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Essay

PROCEDURAL ASPECTS OF STATE WATER LAW: TRANSFERRING WATER RIGHTS IN THE WESTERN STATES

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INTRODUCTION

The transfer of water rights is a common event in much of the arid West. Economic development, population growth in urban areas, and changing attitudes about the environment create pressures for the transfer of water resources from agricultural uses for municipal, industrial, recreational and ecological purposes.[1] Voluntary transfers of water rights enhance flexibility of water use and allow responsiveness to drought, changing economic conditions and new values related to water instream. Water transfers also raise concerns about damage to other water right holders, adverse effects on areas from which the water is taken, impaired water quality, and preservation of fish, wildlife and recreation opportunities. Policymakers are struggling to balance the benefits of flexibility and responsiveness that transfers can provide, with the need to safeguard important but vulnerable interests unprotected by the market mechanism.

Many water transfers require approval of a formal application for a change in the purpose and place of use of a water right. Change applications normally are evaluated by an administrative unit—a department of water

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1. B. COLBY, B. SALIBA & D. BUSH, WATER MARKETS IN THEORY AND PRACTICE: MARKET TRANSFERS, WATER VALUES AND PUBLIC POLICY (1987).

resources, or state engineer's office, if the water right is under the jurisdiction of the state, a water district governing board for transfer within district boundaries, or the Bureau of Reclamation for transfers involving changes in use of federal project water.[2] This article focuses on changes in the use of appropriative water rights held under state law. Some types of water transfers need not be approved by the state agency. Transfers occurring within the service area of irrigation districts, mutual irrigation companies, and water conservancy districts may not require state administrative approval, especially if the water will be put to a use already authorized for district water. Although there is generally no state agency approval required, individual water service organizations often have their own administrative procedures. This article does not discuss those procedures, which vary considerably among organizations.

The procedures to gain approval for changes in the place or purpose of use of water rights can be complicated. The complexity of these procedures, and the uncertainty regarding whether a transfer will be approved, can prove costly for the parties involved. At the same time, formal approval processes can provide an arena where concerns regarding proposed transfers are addressed. Statutes and case law provide criteria by which transfers can be evaluated. Foremost among the transfer impacts considered is impairment of other water right holders. In some states, transfer approval procedures provide a forum where other concerns can be expressed, such as impact on local economies, and effects on recreation, fish and wildlife.

This article compares the procedures involved in evaluating water right change applications in eight western states: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. The purpose of this discussion is to describe the state administrative process and to identify the concerns addressed in state water transfer approval procedures. Tables 1 to 5 summarize key differences among state processes.[3] These comparisons can assist state and federal policymakers and researchers in identifying and im-

2. R. Wahl, Markets for Federal Water: Subsidies, Property Rights and the Bureau of Reclamation (in press, 1989).

3. The information presented in Tables 1 to 5 is based on state statutes and on authors' interviews with state agency staff. The persons interviewed and state statutes referred to are summarized here for all information presented in Tables 1 to 5.

ARIZONA:

B. Markham, Chief Legal Counsel, Arizona Department of Water Resources (personal interviews with B. Colby, M. McGinnis, 1987-1988);

S. Larmore, Deputy Counsel, Arizona Department of Water Resources (personal interviews with B. Colby, M. McGinnis, 1987-1988);

ARIZ. REV. STAT. ANN. § 45-101 *et seq.* (1987);

ARIZ. COMP. ADMIN. R. & REGS., R 12-15 *et seq.* (1987).

COLORADO:

C. Angel & S. Atencio, Office of the Colorado Attorney General (personal interview with B. Colby, 1987);

A. Berryman, Colorado Division of Water Resources (personal interview with B. Colby, 1987);

L. Dalby, Colorado Department of Natural Resources (phone interview with K. Rait, 1988);

R. Stenzel, Colorado Division of Water Resources (personal interviews with B. Colby and K. Rait, 1987-1988);

COLO. REV. STAT. § 37-92-101 *et seq.* (1973).

plementing lower-cost and more effective water transfer procedures. The last section of this article summarizes policies that address broader concerns with water transfers, particularly public values and environmental and area-of-origin interests.

OVERVIEW OF STEPS IN THE STATE WATER TRANSFER PROCESS

While the procedures and criteria to transfer a water right are different in each state, some aspects of the process are common to all states. Figure 1 provides an outline of the general steps followed in evaluating applications to change the purpose of use of a water right. In most states, there are four types of changes for which one can apply regarding a water right. These are a change in: (1) nature or purpose of use, (2) place of use, (3) point of diversion, and (4) season of use. These types of changes are not mutually exclusive. These four aspects of a water right can be simultaneously changed in any combination. This discussion focuses primarily on those change applications that seek to alter the purpose of use from irrigated agricultural use to a non-irrigation use. Transfers of water out of agricultural uses tend to be the most controversial type of water right change in many western states. A

IDAHO:
P. Rassier, Deputy Attorney General, Idaho Department of Water Resources (phone interviews with M. McGinnis, 1988);
IDAHO CODE § 42-101 *et seq.* (1977 & 2d Supp. 1988).

MONTANA:
L. Holman, Chief, Water Rights Bureau, Montana Department of Natural Resources and Conservation (personal interview with B. Colby, 1987);
G. Fritz, Director, Montana Division of Water Resources (personal interview with B. Colby, 1987);
MONT. CODE ANN. § 85-1-101 *et seq.* (1987);
MONT. ADMIN. REG. § 36 (1987).

NEVADA:
R. Turnipseed, Director, Surface Water and Adjudication Section, Nevada Department of Conservation and Natural Resources, Division of Water Resources (personal interview with M. McGinnis, 1988);
NEV. REV. STAT. ANN. § 533.010 *et seq.* (Michie 1987).

NEW MEXICO:
W. Fleming, New Mexico State Engineer's Office, Technical Division (personal interviews with B. Colby, 1987-1988);
D. Stone, New Mexico State Engineer's Office, Water Rights Division (personal interviews with B. Colby, 1987-1988);
P. White, New Mexico State Engineer's Office, Chief Counsel (personal interviews with B. Colby, 1987-1988);
N.M. STAT. ANN. § 72-1-1 *et seq.* (1985);
New Mexico Groundwater Rules and Regulations (1966).

UTAH:
D. Jensen, Utah Attorney General, Division of Water Rights (personal interviews with B. Colby and M. McGinnis, 1987-1988);
K. Jones, Directing Engineer for Distribution, Utah Division of Water Rights (personal interview with M. McGinnis, 1988);
UTAH CODE ANN. § 73-1-1 *et seq.* (1953 & 2d Supp. 1989);
UTAH ADMIN. SERV. ACT, § 63-1-1 *et seq.* (Supp. 1988).

