return flows must be maintained.* If this requirement is met most impacts to other water users are addressed. There may still be some 3<sup>rd</sup> party economic impacts in some areas.

An example of another state's approach in this regard would be that of the *Washington Department of Ecology* which considers the following factors when trying to determine a potential detriment or injury to existing rights:

- The change will not increase the instantaneous or annual quantity of water used
- The water right is eligible to be changed, and has not been abandoned or relinquished for non-use
- The source of water will not change (e.g. new wells must tap the same aquifer)
- The change will not expand the water right
- The change will not increase the consumptive use of water, and
- The change is not contrary to the public interest

### **How to Deal With the Impact to Third Parties, Environment, Economic and Public Interest**

The way states deal with potential impacts to third parties are significantly more varied than how they deal with impacts to other water rights. Third parties may include general economic impacts to an area or impacts to water users who do not have a water right. Some examples of third party protections:

#### *California requires:*

- A finding that the transfer not result in "unreasonable" effects on fish or wildlife or other instream beneficial uses
- Third party impact analysis/protection (typically involving economic impacts in the area from which the water is proposed to be transferred)

#### *Idaho evaluates:*

- Whether the proposed use would be a beneficial use
- Whether the proposed use would be in the local public interest
- Whether the proposed use would be consistent with the conservation of water resources within the state
- Whether the proposed change would impact the agricultural base of the local area

### **Water Banks**

Water banks can create an accounting system that controls transaction costs, facilitates transfers of water and helps bring together buyers and sellers. Water banks can have special relevance in states where significant quantities of agricultural water area being converted to urban uses. Some states with banking provisions include California, Arizona, Idaho, New Mexico, North Dakota and Kansas. Banks may be regional in nature or a statewide entity/authority. Banks can fulfill multiple functions. For example:

*The Arizona Water Banking Authority was created to meet future needs for:*

- Assuring adequate municipal and industrial supply during shortages or disruptions of the Central Arizona Project system
- Meeting management plan objectives of the Arizona Groundwater Code
- Assisting in the settlement of Indian water right claims
- Exchanging water to assist Colorado River Communities

### **Salvage Water**

Water salvaged through conservation or wastewater greywater use can be made available for other uses or transfer in some western states. A question in each case would be to what degree that water would have contributed to return flow or groundwater recharge otherwise. In other words is the salvage water the result of a reduction in the consumptive use of the original use or is it an increased use of water that would otherwise either return to the stream or aquifer. Therefore, the nature of the savings will need to be carefully considered and likely tied to consumptive use. States in which some salvage rights were recognized as of 1994 were California, Idaho, New Mexico, Oregon, Washington, and Utah. Any changes in regard to salvage water need to consider abandonment and forfeiture provisions in the existing laws.

Example:

Oregon provides incentives to conserve and reallocate water to encourage highest and best use. The Water Resources Commission must approve conservation plans prior to transfer of saved water. Conserved water receives a priority on one minute after the original right. The original owner retains rights to three quarters of the conserved water. The remainder is transferred to instream flow.

### **Transfer Programs Specifically for Instream Flow**

As noted above in the case of Oregon salvage, some states have programs that specifically help provide water for instream flow.

Example:

The Washington Water Trust benefits water quality fisheries and recreation by acquiring existing water rights and dedicating them to instream flow. The program provides opportunity for water right holders to participate in salmon recovery.

### **Temporary Transfers**

All but a few western states allow temporary transfers, and the requirements for a temporary/short-term transfer may be less than those for a longer term transfer.

Example:

The California Water Code provides for expedited processing of short-term transfers of one year or less. This is in part because the one year limitation minimizes risk of impacts and also because it takes advantage of specific water supply or water needs that develop in a given year and can be transient in nature. Processing is given highest priority by the State Water Resources Control Board.

### Large Scale Interbasin and Out of State Export

Some states treat applications for large scale transfers differently than smaller transfers, generally with additional protections for the basin or area of origin. In some instances legislative approval may be required. The Sporhase decision curtailed the state's abilities to treat out-of-state transfers differently than in-state transfers.

Example:

Kansas has special provisions applying to transportation of 2,000 or more acre-feet per year for beneficial use outside a 35-mile radius from the point of diversion. In those instances the state must determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer.

