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OFFICE OF THE ATTORNEY GENERAL
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February 24, 2004

The Honorable Laird Noh
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Noh and Representative Stevenson:

This letter is in response to the questions presented in your February 3, 2004, inquiry regarding the revisions proposed by House Bill (H.B.) 636, which would amend the definition of "consumptive use" under Idaho Code § 42-202B and preclude the Director of the Department of Water Resources from considering actual or historic consumptive use in taking action upon an application to change any element of a water right under Idaho Code § 42-222.

QUESTIONS PRESENTED

- Does the Prior Appropriation Doctrine, adopted by Article XV, Section 3, of the Idaho Constitution, implemented through statutes by the Legislature, and endorsed by the Idaho courts, require that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights?
2. If not, what recourse, if any, do the holders of other affected water rights have to ensure that injury to their water rights does not occur as a result of such transfers?

CONCLUSION

Our reading of the prior appropriation doctrine as implemented by Idaho and most other prior appropriation states requires that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights. The current provisions of Idaho Code §§ 42-202B and -222 are in accord with the statutes and law of other prior appropriation states.¹ If H.B. 636 were enacted as proposed, the Director would be precluded from considering historical consumptive use “as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.” An affected water right holder would still be entitled to challenge the proposed transfer of an existing right on the grounds that the change would result in injury, is inconsistent with the State’s policy on the conservation of water, or is not in the local public interest. However, enactment of H.B. 636 would seriously limit the ability of an affected water right holder to successfully protect his or her water right from any injury caused by an increase in consumptive use authorized by the transfer or change in use of another water right.

ANALYSIS

A. Doctrine of Historical Consumptive Use in Idaho

The only reported Idaho case that applies Idaho Code §§ 42-202B and -222 is *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).² Barron applied to the Idaho Department of Water Resources (“Department”) to transfer a water right. During the preliminary stages, the local watermaster recommended that the Department deny the transfer on the basis that, if granted, injury to downstream appropriators might occur. Following the watermaster’s recommendation, the Department requested that Barron provide additional information that the transfer would not injure other users. Concluding that the additional information was insufficient to establish that downstream appropriators would not be injured if the transfer were approved, the Department denied the request. Barron subsequently sought judicial review of the Department’s decision, which was affirmed by the district court.

¹ The prior appropriation states are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

² The Idaho Supreme Court historically has not allowed transfer applications based on injury to downstream junior appropriators. In *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915), a sawmill owner sought to transfer his water right to upstream irrigators. Concluding that change in the nature of use from non-consumptive to consumptive, and change in place of use to an upstream location, would injure downstream junior appropriators, the court denied the transfer. “As against the change sought by petitioners, the junior appropriators had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriations, unless the change can be made without injury to such right.” 27 Idaho at 41, 147 P. at 1078.

On appeal from the district court, the Idaho Supreme Court concluded Barron had not met his burden of demonstrating no injury would occur if the transfer were granted. *Id.* at 418, 18 P.3d at 223. In applying Idaho Code §§ 42-202B and -222, the Idaho Supreme Court ruled, “Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use.” *Id.* at 420, 18 P.3d at 225. The court further found that Barron had failed to supply sufficient information for the Department to establish the historical consumptive use under the water right proposed for transfer. *Id.* at 419, 18 P.3d at 224. Therefore, the court affirmed the Department’s denial of Barron’s transfer application.

B. Doctrine of Historical Consumptive Use in Other Prior Appropriation States

Because the Idaho courts have not discussed the theoretical basis behind the application of the doctrine of historical consumptive use in a transfer proceeding, it is appropriate to examine the reasoning from courts in other prior appropriation states. Before examining the opinions of other prior appropriation states, however, the precise nature of a water right must be discussed.

According to the doctrine of prior appropriation, water is a public resource to which individuals are allotted a right to use. *See, e.g.*, Idaho Code § 42-101. While water rights are considered real property, Idaho Code § 55-101(1), water rights are unique because they are “usufructuary.”³ As a usufructuary right, water rights do not stand on their own. Instead, water rights “are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied” Idaho Code § 42-101.

Because a water right is a usufructuary right, a water right is quantified by the amount of water an individual can beneficially use. To be a beneficial use, “the end use for the water must be generally recognized and socially acceptable use” WATER AND WATER RIGHTS § 12-24 (Robert E. Beck ed., 2001). Therefore, even if an individual possess a right to divert a certain quantity of water, that individual’s entitlement is limited by the amount of water he or she can apply to a beneficial purpose. *See* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho Law Review 1, 38 (1968) (“The [Idaho] supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use”). Limiting an individual’s ability to use water only for beneficial uses maximizes water resources; helps prevent waste, and injury to other users. *Id.* at 2-3.

