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New Legislative Approaches

Larry Morandi

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NEW LEGISLATIVE APPROACHES

Larry Morandi
Senior Fellow, Environment and Natural Resources
National Conference of State Legislatures
Denver, Colorado

"Water Organizations in a Changing West"

Natural Resources Law Center
University of Colorado
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I. INTRODUCTION

A. *Summary*

Agricultural irrigation districts and municipal water utilities exert tremendous influence on western water policy through their ownership of senior rights to large volumes of water. They have served the needs of their constituents effectively through the development of water projects for specific uses within confined service areas. The role of state government often has been limited to providing a framework in which water transactions within and among water districts can occur in order to protect existing water rights.

Demands for water have shifted away from traditional uses, however, and state policy is changing to accommodate broader--environmental, economic and community--interests in water. State legislation may be an appropriate means of providing incentives for greater water use efficiency in order to reallocate conserved water to satisfy these "public interest" uses. Although there has been limited application to date of conservation/transfer statutes to actual water savings, legislation enacted in *Oregon, Washington, California, Montana, and Idaho* illustrates the potential for a greater state role in reshaping western water policy.

B. *References*

The references for this paper consist of the statutory and administrative rule citations noted in the text. The author also conducted interviews with state legislators, legislative staff, state executive agency officials, and water district representatives that are not referenced in the text.

II. OREGON

A. *Water Conservation/Transfer*

1. Legislation enacted in 1987--Chapter 264; Or. Rev. Stat., 537.455 et seq.--authorizes a water right holder to transfer conserved water provided a water conservation plan is submitted to the Water Resources Commission for approval.

2. Conservation is defined to mean "reduction of the amount of water consumed or irretrievably lost in the process of satisfying an existing beneficial use achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other approved conservation measures." (Or. Rev. Stat., 537.455(1))

3. Once the plan is approved, the conserved water is assigned a priority date one minute after the original water right.

4. The statute empowers the commission to dedicate up to 25 percent of the conserved water contained in a transfer application to maintaining instream flows.

5. Transfers outside of the boundaries of an irrigation district require the district's approval.

6. Proposed legislation during the 1993 session--HB 2155--would redefine conservation from water "consumed or irretrievably lost" to water "diverted" and would clarify that it does not include "the elimination of waste." Determining how much water would otherwise be "irretrievably lost" to a system has been an obstacle to implementing the statute.

B. *Reallocation of Surplus Water*

1. An irrigation district may "supply, furnish and sell...any surplus water over and above the domestic needs of its inhabitants, to persons, incorporated communities, water districts, or other municipal or quasi-municipal districts either within or without the district; provided, however, that the power to furnish water for domestic and municipal uses herein conferred will not be exercised in such a manner as to impair the service of the district in furnishing water for irrigation purposes." (Or. Rev. Stat., 545.110)

2. An irrigation district may sell "excess storage or carrying capacity, surplus water or water rights...[provided] such sale can be made without impairing the security of the outstanding bonds." (Or. Rev. Stat., 545.144)

3. An irrigation district is authorized to apply water no longer used for irrigation to other lands within the district provided the district is implementing a water conservation plan approved by the commission. (Or. Rev. Stat., 540.572)

4. Proposed legislation during the 1993 session--HB 3355--would authorize a water right holder to apply to the commission to "lease...all or a portion of the water used or consumed" under a water right; the lease terms would be limited to one year unless approved by the commission for a longer period.

C. *Proposed Water Conservation Regulations*

1. The commission has developed proposed regulations that would require both irrigation districts and municipal water suppliers to prepare comprehensive water conservation plans.

2. The regulations are based on general enabling legislation that empowers the commission to develop a state water resources program that is designed, in part, to protect existing water rights "subject to the principle that all of the waters within this state belong to the public for use by the people for beneficial purposes without waste." (Or. Rev. Stat., 536.310)

3. The plans for agricultural water suppliers and agricultural water users would include a long-range water supply component that lists "potential sources of water, including conserved water...[and an] analysis of the possibility of applying for the allocation of conserved water." (Draft Oregon Administrative Rules, 690-86-260(4)(c)(d))

4. The draft regulations have not been finalized due to opposition from agricultural water suppliers and agricultural water users during public hearings in September 1992.