WYOMING:
F. Carr, Wyoming Board of Control (phone interviews with M. McGinnis, 1988);
F. Trelease, Jr., Chief Engineer, Wyoming State Engineer's Office (phone interviews with M. McGinnis, 1988);
WYO. STAT. § 41-1-101 *et seq.* (Supp. 1989); Wyoming Water and Irrigation Laws (1982).

change from irrigation to non-irrigation uses is often accompanied by a change in place of use, point of diversion, and/or season of use.

Filing Application

The first step in the transfer process is the filing of an application. The application is filed with the state agency responsible for handling changes in water rights. The appropriate agencies for each state are listed in Table 1. The application is usually submitted on a form provided by the agency, along with required supplementary information. Supplementary information requirements vary among the individual states, but normally include such items as maps, surveys, and records indicating historical use of the water right.

Filing fees are similar among the states and are compared in Table 1. In 1988, application fees ranged from $30 (Wyoming and Arizona) to $159 (Colorado). One exception is Utah's graduated scale based upon how many acre-feet the applicant applies to transfer. This fee schedule requires those involved in larger transfers to pay more than those who seek smaller transfers. Since agency staff time required is often related to the quantity of water being transferred, a graduated fee schedule is a reasonable means of allocating state agency costs among water transfer applicants.

Depending on the complexity of the information required, applicants may retain the services of various consultants to help prepare the application. Professionals most often consulted are attorneys, engineers, and surveyors. Consultants retained at this stage typically assume the duties involved in moving the application through the state agency process.

The complexity of each state's approval process affects the amount of documentation and the need for consultants. For example, changes of use in Colorado's most active water court divisions are often heavily contested. The large number of Statements of Opposition typically filed, the judicial nature of the procedures, and the de novo appeal process are some of the factors which combine to make the Colorado system highly litigious.[4] Therefore, attorneys and technical consultants are typically retained at an early stage. In contrast, the change of use process in Idaho and Wyoming is much less formal and complicated, partly because there has been less demand for water transfers in these states. In areas where there is less competition for existing water sources, changes in use generate less conflict among water users. Moreover, because transfers in these areas are less adversarial, legal counsel and technical consultants are less frequently required.

Processing Application

Once submitted, the application is reviewed by the state agency staff. The application and supporting documents are checked for accuracy, completeness, and consistency with the records on the water right maintained by the state agency. This is done either in a local agency field office or at the

4. C. Martz, former head of Colorado Department of Natural Resources and private attorney, Denver, Colorado, (personal interviews with B. Colby, 1987).

central agency headquarters. Local review is a better way of obtaining technical input from the local agency staff at an early stage in the application process. The local staff presumably is more knowledgeable regarding potential water use conflicts in their particular part of the state. Local offices of the state water agency routinely process applications in Colorado, Arizona, Utah, Montana, and Idaho.

Complicated transfer applications may require state agency legal and technical expertise available only at the central office. Utah has a process which accommodates either local or central review. The application is initially submitted to the area office. The area office staff forwards more complex cases directly to the special investigations office at the state level. Other states also allow for varying degrees of interaction between the state and local levels. Incomplete or inaccurate applications are typically returned to the applicant for revision and resubmission.

Public Notice

All states require some form of public notice that an application has been filed to alert parties who might have an interest in the outcome of the transfer.[5] Ordinarily, this is achieved by publishing a notice in a newspaper of general circulation in the counties affected by the transfer. The frequency and duration of publication required vary by state, and are summarized in Table 1. Publication costs vary with the complexity of the proposed change in water use and the extent of the areas affected by the requested transfer.

In Arizona, Idaho, Montana, Nevada, and Utah, the state agency submits the public notice information to the newspaper and pays the associated fees.[6] Application fees are rarely large enough to fully defray the costs of publishing, so taxpayers, through the state agency budget, bear a portion of these costs. In Colorado and Wyoming, the state agency submits the notice to the newspaper and bills the applicant for the cost. New Mexico applicants pay publishing fees directly to the newspaper.

In addition to newspaper publication, some states have requirements that specific individuals be notified of the proposed change. These can include county commissioners, holders of adjacent water rights, water service organizations in affected areas, and local water officials. The procedure requires satisfaction of these public notice statutes prior to further processing of the change application. One interesting variation in public notice practices is Colorado's resume process.[7] In addition to publication in a newspaper, notice of all applications in a given month is compiled and sent to a list of regular subscribers. The costs of the resume publication are paid by the individual subscribers. In Colorado, as in many western states, there are individuals who are actively involved in water issues and who wish to be

5. Conversion of permitted groundwater rights from irrigation to non-irrigation uses does not require public notice under Arizona law. ARIZ. REV. STAT. ANN. § 45-469 (1987).

6. ARIZ. REV. STAT. ANN. § 45-172(7) (1987); IDAHO CODE § 42-203(A) (Supp. 1989); MONT. CODE ANN. § 85-2-307 (1987); NEV. REV. STAT. ANN. § 533.060 (Michie 1987); UTAH CODE ANN. § 73-3-6 (Supp. 1989).

7. COLO. REV. STAT. § 37-92-302(3) (1973).

kept informed of current developments. With the resume, the Colorado Division of Water Resources provides this additional public notice.

Filing Protests

There are often parties who believe their interests are adversely affected by the proposed change in water use and who object to its approval. Formal objections to change applications are allowed in all the states studied. These objections are the primary means for water right holders to express their concerns and, in some states, for the public interest to be protected. The most common basis for filing a protest is impairment of existing water rights. However, in some states, protests may be filed on other grounds which are specified in case law or legislation. Table 2 compares aspects of the protest process in the eight states surveyed.

Protesting parties can state their objections in a variety of ways. Some states allow for protestants to simply appear at the agency hearing and voice their opinions. It is more common for states to require that objectors file a formal written protest with the agency. Although some states provide a standard form for protests, any written protest is generally acceptable.

In Nevada a protest may be filed formally or informally. For a formal protest, the individual must file a required form and pay a filing fee. An informal protest need not be entered on the standard form and there is no filing fee. Formal protests automatically require a hearing; informal protests do not. However, both formal and informal protestants can participate in a hearing. The availability of both options allows protestants greater flexibility in expressing their views on the proposed change.

The requirements for standing to file vary considerably and are an important aspect of the protest process. In Montana, objections are limited to downstream water rights holders.[8] Colorado opposers need not be water rights holders, but statements of opposition can be filed only on the basis of injury to water rights.[9] Wyoming, Nevada, Idaho, Utah, and Arizona have no statutory requirement that protestants must hold water rights, but in practice give less credence to protestants who do not hold water rights that could be affected by the change. A recent Utah Supreme Court decision ruled that a protestant's claim may not be dismissed simply because the protestant does not hold water rights, and that any interested party has standing to protest a change in water right application.[10] New Mexico statutes outline the basis on which protests can be filed.[11] These include: (1) impairment of the protestant's own water rights, (2) detriment to the public welfare, or (3) detriment to water conservation in the state. These statutes specifically provide for a broader range of concerns to be expressed through the protest process. State policies, which preclude the filing of protests by interests who do not hold water rights, limit the types of concerns which may be expressed

8. MONT. CODE ANN. § 85-2-308 (1987).
9. COLO. REV. STAT. § 37-92-305(3) (1973).
10. Bonham v. Morgan, No. 880143 (Utah Feb. 23, 1989).
11. N.M. STAT. ANN. §§ 72-12-3(D), -7(A) (1985), and New Mexico Groundwater Rules and Regulations, Art. 2-8 (1966).

through the formal protest mechanism. Table 2 summarizes criteria for standing to file a protest in the various states.

