

Water as a Part of the Public Trust: A Review of Selected State Codes*

Water Policy Working paper #2002-001

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January 2002

*The authors greatly acknowledge financial support for this work provided by the U.S. Department of Agriculture (2001-38869-10607) and Georgia's Soil and Water Commission (480-02-FR1001)

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Abstract

The purpose of this paper is to survey state codes primarily in the Western States for the purpose of determining the extent to which water resources have been explicitly identified as a part of the state's public trust. Our primary interest was in states wherein water law is based on the prior appropriation doctrine. A strict limitation was found to be impractical, given that some states have water rights based on prior appropriation *and* the riparian doctrine.

Each code is arbitrarily graded A, B, or C, to indicate the strength of public trust statements found in the state codes. We recognize that the State's Supreme Court, not the legislature, decides what resources are included in a public trust, as well as any limits on the legislature's issuance of usufructuary rights to use the resource. Therefore, this was taken into account when grading the state's code.

The method used to access data reported here was using a keyword search in Lexis-Nexis. The reader should keep in mind that the authors are not lawyers nor were the state codes reviewed in their entirety. The key words used in the search were: "public trust", "public interest", and "water".

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I. Introduction

This paper represents the authors' efforts to survey state codes primarily in western states for the purpose of determining the extent to which water resources have been explicitly identified as a part of the state's public trust. While not western states, Kansas is included given its contemporary importance in litigation involving Colorado and Nebraska, and Texas is included given changes in its laws over recent decades that are designed to strengthen water management by the state. Our primary interest was in states wherein water law is based on the prior appropriation doctrine. A strict limitation to such states was found to be impractical given that important states – Oregon and California as examples – have water rights based on prior appropriation *and* the riparian doctrine.

It is important that the reader understand the limited nature of this inquiry. First, the authors are not attorneys. Second, they make no pretense of having attempted to review the entirety of each state's code. The method used to access data reported here was simply to search for key words using Lexis-Nexis. The key words used were: "public trust," "public interest," and "water."

An admittedly crude effort is made to indicate the "strength" of public trust statements found in the state codes. Each code is *arbitrarily* graded A, B, or C, with A indicating the strongest statement. For example, Montana's code, given an A, provides that "The state is owner of all land below the water of a navigable lake or stream. The public trust doctrine provides the public with a constitutional right to use the banks of navigable streams up to the high-water mark despite a landowner's fee title... The public

trust doctrine bars a private party from interfering with the public's right to use of the surface of the waters owned by the state... the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.” (Mont. Code Ann. 70-1-202, 85-2-101). Utah's code, given a B+, states that “All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, *subject to all existing rights to the use thereof (emphasis added)*...The Legislature finds that the conservation, development, treatment, restoration, and protection of the waters of this arid state are a state purpose and a matter of statewide concern.” (Utah code Ann 73-1-1, 73-10c-1)

We recognize that the determination of what resources are included in a public trust, as well as the interpretation of the substance of the public trust, is a matter decided by a state's Supreme Court, not the legislature. Our data must be viewed within this light. For example, we rank Arizona's code as an A notwithstanding language in the code that provides that “The public trust *is not* (emphasis added) an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the court shall not make a determination as to whether public trust values are associated with any of all of the river system or source.” The assigned A reflects the fact that these provisions were struck down by the states' Supreme Court on the grounds that the legislature cannot pass laws that have the effect of removing constraints on their actions by constitutional provisions aimed at limiting their powers. We note that Idaho has a similar provision in their code, which has yet to be challenged in their Supreme Court.

Finally, when “unusual” provisions are found in the code that may be of interest to our ongoing studies of water management, such provisions are set out in a **Comments** section.

II. Arizona

Strength of language grade: A

Comments: Arizona's code is graded A notwithstanding provisions in § 45-263, which make the public trust inapplicable to water rights adjudications. This is because the Arizona Supreme Court struck down these provisions holding that the public trust doctrine is a constitutional limit on the legislature and, therefore, the legislature lacks the power to make the doctrine inapplicable in judicial proceedings.

A.R.S. § 45-263 (2001)

State law applicable; **public trust inapplicable**

A. State law, including all defenses available under state law, applies to the adjudication of all water rights initiated or perfected pursuant to state law.