III. WASHINGTON

A. *Trust Water Rights*

1. Legislation enacted in 1991--Chapter 347--created a state trust water rights program whose intent is to "develop and test a means to facilitate the voluntary transfer of water and water rights, including conserved water, to provide water for presently unmet needs and emerging needs." (Wash. Rev. Code Ann., 90.42.010)

2. The Department of Ecology is authorized to provide financial assistance for water conservation projects that will develop conserved water for conveyance to the state as trust water rights; conveyance may include transfer of title to conserved water or lease arrangements.

3. Protection is accorded to irrigation districts by two provisions: (1) if water is proposed to be transferred by an irrigation district, the district must submit evidence to the department that it represents the water rights holders within the district; and (2) the district's approval is required of any proposed transfer by a water right holder served by the district. Any district's denial of the conveyance of conserved water to the state must be based, however, on "probable adverse effects on the ability of the district to deliver water to other members or on maintenance of the financial integrity of the district." (Wash. Rev. Code Ann., 90.42.030)

4. Legislation enacted in 1989--Chapter 429 (which established a trust water rights program as a demonstration project in the Yakima Basin)--stipulated that "it is not the intent of this chapter [429] to facilitate the transfer of water rights from one irrigation district to another." (Wash. Rev. Code Ann., 90.38.901)

5. The department may apportion trust water rights for instream flows, irrigation, municipal or other beneficial uses. They are held in the name of the state and have the same priority date as the original water right from which conserved water has been developed. Trust water rights that are

leased to the state are not subject to forfeiture for nonuse by the water right holder. (Wash. Rev. Code Ann., 90.42.040)

6. The trust water rights program required the department to develop guidelines by July 1, 1992, for implementing the program. The guidelines were issued on September 10, 1992, and declare that "only that water which has been beneficially used in a reasonable manner may be considered for transfer; water in excess of reasonable use cannot be categorized as a trust water right, since it is not considered to be a beneficial use." (Washington Department of Ecology, *Trust Water Rights Program: Guidelines*, Publication 92-88, September 10, 1992)

B. *Water Conservation*

1. The statement of legislative intent for legislation enacted in 1989 (Chapter 348) stipulates that "state and local governments...shall be encouraged to carry out water use efficiency and conservation programs...[and that such programs] should utilize an appropriate mix of economic incentives, cost share programs, regulatory procedures, and technical and public information efforts." (Wash. Rev. Code Ann., 90.54.180)

2. The same provision suggests a policy to offer incentives for the conservation and transfer of conserved water by stating that "increased water use efficiency should receive consideration as a potential source of water in state and local water resource planning processes."

3. Chapter 348 specifically addresses the role of conservation in irrigation districts by requiring the department to undertake a "state-wide evaluation of irrigated areas...to determine the associated impacts of efficiency measures, efficiency opportunities, and local interest." The evaluation process must include a determination of the "likely net water savings of efficiency improvements including the amount and timing of water that would be saved and potential benefits and impacts to other water uses and resources." (Wash. Rev. Code Ann., 90.54.190) Once this assessment is completed, the department must select an irrigation district for a voluntary water conservation demonstration project.

C. *Proposed Water Conservation/Transfer Legislation*

1. Legislation introduced in 1993--SB 5777--would grant to irrigators who shift to trickle irrigation a right to water saved through reductions in evaporative losses.
2. Conserved water could be used on additional land, transferred to another downstream user, or conveyed to the state for instream flow purposes.
3. The state would be authorized to use Referendum 38 funds to purchase or lease conserved water.
4. The legislation was not enacted in 1993; it will be the subject of an interim legislative study prior to the 1994 session.