In regions where transfers are controversial, it is becoming common for protestants to hire an attorney and other outside consultants to provide legal, engineering, and hydrologic expertise substantiating their objection. Protest procedures should be designed for individuals to voice legitimate concerns regarding changes in water rights at minimal expense. At the same time, protest procedures need to minimize the state's expenses when responding to protests based on irrelevant or insubstantial issues.

States requirements differ regarding how formally the applicant must respond to a protest. In Colorado and New Mexico, the applicant must respond or face possible dismissal of the application. Both these states set a 30-day time limit for response. The other states do not require that the applicant formally respond to protests.

Processing Protests

State agency procedures to process a protest are similar to processing the initial application. Protests are submitted either to the state agency headquarters or to a local field office, where they are checked for accuracy and completeness. If there are specific standing requirements, the standing of the protestant is evaluated. The most common of these requirements is that the protestant be a holder of water rights in an area affected by the proposed transfer.

Resolving Protests

The next step in most states is resolution of filed protests. Table 2 compares state procedures related to resolution of protests. This step is often a critical and costly part of the transfer process. Protest resolution mechanisms can provide a forum for third parties to voice their concerns and to influence the state agency review process. Progress on the application can be significantly delayed during this stage.

Although there are some innovative approaches to resolving disputes between applicants and protestants, there are two primary alternatives: private resolution among the parties or a hearing by the state agency. Nevada also has an option known as a formal field investigation. Here, the parties meet with the agency personnel at the site of the proposed change. This allows for a more complete understanding of the details of the case, and also lends a less formal atmosphere to the proceedings. The state engineer's staff in Nevada find that this method often produces a settlement.

All states provide for a formal hearing process, and some require a hearing for change of use applications, even if no protests have been filed. Table 2 summarizes hearings procedures across states.

Private Resolution

Private resolution involves some form of negotiation between or on behalf of the applicant and objecting parties. State agencies generally attempt to facilitate private negotiations and resolution of conflicts. The different

states pursue private resolution to varying degrees. For example, the Idaho Department of Water Resources often schedules a pre-hearing conference to bring the applicant and protestant together to attempt private negotiation. Other states provide addresses and phone numbers of protestants to the applicants, and most will schedule an informal meeting if the parties so request.

Informal private resolution of conflicts between applicant and protestants is usually the least expensive and swiftest alternative for resolving protests. While the parties may incur attorney's fees if they retain counsel to negotiate on their behalf, often there is little expense incurred by the parties or the state agency. A hearing by the state agency is the alternative to failed negotiation.

Administrative Hearing

Agency hearings can be as informal as a meeting with the local agency staffperson and the parties at the site of the proposed transfer, or as formal as a judicial proceeding in which both parties are represented by counsel and witnesses are under oath. Some states provide the option of holding the administrative hearing in a formal or informal manner. This flexibility allows the formality of the process to vary with the complexity of the particular case and the number of protestants. The location, formality, and timeliness of the hearing can greatly affect the cost of the hearing for applicants, protestants and the state. Hearings range in length from a few hours to many weeks. Both the applicant and protestants, or their representatives, typically attend the hearing. Parties are often represented by legal counsel, and by expert witnesses prepared to substantiate their claims.

Satisfactory resolution is communicated to the state agency by the objectors' formally withdrawing their protest, or by submission of the written agreement reached by the parties. If the agreement involves a modification in the change of water use application, the new proposal must be re-evaluated by the state agency.

Ruling

Following the conclusion of the hearing, or a privately negotiated resolution of objections to the proposed change, the state agency must make a decision, often through the hearing officer. While the hearing officer is usually an official of the state administrative agency, some states employ private individuals, often attorneys, to serve as hearing officers. The form of the ruling varies by state, but the outcome is typically confined to: (1) approval of the transfer as requested on the application, (2) approval of the transfer subject to modifications necessary to satisfy concerns brought forward by protestants and agency staff, or (3) denial of the application. The application is evaluated using information set forth in the agency hearing, the change application, and protests filed. The ruling is provided in written form to the applicant and protestants.

Some states have a time limit to issue a ruling. These are noted in Table 3. Some states' statutes define specific criteria upon which the ruling must

be based and these are also listed in Table 3. Substantive criteria for approval of a change in water use application are desirable because they provide guidelines to potential applicants and reduce uncertainty regarding approval.

New Mexico does not have clear statutory criteria for ruling on change applications. The state engineer's staff normally uses those criteria set forth for new appropriations. Non-impairment of other water rights, and non-enlargement of the subject water rights are statutory criteria in Arizona, Idaho, Montana, Nevada and Wyoming.[12] Protection of the "public interest" or "public welfare" is designated as a basis for denying an application in Idaho and has been utilized in New Mexico.[13] *Bonham v. Morgan*[14] recently extended Utah criteria for applications to appropriate water to water right change applications. These criteria are listed in Table 3. Public interest provisions are discussed in more detail in a later section of this article.

Appeal of Ruling

Parties who are dissatisfied with the decision of the state agency may appeal the ruling. Typically, these appeals are handled by the district or appellate levels of the state court system, but sometimes they must be addressed within the administrative agency prior to using the judicial system. There is normally a statutory time limit within which a party may appeal the decision. These time limits are shown in Table 3. If the individual is not satisfied with the outcome of the initial appeal, a second appeal is often possible. The highest level of appeal for state agency rulings is usually the state supreme court.

Table 4 compares appeals procedures across states. The appeal process differs between states on two counts: (1) the opportunity for appeal at the administrative level, and (2) the degree to which the legal process in the appeal duplicates that of the original hearing.

An administrative appeal can be less costly and time-consuming than a judicial procedure. In Arizona, judicial appeal is allowed only after administrative remedies have first been exhausted.[15] In New Mexico, appeals of state engineer rulings go to district court, unless there was no hearing at the agency level.[16] In that case, the appeal goes to administrative review. In Utah, Wyoming and Idaho, the initial appeal goes directly to district court.[17] Initial hearings on change applications in Colorado involve the district water court and appeals can go directly to the Colorado Supreme Court, bypassing the appellate courts if the significance of the case warrants.[18]

12. ARIZ. REV. STAT. ANN. § 45-153 (1987), IDAHO CODE § 42-203(A) (Supp. 1989), MONT. CODE ANN. § 85-2-311 (1987), NEV. REV. STAT. ANN. § 533.370 (Michie 1987), WYO. STAT. § 41-3-104 (1986).