"To make the determination, the following matters must be considered:

1. Any current beneficial use being made of the water proposed to be diverted, including minimum desirable streamflow requirements;
2. Any reasonable foreseeable future beneficial use of water;
3. The economic, environmental, public health and welfare and other impacts of approving or denying the transfer of water;
4. Alternative sources of water available to the applicant and present or future users for any beneficial use;
5. Whether the applicant has taken all appropriate measures to preserve the quality and remediate any contamination of water currently available for use by the applicant;
6. The proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion, which plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer.
7. The effectiveness of conservation plans and practices adopted and implemented by the applicant and any other entities to be supplied water by the applicant;
8. The conservation plans and practices adopted and implemented by any persons protesting or potentially affected by the proposed transfer, which plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas Water Office pursuant to K.S.A. 74-2608 and amendments thereto; and

9. Any applicable management program, standards, policies and rules and regulations of a groundwater management district.” (Kansas Water Office)

### **The Degree of Transferability Between Uses**

In many western states nearly fully appropriated waters and growing populations and economics have accentuated the need for transfer of water between agriculture and urban-industrial uses. Although such transfers are generally allowed, if other water rights aren't impaired, protections for the basin of origin are common. In Nebraska surface water rights cannot be transferred to uses in other preference categories. However, a higher preference category use may take water from a lower preference user with compensation. Nebraska groundwater can be transferred off the overlying land for in-state domestic, municipal, industrial, or agricultural purposes and for essentially any beneficial interstate purpose. However, transfers must not adversely affect any other water user and affected parties may file objections.

### **Storage of Surface Water Underground**

This is mentioned because of the common use of the practice in Arizona and California rather than to note special legal provisions.

**Attachment**  
**PARTIAL SUMMARY OF WATER TRANSFER LAW PROVISIONS**  
**IN SELECTED WESTERN STATES**

**Arizona**

- In 1996 the state created an Arizona Water Banking Authority which allows the state to more fully utilize its share of Colorado River water.
- A major activity of the Water Banking Authority is to store Central Arizona Project Water in underground storage facilities until needed.
- The Arizona Water Banking Authority was created to meet future needs for
  - Assuring adequate municipal and industrial supply during shortages or disruptions of the Central Arizona Project system
  - Meeting management plan objectives of the Arizona Groundwater Code
  - Assisting in the settlement of Indian water right claims
  - Exchanging water to assist Colorado River Communities
- In Active Management Areas, which contain 80% of Arizona's population and 70% of its groundwater overdraft, there are different types of groundwater rights with different transferability provisions. Irrigation grandfathered rights cannot be sold apart from the associated land, nor can Type 1 non-irrigation grandfathered rights (associated with land permanently retired from farming). However, Type 2 non-irrigation water rights (such as industry, livestock watering, and golf courses) can be sold separately from the land or well and with permission can be used on a different location in the same Active Management Area.
- In 1995 the Arizona Department of Water Resources adopted Assured Water Supply Rules. They require new developments to be based primarily on renewable supplies, such as effluent and water delivered via the Central Arizona Project.
- No new irrigated land will be put into production in active management areas unless agricultural irrigation occurred between 1975 and 1980 and the land received an irrigation grandfathered right.

**California**

- Surface water is subject to appropriation under the California Water Code. Rights to use groundwater have evolved under a long series of court decisions. Diversions of percolating groundwater are not subject to state regulation.

- Water is transferable subject to :
  - No injury rule provisions for other legal water users
  - A finding that the transfer not result in “unreasonable” effects on fish or wildlife or other instream beneficial uses
  - Some third party impact analysis/protection (typically involving economic impacts in the area from which the water is proposed to be transferred)
- Users of water saved through conservation efforts, use of recycled water, or conjunctively used groundwater can retain rights to surface water that the water right holder does not use.
- The U.S. Bureau of Reclamation, California Department of Water Resources, and State Water Resources Control Board are implementing the CalFed Water Transfer Program and intend to create a Water Transfer Information Clearinghouse. However, numerous other water transfers take place within water districts or between agencies or individuals who do not need assistance to complete those transactions.
- Water code defines transferable water for a short term transfer as the amount of water that would have been consumptively used in absence of the transfer.
- Groundwater transfers have significant surface water implications. They include: use of groundwater in lieu of surface water, transfer of “banked” groundwater and direct transfers of groundwater. The “banked” groundwater may be previous surface water now stored in the ground.
- Implemented Drought Water Bank in 1991, 1992, and 1994. Can reallocate water to buyers through critical needs allocation rules.
- Water Transfers generally fall into one of six basic categories with different practicalities for identifying and quantifying new water produced or real water available for transfer in each category
  1. Fallowing (not irrigating) crops
  2. Shifting to lower water-using crops
  3. Substitution of groundwater for surface irrigation supplies
  4. Direct delivery of groundwater
  5. Conserved water
  6. Releasing water from reservoir storage
- Unresolved issue noted on state website: “How do we deal with the possibility that water marketing may stimulate water use that would not otherwise take place? If people will be paid to stop using water, some sellers may start using as much water as possible to establish a higher base level of use”.