Consistent with the theory that water is a public resource that should be managed for the greater good, and that beneficial use is the measure of a water right, “[a] water holder *can only transfer the amount that he has historically put to beneficial use*. Beneficial use is the measure and limit of the transferable right whether the right is a permit or non-permit based right.” A.

³ “[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself.” SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911).

DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:139 (2003) (emphasis added). Therefore, under the doctrine of prior appropriation, the amount of water available to transfer cannot be quantified without an examination of the past use of that right.

While both the Arizona⁴ and Colorado⁵ supreme courts have expressly stated that the amount of water available to transfer under the doctrine of prior appropriation is limited to historical consumptive use, the most thorough analysis behind the application of historical consumptive use appears to have been undertaken by the Washington and Wyoming supreme courts. According to the Washington Supreme Court:

Washington's [transfer] statute *is consistent with the principle of Western water law* that the diversion point of a water right put to beneficial use may be granted unless that change causes harm to other water rights. Both upstream and downstream water right holders can object to a change in the point of diversion or the place of use, which could affect natural and return flows and, thus, adversely affect their rights. A. Dan Tarlock, *Law of Water Rights and Resources* § 5.17[3][a], at 5-92.1 to .3 (1996); *see, e.g., Haberman v. Sander*, 166 Wash. 453, 7 P.2d 563 (1932); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629 (1954). The statute also presumes that a change in point of diversion may be made only where water has been put to a beneficial use. This is also consistent with established water law principles. *A transferred right or a change in point of diversion may be granted only to the extent the water right has historically been put to beneficial use. E.g., May v. United States*, 756 P.2d 362, 370-71 (Colo. 1988); *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52, 57 (1968); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988); *Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978); *see also Tarlock*, § 5.17[5], at 5-93. "[B]eneficial use determines the measure of a water right. The owner of a water right is entitled to the amount of water necessary for the purpose to which it has been put, provided that purpose constitutes a beneficial use." *Dep't of Ecology v. Grimes*, 121 Wash.2d 459, 468, 852 P.2d 1044 (1993).

Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 737 (Wash. 1997) (emphasis added).

In Wyoming, the state supreme court engaged in an extended discussion of the policy behind limiting the amount of water available in a transfer proceeding to the amount historically

⁴ In a groundwater reallocation proceeding involving the city of Tucson, the Arizona Supreme Court stated that the amount of water subject to reallocation was limited to the "annual historical maximum use upon the lands so acquired." *Jarvis v. State Land Dep't*, 550 P.2d 227, 228 (Ariz. 1976) (emphasis added).

⁵ "The amount of consumable water available for transfer depends upon *the historic beneficial consumptive use of the appropriation for its decreed purpose at its place of use.*" *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 59 (Colo. 1999) (emphasis added).

used for a beneficial purpose. *Basin Elec. Power Co-Op v. State Board of Control*, 578 P.2d 557 (Wyo. 1978). There, the court stated:

While this court has for many years recognized that one of the fundamental principles applicable to any transfer of water rights for change in use is the avoidance of injury (*Johnston v. Little Horse Creek Irrigation Co.*, supra), *equally fundamental is the principle which holds that an appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use.* Our statutes provide:

“ . . . Beneficial use shall be the basis, the measure and the limit of the right to use water at all times, not exceeding the statutory limit” (Emphasis supplied) Section 41-3-101, W.S. 1977 (Section 41-2, W.S.1957).

We have previously said that the water right of an appropriator is limited to beneficial use, even though a larger amount has been adjudicated. Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 P.2d 568, 570-571, and *Budd v. Bishop*, Wyo., 543 P.2d 368, 373. *The decreed amount of water may be prima facie evidence of an appropriator's entitlement (Quinn, supra), but such evidence may be rebutted by showing actual historic beneficial use. Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable. The state's abandonment statutes, ss 41-3-401 and 41-3-402, W.S.1977 (ss 41-47.1 and 41-47.2, W.S.1957, 1975 Cum. Supp.), are recognition of this requirement. See also, Budd v. Bishop, supra. This principle announced in Johnston, supra, at 79 P. 24, continues to be the law to this day. We said in Johnston:*

“As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he cannot sell surplus water which he does not need, while retaining his original appropriation; . . .” (Emphasis supplied)

As we have heretofore observed, the Johnston decision indicates that if the seller-appropriator or the buyer were shown to have committed waste or that they intend the commission of waste the court would interfere.

The key to understanding the application of beneficial-use concepts to a change-of-use proceeding is a recognition that the issues of nonuse and misuse are inextricably interwoven with the issues of change of use and change in the place of use. This is true even without the formal initiation of abandonment

proceedings under the statutes. If an appropriator, either by misuse or failure to use, has effectively abandoned either all or part of his water right through noncompliance with the beneficial-use requirements imposed by law, he could not effect a change of use or place of use for that amount of his appropriation which had been abandoned.