IV. CALIFORNIA

A. *Water Conservation/Transfer*

1. Legislation enacted in 1982--Chapter 867--allows conserved water to be "sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer." (Calif. Water Code, 1011)
2. The conservation and transfer statute is being tested by the El Dorado Irrigation District (EID) and the State Water Resources Control Board. The irrigation district completed water conservation improvements in its Crawford Ditch in January 1991, in response to allegations by private parties and the Department of Fish and Game that conveyance system losses amounted to unreasonable waste in violation of the state constitution's mandate that the "general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable,

and that waste and unreasonable use or unreasonable method of use of water be prevented." (Article X, Section 2)

3. EEI contends that the amount of conserved water should revert to the district under Calif. Water Code, 1011.

4. In an attempt to avoid a strict determination of what constitutes "reasonable use," the district, the board and the department are negotiating the amount of conserved water that EID can, in fact, use.

B. *Water District Contracts*

1. Chapter 481 of 1992 authorizes a water supplier to contract with water users within the supplier's service area to "reduce or eliminate for a specified period of time their use of water supplied by the water supplier." (Calif. Water Code, 1745.02)

2. The water supplier may contract with the state drought water bank or with any other water supplier "inside or outside the service area of the water supplier to transfer...water if the water supplier has allocated to the water users within its service area the water available for the water year, and no other user will receive less than the amount provided by that allocation or be otherwise unreasonably adversely affected without that user's consent." (Calif. Water Code, 1745.04)

3. Chapter 481 includes the transfer of water made available from "conservation or alternate water supply measures taken by individual water users or by the water supplier." (Calif. Water Code, 1745.05)

4. Chapter 481 specifically authorizes the transfer of water "whether or not the water proposed to be transferred is surplus to the needs within the service area of the water supplier." (Calif. Water Code, 1745.06) The former requirement that conserved water be surplus to a water district's needs has been cited as a reason for the lack of conservation and reallocation activity authorized under Calif. Water Code 1011.

C. *Related Federal Water Conservation/Transfer Law*

1. The Metropolitan Water District of Southern California (MWD) and the Palo Verde Irrigation District (PVID) reached an agreement on May 12, 1992, for a two-year experimental program that will fallow 25 percent of PVID's irrigated farmland, with the resultant conserved water being conveyed to MWD.

2. MWD will pay individual PVID farmers \$620 per acre of fallowed land, which translates into \$135 per acre-foot of water, based on 4.6 acre-feet of water per acre of land. MWD expects to realize up to 100,000 acre-feet of water per year through July 31, 1994.

3. The transaction is being entered into under the Boulder Canyon Project Act of 1928, and the Seven Party Agreement of 1931, which provide that Colorado River water not used by a California water contractor shall be made available to the next senior California water contractor (in this case, MWD).

V. MONTANA

A. *Salvaged Water*

1. The intent of Montana's 1991 water salvage statute (Chapter 308) is "to make water available for beneficial use from an existing valid appropriation through the application of water-saving methods." (Mont. Code Ann., 85-2-102)

2. The statute authorizes a water right holder who salvages water to "retain the right to the salvaged water for beneficial use." (Mont. Code Ann., 85-2-409)

3. The use of salvaged water "for any purpose or in any place other than that associated with the original appropriation" is subject to approval by the Department of Natural Resources and Conservation. (Mont. Code Ann., 85-2-409)

B. *Water Leasing*

1. Statutory law authorizes the Department of Fish, Wildlife and Parks to "lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries...." (Mont. Code Ann., 85-2-436(2)(a))

2. The volume of water associated with a lease is the amount historically diverted, provided "only the amount historically consumed...may be used to maintain or enhance streamflows below the lessor's point of diversion." (Mont. Code Ann., 85-2-436(d))

3. Lease terms are for a 10-year maximum with an option for one 10-year renewal.

C. *Application of Statutes*

1. Montana has combined the salvaged water and leasing statutes to transfer conserved irrigation water to instream flow purposes.

2. An irrigation district on Mill Creek in the Yellowstone River drainage has changed its irrigation practices from flood irrigation to sprinkler irrigation.