## Colorado

- Surface water transfers allowed subject to “no injury” rule
- In Colorado there is both a requirement that only consumptive use be transferred and a requirement that timing, quantity and location of return flows must be maintained. If this requirement is met most impacts to other water users are addressed. There may still be some 3<sup>rd</sup> party economic impacts in some areas.
- In most basins an underground water right cannot be obtained without a plan for augmentation that replaces depletions associated with that diversion
- Revegetation is required on land from which irrigation is removed.
- Although conservation is encouraged, efforts to market conserved or saved water are discouraged when alteration of return flow would be to the detriment of downstream water rights

## Idaho

- Department of Water Resources approval is required prior to changing point of diversion, place of use, period of use, or nature of use of an established water right
- The Department of Water Resources evaluates:
  - whether there would be an injury to other water rights
  - whether there would be an enlargement in use of the original right
  - whether the proposed use would be a beneficial use
  - whether the proposed use would be in the local public interest
  - whether the proposed use would be consistent with the conservation of water resources within the State of Idaho
  - whether the proposed change would impact the agricultural base of the local area
- A state water supply bank assists short term transfers from irrigation districts and individual irrigators. Leased rights are protected from abandonment or forfeiture and revert to former status at end of lease.
- Western States Water Council publication notes: “Idaho law limits the permanent transfer of conserved water to new uses. Transfers must be evaluated under the “no injury” rule and to ensure that they do not enlarge the original right. The latter criterion effectively precludes reallocation of conserved water because the rate of flow, total volume of the diversion and of water consumed, and the extent of beneficial use cannot be exceeded. Instead, conserved water returns to the stream for use by junior appropriators, unless it is leased through the state’s water supply bank.”



## Kansas

- Prior appropriation of surface water and groundwater
- “Changing a water right – When a water right holder wants to change such things as the place of use, the type of water use, or a point of diversion, he or she is required to file an application for change with the Division of Water Resources, and to pay the appropriate filing fee. Some parts of Kansas have no water available for new permits. In those areas, acquisition of an existing water right and obtaining approval to change one of the features may be the only way to meet such a change request.”(Kansas Dept. Agriculture – Division of Water Resources)
- Kansas has a requirement that only consumptive use may be transferred and that there be no impairment of existing rights. They do account for return flows and when there is a change in location, it must be from the same source of supply.
- “Senate Bill 237 enacted the Kansas Water Banking Act, which allows water banks to form. The Bank provides a method to redistribute water in areas that are fully appropriated. A groundwater bank’s charter must ensure the operation of the bank will result in 10% or more water savings. The Chief Engineer must approve the charter before a bank is authorized to operate.”(Kansas Water Office). The Kansas Water Banking Act has not yet been used.
- “A water bank may be chartered for up to seven years, and must be evaluated within five years as to whether it is meeting the goals and objectives of the Kansas Water Plan. The water bank is responsible for costs incurred by the Division of Water Resources and the Kansas Water Office for the evaluation. Water right holders may deposit all or a portion of their water rights from a hydrologic unit within the bank boundary. A water bank would be able to lease water from a water right within the bank boundary. A water bank would be able to lease water from a water right within the bank boundary and same hydrologic unit. A water bank shall also provide safe deposit accounts where a water right holder can place unused from a water right in the immediate past calendar year, for future withdrawals. The amount in a safe deposit account shall decrease by 10% or more each calendar year.”(Kansas Water Office)

### Large Scale Transfers

- For purposes of the Water Transfer Act a transfer is defined as a diversion and transportation of water in a quantity of 2000 acre feet or more per year for beneficial use outside a 35 mile radius from the point of diversion of such water.
- The purpose of the Water Transfer Act is to determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer.

- “To make the determination, the following matters must be considered:
  1. Any current beneficial use being made of the water proposed to be diverted, including minimum desirable streamflow requirements;
  2. Any reasonable foreseeable future beneficial use of water;
  3. The economic, environmental, public health and welfare and other impacts of approving or denying the transfer of water;
  4. Alternative sources of water available to the applicant and present or future users for any beneficial use;
  5. Whether the applicant has taken all appropriate measures to preserve the quality and remediate any contamination of water currently available for use by the applicant;
  6. The proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion, which plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer.
  7. The effectiveness of conservation plans and practices adopted and implemented by the applicant and any other entities to be supplied water by the applicant;
  8. The conservation plans and practices adopted and implemented by any persons protesting or potentially affected by the proposed transfer, which plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas Water Office pursuant to K.S.A. 74-2608 and amendments thereto; and
  9. Any applicable management program, standards, policies and rules and regulations of a groundwater management district.” (Kansas Water Office)