Prior to the enactment of s 41-3-104, *supra*, the laws of Wyoming did not clearly recognize the role played by the concept of beneficial use in the context of a change-of-use proceeding. Emphasis was placed, in cases where such changes were allowed, on the avoidance of injury to other appropriators. Commentators and those involved in water administration, however, came to realize the great disparity between the actual practices of water users and adjudicated water rights.

Id. at 564-566 (emphasis added).

C. Codification of Historical Consumptive Use in the Prior Appropriation States

While the appellate courts in many of the prior appropriation states have seemingly not engaged in a thorough theoretical analysis of the doctrine of historical consumptive use, every prior appropriation state--with the exception of Alaska--has codified statutes that limit water transfers.⁶ Of those states, Colorado, Oregon, Washington, and Wyoming appear to have statutes that are the most similar to the current version of Idaho Code §§ 42-202B and -222. Even in the states that have not expressly defined the theory of consumptive use--California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Texas--legislation prevents the reallocation of water if it will injure any vested water right holder.

Presently, Utah appears to be the only prior appropriation state with a statute similar to the proposed revisions to Idaho Code §§ 42-202B and -222. The Utah transfer statute provides that “[a] change may not be made if it impairs any vested right without just compensation.” Utah Code § 73-3-3(2)(b). However, another subsection of the same statute also provides that “[t]he state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.” Utah Code § 73-3-3(7)(a).

While Utah Code § 73-3-3(7)(a) clearly states that injury may not be the sole reason for denying a request to reallocate water, the Utah Supreme Court has found the opposite. In *Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co.*, 367 P.2d 855 (Utah 1962),⁷ the state supreme court was presented with an application for change of use that, if

⁶ See Appendix attached.

⁷ Utah Code § 73-3-3 was codified in 1919, but has been amended numerous times since its enactment. The current language in Part (7)(a) has been in existence since at least 1947. See *Moyle v. Salt Lake City*, 176 P.2d 882 (Utah 1947). Therefore, Part 7(a) predates the Utah Supreme Court’s 1962 decision in *Piute*.

evidence presented supported a finding of injury, the court denied the application: “if vested rights will be impaired by such change or application to appropriate, such application should not be approved.” *Id.* at 858. Therefore, the Utah Supreme Court appears to have limited the application of Utah Code § 73-3-3 in a manner consistent with the doctrine of prior appropriation in the other western states.

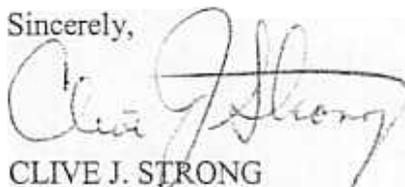
D. Recourse Available to Holders of Affected Water Rights

Even if Idaho Code §§ 42-202B and -222(1) are amended as proposed in H.B. 636, affected water right holders would still be able to object to the proposed transfer or change of a valid water right on grounds of injury, enlargement of the original right, inconsistency with the conservation of water resources, or violation of the local public interest. Idaho Code § 42-222(1). However, if Idaho Code § 42-222(1) is changed as proposed, and only the “authorized” as opposed to the “actual or historic” consumptive use volume can be considered by the Director in a transfer proceeding, it may be difficult for the holder of an affected water right to protect his or her right from injury caused by an increase in consumptive use under a transferred water right.

Under the prior appropriation doctrine, water authorized to be diverted and beneficially used under a permit, license, or decree but not required to accomplish the beneficial use being made must remain part of the public water resource available to meet the needs of other water right holders. Thus, if a water right holder has not been required to use the maximum amount of water authorized under the right in order to accomplish the beneficial use made, the remaining water has likely been left in the stream or other public source and appropriated by other users. Depending on the duration of this practice, other appropriators may have come to rely upon the unused water to meet their needs.

In the event that a water right holder seeks to transfer or change his or her water right, other appropriators could be injured if the amount of water available for transfer or change is the entire permitted, licensed, or decreed right--more than the amount beneficially used. As Idaho law currently stands, the Director could limit the transfer or change based on the historic use of the water right, determining that a transfer of the full amount of water authorized to be used under the right would injure other appropriators or constitute an enlargement of the beneficially used right. Without the ability to look at historical use, it may be difficult for the Director to deny or condition a transfer or change on the basis of injury or enlargement.

Sincerely,



CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

APPENDIX

The following is a survey of laws currently in effect in the prior appropriation states that govern water reallocation.

1. Alaska

Alaska does not statutorily regulate water transfers; however, Alaska common law recognizes that a transfer can be denied on the basis of injury. WATER AND WATER RIGHTS § 14-44 n.200 (Robert E. Beck ed., 2001).

2. Arizona

Arizona Revised Statute § 45-172 states that the amount of water available for reallocation shall not “exceed the vested rights existing at the time of such severance and transfer, and the director shall by order so define and limit the amount of water to be diverted or used annually subsequent to such transfer.”