B. The **public trust** is **not** an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the court shall **not** make a determination as to whether **public trust** values are associated with any or all of the river system or source.

A.R.S. § 37-1001 (2001)

Declaration of policy

It is declared the policy of the legislature to provide for the restoration and conservation of lands and soil resources of the state, the preservation of water rights and the control and prevention of soil erosion, and thereby to conserve natural resources, conserve wildlife, protect the tax base, protect public lands and **protect and restore this state's rivers and streams and associated riparian habitats**, including fish and wildlife resources that are dependent on those habitats, and in such manner to protect and promote the public health, safety and general welfare of the people.

A.R.S. § 37-1055 (2001)

Limitation of powers

A. **Nothing in this chapter shall affect existing water rights** or in any manner contravene the provisions of this title.

B. No district or public body shall undertake or cooperate in the planning, construction, improvement or maintenance of any structure, dike or channel for the storage, spreading, diversion or conveyance of water resulting in the consumptive use of water, on any watershed or drainage area which supplies or contributes water for the irrigation of lands within any irrigation district or for the irrigation of other lands having established rights in such water, without first submitting the plans therefore to the governing body of such irrigation district or districts. Such governing body shall within forty-five days after receipt of such plans either approve or reject them. The approval may be given for rangeland soil conservation practices by agreement on an annual or continuing basis between the governing bodies of the affected irrigation districts and the supervisors of such natural resource conservation districts. If the governing body fails to approve or reject the plans within forty-five days, it shall be deemed to have approved them. If the governing body rejects the plans, the district or public body proposing such plans may

appeal to the commissioner. The appeal shall be taken within forty-five days after such decision. The commissioner shall review the decision, and may approve the plans only if after an investigation and hearing he finds that the work proposed to be done will not result in the consumptive use of water. An appeal from the decision of the commissioner may be taken by either party pursuant to the provisions of section 37-215. The provisions of this subsection shall not preclude the use of any other legal remedy otherwise available to any person or interested party.

C. The diversion, application or use of water by means of any improvement constructed, maintained or operated under the provisions of this chapter shall not be construed to be an appropriation of or vest any right to the **use of public water**.

A.R.S. § 45-141 (2001)

Public nature of waters of the state; beneficial use; reversion to state; actions not constituting abandonment or forfeiture

A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, **belong to the public** and are subject to appropriation and beneficial use as provided in this chapter.

B. Beneficial use shall be the basis, measure and limit to the use of water. **An appropriator of water is entitled to beneficially use all of the water** appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right.

C. Except as otherwise provided in this title or in title 48, when the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the **water shall revert to the public** and shall again be **subject to appropriation**. This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919.

E. The following water exchange arrangements or substitutions do not constitute an abandonment or forfeiture of all or any portion of a right to use surface water:

A.R.S. § 45-182 (2001)

Claim of right to withdraw, divert or use **public waters**; exception; administration by director of water resources

A. Except as provided by subsections B and E of this section, all persons who before the effective date of this amendment to this section were using and claiming the right to withdraw or divert and make **beneficial use of public waters** of the state based on state law shall file not later than ninety days before the date of the filing of the director's final report pursuant to section 45-256 for the subwatershed in which the claimed right is located a statement of claim for each water right asserted, on a prescribed form. The filing by any person on behalf of its members or users shall constitute the required filing of the individual users under this section.

B. The requirement of the filing of a statement of claim shall not apply to any of the following:

1. Any water rights issued pursuant to a permit or certificate issued pursuant to law.
2. Rights acquired to the use of the mainstream waters of the Colorado River.

3. Rights acquired or validated by contract with the United States of America, court decree or other adjudication.

4. Rights to the **use of public waters** of the state that are determined to be de minimis pursuant to section 45-258.

D. A person who before the effective date of this amendment to this section was using and claimed the right to withdraw or divert and make **beneficial use of public waters** of the state based on state law and who is exempt from filing pursuant to subsection B of this section is permitted to file a statement of claim of right under this article for each water right asserted not later than ninety days before the date of filing of the director's final report

E. Water right claims may be asserted under this article for **uses, diversions or withdrawals of public waters** of the state based on state law and initiated at any time before the effective date of this amendment to this section. A claim may not be asserted under this article for **uses, diversions or withdrawals of public waters** of the state initiated on or after the effective date of this amendment to this section. Any person who before the effective date of this amendment to this section filed a statement of claim for a water right under this article is not required to file another statement of claim for the same water right after the effective date of this amendment to this section.