### Montana

- Prior appropriation of surface water and groundwater
- The applicant for a change in an appropriation water right has the burden to prove by a preponderance of the evidence that the criteria for issuance of an authorization are met. These include:
  1. The proposed use will not adversely affect the use of other water rights or other planned developments for which a permit or certificate has been issued or water reserved
  2. The proposed means of diversion, construction, and operation of the appropriation works are adequate
  3. The proposed use of water is a beneficial use
  4. The applicant owns or has permission from the person who owns the property where the water is to be used
- The owner of an existing consumptive use water right may change its purpose temporarily to instream flow. The owner must file an application. The owner may

voluntarily change the purpose to instream flow or may lease the water right and change the purpose to protect the fishery resource.

- A water user who saves water through conservation may retain right to the salvaged water for a beneficial use.

### New Mexico

- State water rights undergoing adjudication and adjudicated rights are likely to be marketable at lower risk.
- Owner can sever right from land and transfer or can transfer the right to other purposes and retain priority
- Water rights may be leased as well as purchased. Water rights may be leased for 40 years by member owned community water systems, municipalities, public water utilities supplying water to municipalities and counties, counties, and state universities.
- State Engineer's Office must approve transfers. Only the water that has been put to beneficial use may be transferred.
- Water transfers must not be detrimental to public welfare or water conservation

### Oregon

- Prior appropriation of surface water and groundwater

#### Permanent Transfers

- Requires a map prepared by a certified water right examiner
- Oregon Water Resources Department must determine proposed change will not injure other water users
- Public is offered chance to comment and protest if another water right would be injured. Only protests which claim injury to another water right can be accepted.
- Department may attach conditions to an approval order to eliminate potential injury to other water rights

#### Temporary Transfers

- May not exceed five years
- Typically used for crop rotations or other rotational use
- Temporary change in type of use not allowed

### Transfers to Instream Use

- Water rights may be transferred to instream use, either permanently or temporarily
- Temporary transfers accomplished via lease agreement
- Must show that no injury will occur

### District Transfers

- Irrigation Districts and certain other districts may apply for a specific kind of transfer that allows several transfers in a single annual application

### Conservation Water

- State law allows a water right holder to submit a conservation proposal to the Water Resources Commission and receive authorization to use a portion of the conserved water on additional lands, apply the water to new uses, or dedicate the water to instream use. A percentage of the saved water must be returned to the stream for instream uses if needed.

### Texas

#### *Excerpt from Web Page "Texas Water – Water Resources Education"*

"In Texas, a water right is a recognized property right. The owner of a water permit has no actual title to the water but only a right to use that water. As with other property rights, a water right can be sold, leased or transferred to another person. As such, the water right can be passed or conveyed automatically with the title to the land, unless reserved in a deed, or can be sold separately from the land. In these cases the water code provides that the written instruments conveying water rights may be recorded in the same manner as a property deed.

**Restrictions on Transfers.** The water code and rules of the Texas Commission on Environmental Quality place certain restrictions on the transfer of water rights. The commission must be notified of the sale of a water right, and a transfer will not be allowed if it would impair other water rights. The water code prohibits the transfer of a water right to another river basin if the transfer will materially harm any person in the watershed from which the water was taken. The physical transport of water from one river basin to another is allowed only if there is no prejudice. In this case, it is the water that is transported and not the water right."

### Washington

- Prior appropriation of surface water and groundwater
- The Washington Department of Ecology may consider changes to the following elements of an existing water right permit, certificate, or claim:
  - Place of use

- Point of diversion
- Additional points of diversion or withdrawal
- Purpose of use
- Decisions must pass the following legal test:
  - The change, as requested, will not impair any existing rights, including pending applications
- Ecology considers the following factors when trying to determine a potential detriment or injury to existing rights:
  - The change will not increase the instantaneous or annual quantity of water used
  - The water right is eligible to be changed, and has not been abandoned or relinquished for non-use
  - The source of water will not change (e.g. new wells must tap the same aquifer)
  - The change will not expand the water right
  - The change will not increase the consumptive use of water, and
  - The change is not contrary to the public interest
- State has water acquisition program that provides opportunity for water right holders to participate in salmon recovery by selling, leasing, or donating their water where critically low streamflows limit fish survival. Washington Water Trust benefits water quality, fisheries and recreation by acquiring existing water rights and dedicating them to instream flow.