13. IDAHO CODE § 42-203(A) (Supp. 1989); N.M. STAT. ANN. § 72-5-7 (1985).

14. *Bonham*, Utah Supreme Court Case No. 880143.

15. ARIZ. REV. STAT. ANN. §§ 45-405 to -407 (1987).

16. N.M. STAT. ANN. § 72-2-16 (1985).

17. UTAH CODE ANN. § 73-4-3 (1953); WYO. STAT. § 41-3-104 (1986); IDAHO CODE § 42-203(A) (Supp. 1989).

18. COLO. REV. STAT. § 37-92-304(9).

The appeal process is de novo in New Mexico and Colorado.[19] Therefore, the entire process of submitting evidence, cross-examining experts, and so on, is repeated for the appeal hearing. Appeals in the other states are generally not de novo. The appeal is based on the record developed in the original hearing. Introduction of new issues of fact are not generally allowed at the appeal stage.

New fact-finding procedures at an appeal stage can be both costly and productive. A balance must be reached between obtaining accurate and complete information and minimizing the costs of the appeal process. In general the duplicative nature of a trial de novo seems overly burdensome to the parties involved in a change of water right proceeding.

Proving Up/Certifying Change

Upon state agency approval of a transfer application, the applicant usually must take steps to show diligence in pursuit of the change for which they applied, and to show compliance with any conditions imposed on the change in purpose or place of use. These conditions may include construction of diversion works, modifications in quantity or timing of diversions, and other steps necessary to effect the transfer.

Requirements for eventual certification of the approved change application are similar between the states, and are summarized in Table 4. Montana, Arizona, and Idaho have no specific statutory time limit within which the change must be implemented. All these states, however, require that the applicant must "show due diligence" or must complete the change "within a reasonable time." Utah requires that the change be completed within three years of final approval.[20] The limit is four years in New Mexico.[21] In Nevada, Colorado and Wyoming, a time limit, and any special implementation conditions, are determined on a case-by-case basis.[22]

In Nevada, Montana, and New Mexico, the applicant must file notice of completion when the project is finished.[23] The state agency then inspects the site to verify that the change has taken place as approved. Persons completing changes in Utah can either hire a professional surveyor to document the change, or request that the state engineer determine if the change has been properly implemented.[24]

INCORPORATING BROADER INTERESTS IN THE TRANSFER PROCESS

Political and economic pressures to incorporate broader interests and more flexibility in water transfer processes are intensifying. Environmental organizations increasingly scrutinize the effects that water transfers may have on fish, wildlife, recreation, and the riparian environment. In some states, these effects can be considered when a transfer proposal is evaluated.

19. N.M. STAT. ANN. § 72-7-1(E) (1985); COLO. REV. STAT. § 37-92-304(3) (1973).
20. UTAH CODE ANN. § 73-3-12 (1953).
21. N.M. STAT. ANN. §§ 72-5-14, -12-8 (1978).
22. *See, e.g.*, COLO. REV. STAT. § 37-92-345 (1973).
23. NEV. REV. STAT. ANN. § 533.400 (Michie 1987); MONT. CODE ANN. § 85-2-315 (1987); N.M. STAT. ANN. § 72-12-5 (1985).
24. UTAH CODE ANN. § 73-3-16 (1953).

In many states, however, there is no provision in the administrative process for addressing potential environmental concerns. Rural areas also worry that water transfer procedures do not address the economic and social impacts on the area from which water is transferred. Rural communities and agricultural interests in several states are lobbying for policies that routinely consider area-of-origin concerns when a change in water use application involves the export of water.

Public interest provisions, arising through statutes or case law, are one avenue for broadening the concerns that can be addressed when change in water use proposals are evaluated. State policies protecting instream flows provide another avenue to consider environmental impacts of proposed transfers. Procedures that require consideration of transfer effects on the region from which water is exported, can protect areas of origin from adverse effects of water transfers. These three issues are discussed below, and state policies on public interest and instream flow issues are compared in Table 5.

Public Interest Considerations

The public interest in western water is a largely undefined concept referring to the consideration of public values affected by water allocation and transfer. Some western states explicitly include statutory reference to the public interest or public welfare. Other states incorporate these concepts based on court decisions. Many observers believe, based on recent court decisions and policy initiatives, that public interest considerations will play a key role in water transfer approval procedures.[25]

Arizona includes public interest language in its statutes regarding appropriation of water but the terms "public interest" and "welfare" are not defined statutorily.[26] Case law, and administrative policy, have interpreted public interest provisions as a basis for regulating groundwater pumping recharge in Active Management Areas, where groundwater overdraft is a central policy concern.[27]

In Colorado, public interest language is not explicitly included in statutes related to appropriation or transfer of water rights. State appropriation of water rights, through the Colorado Water Conservation Board, for maintaining instream flows is one expression of public values in Colorado water policy.[28]

The most complete and precise definition of the public interest in water right change applications has developed in Idaho.[29] The Idaho Supreme Court specifically noted twelve factors which should be considered in determining the effect of a change in water use upon public welfare. Among these are the assurance of minimum stream flows, conservation, public health and safety, aesthetics and environmental ramifications, and fish and wildlife.

25. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317 (1985).
26. ARIZ. REV. STAT. ANN. § 45-153 (1987).
27. Arizona Game & Fish Dep't v. Ariz. State Land Dep't, 24 Ariz. App. 29, 535 P.2d 621 (1975); Reinhard v. Ariz. Dept. of Water Resources (1986)(unpublished opinion).
28. COLO. REV. STAT. §§ 37-92-102(3), -92-103(4) (1973).
29. Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).

The court also held that the economic effects on the local area and benefits to the applicant should be considered. In response to this court decision, Idaho statutes now require that public interest considerations be considered in approving the transfer of water rights.[30] Statutory public interest considerations include the following:[31]

1) impact on local economies,
2) impact on recreation, fish and wildlife resources, and
3) compliance with air, water, and hazardous substance standards.

Montana does not routinely consider public interest criteria in evaluating changes in water use. However, the public interest may be considered based on Montana's reasonable use provisions which apply to appropriations of more than 4,000 acre-feet, and include the following considerations:[32]

1) existing and future demands, including instream flow uses,
2) benefits to the applicant and the state,
3) effects on other water uses,
4) availability and feasibility of using lower-quality water,
5) effects on private property rights by the creation or contribution to saline seep, and
6) probable adverse environmental impacts.

The application of these criteria to changes in use in Montana has thus far been limited to proposed out-of-state transfers. The criteria have not been applied to changes of use within Montana because no applications have involved more than 4,000 acre-feet.[33]

Nevada statutes require rejection of transfer applications if the transfer is detrimental to the public interest.[34] Public interest criteria are not statutorily defined. The public interest is applied to transfer applications by the state engineer on a case-by-case basis. New Mexico statutes for surface water have always contained a public interest clause, and the groundwater code passed in the 1930s was amended in 1983 to include public interest considerations for groundwater use.[35] In 1985, amendments to the surface and groundwater codes were explicitly extended to public welfare consideration to changes in water rights.[36] Public welfare, while not statutorily defined, is one of the criteria the state engineer must consider in evaluating transfer applications. The New Mexico Supreme Court ruled as early as 1910 that the state engineer, then a territorial engineer, must consider the benefits to the public in weighing the merits of alternative water allocations.[37] The state engineer determines the relevancy of public interest considerations on a case-by-case basis.