3. The Department of Fish, Wildlife and Parks is leasing the salvaged water for 10 years for purposes of maintaining cutthroat trout spawning grounds downstream of the diversion.

VI. IDAHO

A. *Water Banking*

1. Legislation enacted in 1979 (Chapter 193; Idaho Code, 42-1761 et seq.) requires the Water Resource Board to operate a water supply bank.

2. The board is authorized to acquire water rights through purchase, lease or rental; the bank is empowered to lease or rent such water rights. The terms and conditions of any lease or rental are subject to approval by the DWR director.

3. Protection against potential loss of a water right leased to the bank is afforded to water right holders by a provision that states "[water rights] are not subject to forfeiture for nonuse...while retained in or rented from the water supply bank." (Idaho Code, 42-1764)

4. The board's water supply bank rules and regulations protect irrigation districts from reallocation of water outside a district's boundaries by requiring an applicant who wishes to transfer water to the bank to include "the written consent of such...irrigation district to the proposed sale or lease...if the right to the use of the water, or the use of the diversion works or irrigation system...is owned or managed by an irrigation district." (Rule 3,2,5)

5. The board may appoint local committees to facilitate the leasing of stored water through locally operated rental pools. The board must approve each committee's operating procedures. Most of the water rental is done by local committees; the statewide water bank has seen limited activity. Committees have been appointed for the Upper Snake River, Boise River, and Payette River basins.

6. Legislation enacted in 1992 (Chapter 101) authorizes use of the water supply bank to rent storage water "to augment flows in and out of the state of Idaho for salmon migration provided said flows are used for power production purposes within the state of Idaho." The DWR director is not required to determine, as he would for other water uses, "whether the water supply is sufficient for the purpose for which it is sought...." The bill specifies that as a condition for approval, rental water shall be used "as part of a regional coordinated effort to enhance salmon migration and that the other parties are making a proportional contribution to solving the salmon migration problem." It concludes that "nothing in this act shall constitute a finding by the legislature that the rental or use of water for augmentation of

flows for salmon migration is a beneficial use of water, is in the public interest, or whether such use injures existing water rights."

B. *Water Leasing*

1. Irrigation districts may reallocate water on a short-term basis through a provision that allows a district "which has within its boundaries residential, commercial or industrial lands...and which holds water rights for those lands...[to] lease, to any municipality, public utility or domestic water users organization which furnishes water service to those lands, those water rights which are held for any residential, commercial or industrial lands for which the owner has elected not to receive his proportionate share of the irrigation district's water through the irrigation system of the district; provided, however, that no water right under which water is delivered through a community ditch shall be leased without the written consent of the ditch users who do not elect not to receive water from the district." (Idaho Code, 43-335)

2. The statutes protect the water right holder by establishing that "use of water under a lease... shall not constitute abandonment, or be grounds for forfeiture of the water right, and shall not be deemed a change in the place of use or in the nature of the use of the water." (Idaho Code, 43-341)

3. Once a water right or any portion of the right is leased by an irrigation district, the district cannot "levy tolls or assessments...against the lands for which the water right is held by the district, so long as the lease remains in effect...." (Idaho Code, 43-339). All payments received by the district under a lease agreement "shall belong to the district, and...shall be deemed to have been received by the district in lieu of tolls and assessments which otherwise would have been levied against the lands for which landowners have elected not to receive water...." (Idaho Code, 43-340)

C. *Water Conservation/Transfer Limitations*

- 1. The DWR director must determine, among other criteria, that a proposed water transfer "does not constitute an enlargement of the original right." (Idaho Code, 42-222)**

- 2. For the purpose of determining the potential enlargement of a water right, DWR quantifies each right on the basis of rate of flow, total volume of water diverted, and volume of water consumed; none of the criteria may be exceeded.**

- 3. The state water banking statute stipulates that the DWR director may reject a proposed lease that "would cause the use of water to be enlarged beyond that authorized under the water right to be rented...." (Idaho Code, 42-1763)**