

Discussion about **Inter-Basin Water Transfers**
Before the **Water and Natural Resources Committee**
Anne Minard, Sept. 1, 2015

I. Introduction

II. General considerations

- a. Advantages of water mobility
- b. Risks to rural and agricultural communities

III. New Mexico's Legal Framework

- A. Basic tenets:
 - a. Beneficial use
 - b. Water use may be severed from land
 - c. New Mexico Constitution, Article XVI, § 2: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public..."
- B. OSE criteria, subject to review in NM courts:
 - (1) likely to impair existing valid water rights (OSE gets wide latitude, see *Montgomery v. Lomos Altos, Inc.* (NMSC 2007); quantity *or* quality, see *Heine v. Reynolds* (NMSC 1962))
 - (2) contrary to conservation of water within the state (sometimes analyzed in context of anti-speculation doctrine; see *Jicarilla Apache Tribe v. United States* (10th Cir. 1979))
 - (3) detrimental to the public welfare of the state. See *Young & Norton v. Hinderlider* (NMSC 1910), holding that considerations of public interest need not be limited to menaces to public health and safety: "There is no such limitation expressed in terms in the statute, and we think not by implication. The declaration in the first section of the statute that the waters therein described are 'public waters,' and the fact that the entire statute is designed to secure the greatest possible benefit from them for the public, should be borne in mind."
- C. Inter-basin transfers are currently exempt from Clean Water Act oversight; but see *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, a 2014 New York federal district court case.

IV. Other states' approaches

A. California

- a. Allows transfers only if they do not unreasonably affect fish, wildlife, or other in-stream beneficial uses, and do not unreasonably affect the overall economy of the area from which the water is being transferred.
- b. Prohibits the transfer of groundwater unless the transfer is in compliance with a county-adopted groundwater management plan.

B. Colorado

- a. Transfers from agricultural areas “shall include reasonable provisions designed to accomplish the re-vegetation and noxious weed management of lands from which irrigation water is removed.”
- b. Requires compensation to local governments in the source areas when applicants seek to transfer more than 1,000 acre-feet per year more than 20 miles away, and allow for offsets if pollution excesses occur as a result of the lost water volume.

C. Idaho

- a. Transfers must be “consistent with the conservation of water resources within the state of Idaho and in the local public interest...[and] will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.”
- b. No transfers that would significantly impact the agricultural base of a local area.

D. Montana

- a. Transfers greater than 4,000 acre-feet per year, and 5.5 cubic feet for second, must consider both “the effects on the quantity and quality of water for existing uses in the source of supply,” and “the probable significant adverse environmental impacts of the proposed use of water.”

E. Nevada

- a. Transfers out of irrigation districts “must not adversely affect the cost of water for other water rights holders in the district or lessen the efficiency of the district in its delivery or use of water.”
- b. Counties of origin can impose an annual fee of \$10 per acre-foot on certain groundwater transfers or draft a binding plan, including requirements for the applicant and successors to offset economic losses.
- c. For inter-basin groundwater transfers, the state engineer must consider whether the transfer will “unduly limit the future growth and development in the basin from which the water is exported.”
- d. State engineer must evaluate “whether the proposed action is environmentally sound as it relates to the basin from which the water is exported.”

F. Oregon

- a. Applicants must quantify the return flow benefits that will be eliminated and impacts on both surface water and groundwater, along with six other factors.
- b. The state must “reserve an amount of water adequate for future needs in the basin of origin, including an amount sufficient to protect public uses, and subordinate the out-of-basin use to that reservation.”
- c. Legislature must approve transfers of 50 cubic feet per second or more.

- d. Applications impacting streams subject to in-stream water rights must secure “consent to injury” from any resource management agency that holds the in-stream flow rights.

G. Texas

- a. Inter-basin transfers of more than 3,000 acre-feet per year of surface water are subject to an analysis of water quality impacts and economic considerations for the source area, among other factors.
- b. Surface-water inter-basin transfers in Texas carry a junior priority date.
- c. The Texas water code prohibits transfers that “cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised.”

H. Utah

- a. Water code directs the state engineer to reject a transfer application if it “...will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare.”

I. Wyoming

- a. Statutes provide that “[t]he change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition
 - i. shall not exceed the amount of water historically diverted under the existing use,
 - ii. nor exceed the historic rate of diversion under the existing use,
 - iii. nor increase the historic amount consumptively used under the existing use,
 - iv. nor decrease the historic amount of return flow,
 - v. nor in any manner injure other existing lawful appropriators.”

V. Recommendations

- If legislation is forthcoming, conduct analysis first to learn why the various states set legislative triggers based on specific volumes and rates (1,000 af + 20 miles on Colorado; 4,000 acre-feet per year, and 5.5 cfs in Montana; 50 cfs or more in Oregon; 3,000 af/year in Texas).
 - Consider various policies/thresholds that will affect the balance of discretion and power between the OSE and the legislature.
- Also conduct analysis to track the success of various states’ approaches.
- Within legislation itself:
 - Require analysis by applicants about environmental, economic and social effects in areas of origin; allow for notice of local public, and opportunity to comment. (Oregon) *OSE opposed this idea in SB 77 (2014)*.
 - Economic analysis could also include projections of water costs for remaining local users. (Nevada)
 - Can source communities require financial compensation? (Nev.)

- Does water loss exceed what was consumed, such that it will diminish return flows? (Oregon)
- Impacts to other in-stream uses. (Oregon)
- Water quality impacts in both the source and recipient areas.
- Consider requiring compliance with county-adopted groundwater management plans. (California)
- Avoid ambiguous terms like “reasonable,” significant,” “unduly” and “sound.”