Utah statutes allow the state engineer to consider the public interest or

30. IDAHO CODE § 42-222 (Supp. 1988).
31. Idaho Dep't of Water Resources, 1986.
32. MONT. CODE ANN. § 85-2-311 (1985).
33. McKinney, Fritz, Graham & Schmidt, *The Protection of Instream Flows in Montana: A Legal-Institutional Perspective*, in INSTREAM FLOW PROTECTION IN THE WESTERN UNITED STATES 286 (L. MacDonnell, T. Rice & S. Shupe eds. 1989).
34. NEV. REV. STAT. ANN. § 533.370(3) (Michie 1987).
35. N.M. STAT. ANN. § 72-12-3 (1985).
36. N.M. STAT. ANN. §§ 72-5-23, -12-7 (1985).
37. Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910).

public welfare to evaluate applications to appropriate water.[38] The public interest provision has not been applied routinely to evaluate applications for appropriation or transfer. However, a 1989 Utah Supreme Court decision[39] extended the criteria for new appropriations to change applications, and requires the state engineer to reject applications for changes in water rights which will "unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare."[40]

Although Wyoming water law refers to "public interest" and "public welfare," there are no specific requirements that these be considered in evaluating changes in water rights. Application of public interest considerations is at the discretion of the state engineer.

State Instream Flow Policies

Instream flow policies, based on statutes or case law, provide another avenue by which broader concerns can be incorporated in the water transfer process. The ability to appropriate water, or to change the purpose of use of an existing water right to maintain stream flows, gives environmental interests access to water rights and a basis to participate as applicants or protestants in the process. The western states differ a great deal in their approaches to instream flow protection.[41] Differences are notable both in the legal basis for establishing water rights to maintain flow levels, and the extent to which state agency programs are directed towards protecting free-flowing waters. Table 5 summarizes the approaches of the states in this study.

While Arizona statutes do not explicitly recognize appropriations for instream flow maintenance, in *McClellan v. Jantzen* the appellate court held that surface water may be appropriated for instream recreation and fishing.[42] The Arizona Department of Water Resources ("ADWR") granted two permits in 1983 to the Nature Conservancy and about forty applications from various public and private entities are pending.[43] An instream flow task force has been appointed to assist ADWR in developing criteria and procedures for granting permits.

In Colorado, the Colorado Water Conservation Board ("CWCB") may appropriate water for instream flow and lake level maintenance. Private entities are not authorized to appropriate water for instream flow protection but may dedicate water rights to the CWCB for instream flow maintenance. The CWCB is also responsible for filing objections to water transfers which may impair instream flow rights.[44]

Idaho's instream flow program, enacted in 1978, authorizes the Idaho Water Resources Board ("IWRB") to apply for and hold instream flow rights. State statutes specifying that public interest concepts apply to recrea-

38. UTAH CODE ANN. § 73-3-8 (1953).
39. *Bonham*, No. 880143 (Utah Feb. 23, 1989).
40. *Id.*
41. L. MACDONNELL, INSTREAM FLOW PROTECTION: LAW AND POLICY (1989).
42. McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976).
43. Arizona Dep't of Water Resources, 1988.
44. COLO. REV. STAT. §§ 37-92-102(3), -92-103(4) (1973).

tion, fish, and wildlife provide another mechanism for protecting flow levels.[45]

Montana's instream flow program operates under the 1973 Montana Water Use Act which provides that any state or political subdivision of the state may apply to the Board of Natural Resources and Conservation to reserve water for instream uses.[46] Water reservations in some basins have already been important, and the state is preparing a more comprehensive strategy for instream flow protection.

Appropriations for instream flow and storage in lakes without a physical diversion have been granted in Nevada in specific instances. Instream flow appropriations must be acquired through the same process as any other appropriation. A 1988 state Supreme Court decision held that federal agencies can hold rights for wildlife, and affirmed that there is no absolute diversion required precluding the granting of an in-situ water right.[47] New Mexico statutes do not provide for appropriation and changes in use of water rights for instream flow maintenance, though recognition of instream flow rights has been considered in recent legislative sessions. *Reynolds v. Miranda* and subsequent rulings by the state engineer imply that diversion structures are necessary for water right appropriation.[48] There is, as of yet, no case law and no administrative precedent for considering impacts on instream flow levels, other than those which affect existing water rights, in evaluating change in water use proposals.

A Utah statute enacted in 1986 allows the State Division of Wildlife Resources to acquire established water rights to maintain flows for fish habitat. The division must have legislative approval to acquire a right for instream flows.[49]

Wyoming instituted a program in 1986 to maintain flows in order to protect the state's fisheries. Based upon information provided by the state's Game and Fish Commission, the Wyoming Water Development Commission and Water Division of the Economic Development and Stabilization Board may file applications with the state engineer for appropriation of flow in identified stream segments.[50] In addition, the state may acquire any existing water right by transfer or gift.[51]

Area of Origin Protection

Local governments in the area of origin and local residents who do not hold water rights typically cannot obtain standing to enter the change in water right process as a protestant. Thus, frequently their interests are not taken into account. However, awareness of the environmental and economic impacts of water exports is growing, and there is increased pressure in some states to consider area of origin impacts in the change of water right process.

45. IDAHO CODE § 42-203(A), -222 (Supp. 1989).
46. MONT. CODE ANN. § 85-2-316(1) (1985).
47. State v. Morros, 766 P.2d 263 (Nev. 1988).
48. Reynolds v. Miranda, 83 N.M. 445, 493 P.2d 409 (1972).
49. UTAH CODE ANN. § 73-3-3 (Supp. 1986).
50. WYO. STAT. 41-3-1003 (Supp. 1989).
51. WYO. STAT. 41-3-1007 (Supp. 1989).

Negative effects tend to be most serious when transfers involve moving water from one region to another. Fiscal impacts include loss of property tax base and local government capacity to issue bonds, tighter spending limitations, and reduced revenue sharing. Transfers that involve surface waters may lead to degradation of water quality and loss of riparian habitat. Where surface water and groundwater are interrelated, the export of groundwater also can alter surface flows with potential adverse effects on vegetation and wetlands. Other environmental effects are associated with the retirement of irrigated land. Environmental consequences include soil erosion, blowing dust, and tumbleweeds that arise after crop production ceases.