3. California

California Water Code § 1702 establishes that a reallocation of water may not occur if the change will “operate to the injury of any legal user of the water involved.”

4. Colorado

Colorado Revised Statute § 37-92-305 states:

- (3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.
- (4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

- (a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;
- (b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;
- (c) A time limitation on the diversion of water for which the change is sought in terms of months per year;
- (d) Such other conditions as may be necessary to protect the vested rights of others.

5. Kansas

Kansas Statute § 82a-1502 states that in a water reallocation proceeding, “the hearing officer shall consider all matters pertaining thereto, including specifically, (1) Any current beneficial use being made of the water proposed to be diverted . . . (3) . . . other impacts of approving or denying the transfer of the water.”

6. Montana

According to Montana Code § 85-2-402:

. . . the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

- (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

7. Nebraska

Nebraska Revised Statute § 46-294 states:

The Director of Natural Resources shall approve an application filed pursuant to section 46-290 if:

- (a) The requested change of location is within the same river basin, will not adversely affect any other water appropriator,

- and will not significantly adversely affect any riparian water user who files an objection in writing prior to the hearing;
- (b) The requested change will use water from the same source of supply as the current use;
 - (c) The change of location will not diminish the supply of water otherwise available;
 - (d) The water will be applied to a use in the same preference category as the current use, as provided in section 46-204 [domestic, agricultural, or manufacturing]; and
 - (e) The requested change is in the public interest.

8. Nevada

According to Nevada Revised Statute § 533.370:

- 1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:
 - (a) The application is accompanied by the prescribed fees;
 - (b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and
 - (c) The applicant provides proof satisfactory to the State Engineer of:
 - (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
 - (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

Nevada Revised Statute § 533.371 states that a reallocation of water may not occur if “[t]he proposed use conflicts with existing rights; or [t]he proposed use threatens to prove detrimental to the public interest.”

9. New Mexico

New Mexico Statute § 72-5-23 states:

All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, all or any part of the right may be severed from the land, simultaneously

transferred and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state, on the approval of an application of the owner by the state engineer. Publication of notice of application, opportunity for the filing of objections or protests and a hearing on the application shall be provided as required by Sections 72-5-4 and 72-5-5 NMSA 1978.

North Dakota

According to North Dakota Century Code § 61-04-15.2, “[t]he state engineer may approve the proposed change if the state engineer determines that the proposed change will not adversely affect the rights of other appropriators.”

Oklahoma

Oklahoma Statute § 82-105.23 states: “Any appropriator of water including but not limited to one who uses water for irrigation, may use the same for other than the purposes for which it was appropriated, or may change the place of diversion, storage or use, in the manner and under the conditions prescribed for the transfer of the right to use water for irrigation purposes in Section 105.22 of this title.” Oklahoma Statute § 82-105.22 states that a change in use may occur “if such change can be made without detriment to existing rights.”

12. Oregon

According to Oregon Revised Statute § 540.520:

The application required under subsection (1) of this section shall include:

- (a) The name of the owner;
- (b) The previous use of the water;
- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use which is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner’s water right certificate or that the water right is not subject to forfeiture under ORS 540.610.

13. South Dakota

South Dakota Codified Laws § 46-5-34.1 states that a reallocation of a water right will not be granted “unless the transfer can be made without detriment to existing rights having a priority date before July 1, 1978, or to individual domestic users.” Emphasis added. South

Dakota Codified Laws § 46-5-34.1 further limits reallocation by stating that “[n]o land which has had an irrigation right transferred from it pursuant to this section, may qualify for another irrigation right from any water source.”

14. Texas

According to Texas Water Code § 11.134(b):

The commission shall grant the application only if:

- (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use;
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;
 - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and
- (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Subdivision (8)(B), Section 11.002.

15. Utah

Utah Code § 73-3-3 states in relevant part:

- (2)(a) Any person entitled to the use of water may make permanent or temporary changes in the:
 - (i) point of diversion;
 - (ii) place of use; or
 - (iii) purpose of use for which the water was originally appropriated.
 - (b) A change may not be made if it impairs any vested right without just compensation.
-
- (4)(a) A change may not be made unless the change application is approved by the state engineer.

The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.

The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.

16. Washington

Revised Code of Washington § 90.03.380 states:

(1) The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.

17. Wyoming

According to Wyoming Statute § 41-3-104(a):

When an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. The petition shall set forth all pertinent facts about the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and the proposed place of use. The board may require that an advertised public hearing or hearings be held at the petitioner's expense. The petitioner shall provide a transcript of the public hearing

to the board. The 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 shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:

- (i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;
- (ii) The extent to which such economic loss will be offset by the new use;
- (iii) Whether other sources of water are available for the new use.