When farmland is retired from agriculture, loss of farm sector jobs and income often follows. Businesses that provide goods and services to farmers are affected and future economic growth can be inhibited. As the tax base shrinks and local services decline, the area of origin becomes less attractive to new businesses. Also, water and land resources needed by new local development may be unavailable as a result of water exports. Economic losses suffered by areas of origin may be insignificant in the context of a state-wide economy, and may appear inconsequential relative to the benefits of additional water supplies which accrue to the new users of the water. Area of origin losses, however, can seriously impair the viability of small, rural communities which may lack the economic strength and diversity to recover.

In most western states, local government units are not involved formally in the change of water right process and consideration of area-of-origin impacts generally is not incorporated into transfer approval procedures. However, area-of-origin concerns are receiving more attention from state policy makers. Area-of-origin issues have the potential of affecting the conditions under which water transfers will be approved and the costs of implementing such transfers.

Recent Arizona legislative activity indicates a growing concern with the impact on rural areas of agricultural-to-urban water transfers. Legislation passed in 1986 allows payments in lieu of property taxes by cities who purchase and retire farmland to taxing jurisdictions in the area of origin.[52] In 1987, the Arizona legislature allowed municipally-held lands to be included in a county's net assessed valuation for the purpose of distributing state sales tax revenues to counties. This legislation also permits municipal holdings to be counted in assessed valuation for determining county levy limits, but only if the municipality agrees to pay in-lieu taxes to the county.[53] Years of conflict and litigation over dust storms and tumbleweeds generated by municipally-owned water farms culminated in legislation requiring owners of "water farms" to maintain the retired agricultural acreage free of dust and noxious weeds.[54] Arizona statutes provide that "no right to the use of water on or from any watershed or drainage area which supplies or contributes water for the irrigation of lands within an irrigation district, agricultural improvement district or water user association shall be severed or trans-

52. 1986 Ariz. Legis. Serv. ch. 146 (West).

53. 1987 Ariz. Legis. Serv. ch. 268 (West).

54. Jarvis v. State Land Dep't, 106 Ariz. 506, 479 P.2d 169 (1970), *injunction modified*, 113 Ariz. 230, 550 P.2d 227 (1976); 1986 Ariz. Legis. Serv. ch. 146 (West).

ferred without the consent of the governing body of such."[55] Transfer applicants routinely provide evidence to the Arizona Department of Water Resources that water organizations in the watershed of origin have consented to the proposed transfer, as a condition for transfer approval. Those wishing to transfer water out of a basin have incentive to consider impacts, because exporters of groundwater from one basin to another are potentially liable for damages to affected individuals in the basin of origin.[56] This statute has not yet been invoked to obtain compensation for damages resulting from water exports.

Colorado law requires that conservancy district projects which transfer water out of a basin must protect current and future consumptive water users in the basin of origin and must not increase their cost of obtaining water in the future.[57] In practice this has caused importing conservancy districts to build "compensatory storage" facilities in the basin of origin. Although affording significant protection to exporting communities, this provision applies only to conservancy districts and so does not protect rural areas from transfers by other entities, such as municipalities.

Colorado statutes also provide that when an action of statewide concern is proposed in a county, county commissioners may hold hearings on the proposed action and issue or deny a permit to allow the proposal to be implemented.[58] Eagle County commissioners have invoked this statute in order to obtain permitting authority over the Homestake II transmountain diversion project which would provide water for the cities of Aurora and Colorado Springs.

Water court proceedings generally are not a forum in which area-of-origin concerns can be addressed because harm to existing water rights is the only criterion that Colorado water courts are required to consider in evaluating transfer proposals.[59]

In Idaho, district watermasters must be advised of transfer proposals and must submit a recommendation to the Idaho Department of Water Resources when they evaluate a proposed change in use. The consent of irrigation districts or corporations is required for approval of proposals that would transfer water out of their service areas.[60] Some area of origin considerations are formally incorporated into Idaho Department of Water Resources transfer approval policies. These include: "direct and indirect economic impacts" and "the affairs of people in the area."[61]

In 1985, Montana enacted legislation that prohibits any entity other than the Montana Department of Natural Resources and Conservation from engaging in out-of-basin transfers.[62] Organizations wishing to use water imported from another basin must negotiate with the state agency and may

55. ARIZ. REV. STAT. ANN. § 45-172(5) (1987).
56. ARIZ. REV. STAT. ANN. §§ 45-544, -545 (1987).
57. MacDonnell & Howe, *Area of Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches*, 57 U. COLO. L. REV. 527 (1986).
58. COLO. REV. STAT. ANN. § 24-65.1 (1973).
59. COLO. REV. STAT. ANN. § 37-92-304 (1973).
60. IDAHO CODE § 42-108 (Supp. 1989).
61. IDAHO CODE §§ 42-203(A), -222 (Supp. 1989).
62. MONT. CODE ANN. § 85-2-141 (1985).

lease up to 50,000 acre feet for a period of fifty years from the state. The designation of a state agency as the sole applicant for interbasin water right transfers facilitates public scrutiny of such transfers, and allows for incorporation of area-of-origin concerns.

Nevada requires that county commissions be notified of changes in the place of use for water rights that will move water across county lines.[63] The commissioners then hold public hearings to solicit input before making a recommendation to the state engineer regarding approval of the change application. Even though the state engineer is not bound by the county's recommendation, hearings involving rural and agricultural interests may increase transferrors' sensitivity to local concerns.

In New Mexico, transfers of water rights that were initiated as a result of the formation of a district, and held in the name of the district require approval by district authorities.[64] The state engineer takes the position that rights perfected prior to the creation of an irrigation district may be transferred without the approval of the district, although case law has been unclear regarding this issue.[65] New Mexico state codes provide for reserving a share of a basin's water supply for use in the basin of origin. However, water users in areas dependent upon imported water, resist recapture by the area of origin. The conditions under which recapture would be permitted were never clearly spelled out.[66]

Area-of-origin issues have been raised in New Mexico in response to a number of proposed transfers. The impacts on local culture of water transfers out of traditional acequia-based irrigation systems to nonagricultural uses were a key issue in the *In re Sleeper* decision in Rio Arriba County.[67] In *Sleeper*, a state district court found that a proposed transfer of agricultural water rights to a resort project not only impaired the rights of other agricultural water users, but also was contrary to the public interest because it undermined local cultural traditions based on irrigated agriculture. The Court of Appeals reversed the district court finding in 1988.[68]

Neither Utah statutory law nor case law addresses directly the impact of water transfers on the area of origin. Utah has an active and viable farm economy dating from the early years of Mormon settlement. Concern with the impact of transfers on the agricultural sector have arisen in the context of energy development.[69] Area-of-origin concerns in Utah appear to have been addressed through negotiation and litigation on a case-by-case basis rather than through legislation.

In Wyoming, water rights may not be transferred out of their basin of

63. NEV. REV. STAT. ANN. § 533.363 (Michie 1987).

64. N.M. STAT. ANN §§ 72-5-1, -12-1 (1978).

65. *See, e.g.*, Middle Rio Grande Conservancy Dist. v. Cox, N.M., No. 6745, 17145 (13 N.M. Jud. Dist. Ct. 1988) (appeal pending).

66. MacDonnell & Howe, *supra* note 57.

67. *In re* Sleeper, No. RA 84-53(c) (Rio Arriba County Ct. 1986).

68. *In re* Sleeper, 107 N.M. 494, 760 P.2d 787 (1988).

69. Brown, Tyseling & DuMars, *Water Reallocation, Market Proficiency and Conflicting Social Values*, in WATER AND AGRICULTURE IN THE WESTERN UNITED STATES: CONSERVATION, REALLOCATION, AND MARKETS 191 (G. Weatherford ed. 1982).

origin although "wet water" associated with water rights may be transported for use out of the basin of origin.

SUMMARY

As evident in this analysis, the administrative procedures involved in a change in the purpose of a water right in these western states are similar in many aspects. Some differences between the states concern style and terminology more than substance. There are, however, distinctions in the change of water right process which have important implications for water users, protestants, administrative agencies and the public.

Ideally, water transfer procedures should distinguish between desirable and undesirable changes in water use, while minimizing costs incurred by applicants, protestants and the state agency. Since all proposed changes in the purpose of use of a water right are not necessarily in the best interests of the state and its citizenry, state water agencies serve a vital role in regulating changes, settling disputes among parties, and protecting broader interests.

Western states, whose primary concern in change of water right procedures has been protection of other water right holders, have begun to incorporate broader concerns into their water transfer approval processes. They have done so through public interest statutes and case law and through permitting water appropriations or reservations for instream flow maintenance. They have also adopted a variety of provisions that give local governments and water districts a voice in the transfer approval process and allow consideration of area-of-origin impacts.[70]

70. Morandi provides specific suggestions and statutory language useful to state policymakers considering how they might address broader concerns regarding water transfers. L. MORANDI, REALLOCATING WESTERN WATER: EQUITY, EFFICIENCY AND THE ROLE OF LEGISLATION (1988).

FIGURE 1. CHANGE OF WATER RIGHT PROCESS

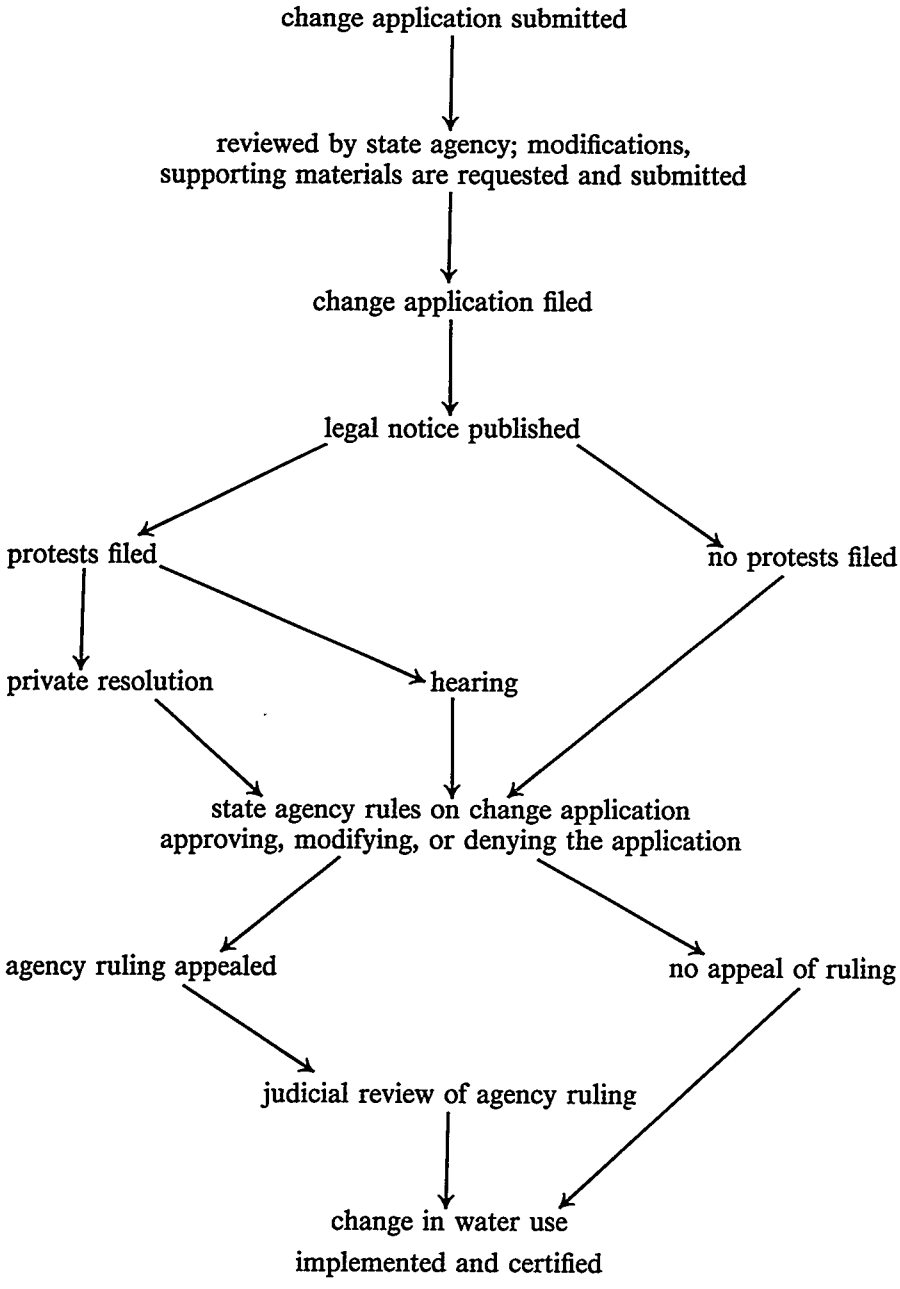

TABLE 1: TERMINOLOGY, FILING AND PUBLIC NOTICE POLICIES

STATE:	NEW MEXICO	UTAH	NEVADA	COLORADO	ARIZONA Groundwater (1)	ARIZONA Surface Water (2)	MONTANA	IDAHO	WYOMING
State Agency Administering Changes in Water Rights	State Engineer	Division of Water Rights	Department of Conservation and Natural Resources	Division of Water Resources	Department of Water Resources	Department of Water Resources	Department of Natural Resources and Conservation	Department of Water Resources	Board of Control
Term for person desiring change:	applicant	applicant	applicant	applicant	applicant	applicant	applicant	applicant	petitioner
Term for person opposed to change:	protestant	protestant	protestant	opposer	protestant	protestant	objector	protestant	protestant
Filing fee; applicant to change purpose of use:	$5	$30-$450	$40	$159	$30	$50	$50	$50; $30 if less than 0.2 cfs	$30
Standard form available for filing application?	yes	yes	yes	yes	yes	yes	yes	yes	no, affidavit
Application submitted to:	State Engineer district office	Division of Water Rights area office	Division of Water Resources central office	Division Water Court	Active Management Area office	Department of Water Resources	field office	regional office	State Board of Control
Time required for public notice:	once a week for 3 weeks	once a week for 3 weeks	once a week for 5 weeks	once	no public notice	once a week for 3 weeks	once	once a week for 2 weeks	once during 30 days

NOTES:
(1) Groundwater information for Arizona refers to a conversion of Irrigation Grandfathered Rights to Type I rights for non-irrigation uses within Active Management Areas.
(2) Surface water information for Arizona refers to a severance and transfer procedure.

TABLE 2: PROTEST AND HEARING POLICIES

STATE:	NEW MEXICO	UTAH	NEVADA	COLORADO	ARIZONA Groundwater (1)	ARIZONA Surface Water (2)	MONTANA	IDAHO	WYOMING
Standard form for protests?	no, usually letter	yes, but not required	yes, but not required	yes	no protest process	none required	no	no	no, written or verbal
Time limit to file protests from last date of publication:	10 days	30 days	30 days	30 days	not applicable	none	2 weeks	10 days	specified in public notice
Must protestant be water right holder?	no	yes	no	no	not applicable	no	yes	no	no
Methods of resolution available	private resolution or hearing	private resolution or hearing	private resolution, field investigation, or hearing	private resolution or hearing	not applicable	private resolution or hearing	private resolution or hearing	conference or hearing	private resolution or hearing
Must applicant respond?	yes, within 30 days of hearing	no	no	yes, within 20 days of protest	not applicable	no	yes, within 30 days of Statement of Opinion	no	no
Hearing deposit required?	yes, $300	no	no	no	not applicable	no	no	no	no
Typical length of hearing	1 day-2 weeks	1-2 hours	1-6 days	1 day to a few weeks	not applicable	2-4 hours	3-4 hours	4 hours-3 days	2 hours-6 days
Attorneys usually present?	yes	yes	yes	yes	not applicable	no	yes	yes	yes

NOTES:
(1) Groundwater information for Arizona refers to a conversion of Irrigation Grandfathered Rights to Type I rights for non-irrigation uses within Active Management Areas.
(2) Surface water information for Arizona refers to a severance and transfer procedure.

TABLE 3: CRITERIA APPLIED IN ADMINISTRATIVE RULINGS AND RULING POLICIES

STATE:	NEW MEXICO	UTAH	NEVADA	COLORADO	ARIZONA Groundwater (1)	ARIZONA Surface Water (2)	MONTANA	IDAHO	WYOMING
State Agency Evaluation Criteria;	1) impairment of existing rights; 2) contrary to water conserv.; 3) detrimental to public interest	1) impairment of vested rights 2) unreasonably affect public recreation or the natural stream environment 3) detrimental to the public welfare	1) impairment; 2) adverse to public interest	1) non-injury; 2) non-enlargement; 3) maintain historic returns	1) land outside service area; 2) development plan filed; 3) non-irrig. use; 4) land previously irrigated	1) non-injury; 2) non-enlargement of subject rights; 3) consent from district or assoc.; perfected rights	1) non-impairment; 2) means of approp. works must be adeq.; 3) proposed use is beneficial use	1) non-injury; 2) non-enlargement; 3) consistent with local public interest	1) non-enlargement of division, historically and beneficially consumed; 2) non-impairment of return flows; 3) non-injury
Time limit from end of protest period in which to rule:	none	none	one year	60 days	none	30 days	180 days	none	none

NOTES:
(1) Groundwater information for Arizona refers to a conversion of Irrigation Grandfathered Rights to Type I rights for non-irrigation uses within Active Management Areas.
(2) Surface water information for Arizona refers to a severance and transfer procedure.

TABLE 4: POLICIES REGARDING APPEALS AND CERTIFICATION OF WATER RIGHT CHANGES

STATE:	NEW MEXICO	UTAH	NEVADA	COLORADO	ARIZONA Groundwater (1)	ARIZONA Surface Water (2)	MONTANA	IDAHO	WYOMING
Time limit to appeal ruling:	30 days	30 days	30 days	20 days	15 days	15 days (3) 35 days (4)	—	30 days	30 days
Forum for Appeal:	State District Court	State District Court	State District Court; appeals involving Carson and Truckee Rivers go to Federal District Court	Division Water Court or State District Court upon request	administrative review of law or rehearing on facts	administrative review of law or rehearing on facts	State District Court	petition for rehearing or State District Court	State District Court
Typical time period from application filing to administrative ruling:	6 months -2 years	6 months -2 years	5 months -1 year	6 months -1 year	6 months or less	6 months -1 year	6 months -1 year	8 months	6-8 months
Time period for applicant to demonstrate implementation of approved change:	4 years	3 years	variable, but less than 5 years	court decree is evidence; subject to abandonment	no process	no process; subject to forfeiture and abandonment statute	variable	no process	up to 5 years
Extensions available on this time period?	yes; 1 year	yes; up to 50 years	yes; 1 year	not applicable	not applicable	not applicable	up to 10 years	not applicable	variable up to 5 years

NOTES:
(1) Groundwater information for Arizona refers to a conversion of Irrigation Grandfathered Rights to Type I rights for non-irrigation uses within Active Management Areas.
(2) Surface water information for Arizona refers to a severance and transfer procedure.
(3) For administrative appeal.
(4) For judicial appeal.

TABLE 5: COMPARISON OF PUBLIC WELFARE AND INSTREAM FLOW PROVISIONS

STATE:	NEW MEXICO	UTAH	NEVADA	COLORADO	ARIZONA Groundwater (1)	ARIZONA Surface Water (2)	MONTANA	IDAHO	WYOMING
Public interest/ public welfare apply to water transfers?	yes; statutory	yes; statutory	yes; statutory	no	yes; case law	no	yes (limited); statutory	yes; statutory	no
Specific public interest/public welfare criteria?	consistant with conservation in the state	impacts on public recreation or natural stream environment	none	none	impacts on groundwater recharge	none	transfers of more than 4,000 acre-feet to consider impacts on existing and future demands, instream flow, and the environment	impact on local economy, fish recreation, and compliance with air, water and hazardous substance standards	none
Basis of Instream Flow Law:	none	statute	case law	statutes	not applicable	case law	statute	statutes	statute
Who may apply for instream flow permit?	no precedent	Division of Wildlife Resources	federal government agencies	Colorado Water Conservation Board; U.S. Dept. Agric.; U.S. Dept. Int.	not applicable	anyone	any state or political subdivision	Idaho Water Resources Board	Wyoming Water Development Commission; Water Division of Economic and Stabilization Board

NOTES:
(1) Groundwater information for Arizona refers to a conversion of Irrigation Grandfathered Rights to Type I rights for non-irrigation uses within Active Management Areas.
(2) Surface water information for Arizona refers to a severance and transfer procedure.