A.R.S. § 45-184 (2001)

Waiver and relinquishment of water right

Any person who is **claiming the right to divert or withdraw public waters** of the state based on state law and who fails to file a statement of claim as provided in this article shall have waived and relinquished any right, title or interest in that right.

A.R.S. § 45-187 (2001)

No rights acquired by adverse use or adverse possession

Beginning on May 21, 1974, **no rights to the use of public waters of the state may be acquired by adverse use or adverse possession as between the person and the state**, or as between one or more persons asserting the water right, but nothing contained herein affects the validity of a claim filed under this article based on prior adverse use or adverse possession.

A.R.S. § 45-188 (2001)

Future rights acquired through appropriation; rights within service area of agricultural or municipal provider

A. Any person who is **entitled to divert or withdraw public waters** of the state **through an appropriation** initiated on or after June 12, 1919 and evidenced by a **certificate of water right** issued under article 5 of this chapter, a court decree, or previous possession or continued beneficial use and who intentionally abandons the use thereof or who voluntarily fails, without sufficient cause, to beneficially use all or any part of the right to withdraw for any period of five successive years shall **relinquish** such right or portion thereof. The rights relinquished shall revert to the state, and the waters affected by such rights shall become available for appropriation to the extent they are not lawfully claimed or used by existing appropriators.

B. Any person who is entitled to divert or **withdraw public waters** of the state through

an appropriation initiated before June 12, 1919 and evidenced by a notice of appropriation, a court decree, previous possession or continued beneficial use or any other action taken in accordance with federal, state or territorial law existing at the time of the appropriation and who intentionally abandons its use relinquishes that right. The rights relinquished revert to the state, and the waters affected by those rights become available for appropriation to the extent they are not lawfully claimed or used by existing appropriators.

C. Water rights appurtenant to lands within the exterior boundaries of an irrigation district, water users' association, ditch company or similar provider of water for agricultural and municipal uses, or within the service area of a municipal provider or a private water company, are not subject to abandonment or forfeiture if the water provider and its agents maintain an operable water delivery system within that district or service area with the total capacity to deliver the amount of water appropriated.

D. If a use or claim is subject to forfeiture by nonuse, failure by the appropriator to use water within a five year period does **not** result in a forfeiture of the associated water right if water use is resumed before the occurrence of the earlier of any of the following:

1. The initiation of proceedings pursuant to section 45-189 to determine whether the right has been forfeited or abandoned.
2. The filing by a third party of a statement of claimant in a general adjudication instituted pursuant to article 9 of this chapter that asserts the right to use water from the stream in which the subject nonuse has occurred.
3. The assertion by a third party of written objections in response to an application by the appropriator to sever and transfer the right pursuant to section 45-172.

A.R.S. § 45-2101 (2001)

Declaration of policy

A. It is the declared policy of the legislature to provide for a coordinated effort for the restoration and conservation of the water resources of this state. This policy is designed to allow the **people of this state to prosper while protecting and restoring this state's rivers and streams and associated riparian habitats**, including fish and wildlife resources that are dependent on these important habitats. In support of this policy, financial resources shall be made available by this state to the **appropriate public and private entities to assist in water** resource management activities that protect this state's rivers and streams and associated riparian habitats.

III. California

Strength of language grade: A-B

Comments: Grading the public trust strengths of language in California’s code is made difficult by the fact that, while one does not find sweeping statements of water being a part of the public trust as seen, e.g., in the codes of Montana or Oregon, references to public interests and the state welfare as being tied to the state’s water resources are sprinkled throughout the code in virtually every section that deals with some aspect of water. Thus, one could easily argue a “grade” between A or B.

Cal Gov Code § 39933 (2001)

Waters to remain open to public; Public rights of way

All navigable waters situated within or adjacent to city shall remain open to the free and unobstructed navigation of the **public**. Such waters and the waterfront of such waters **shall remain open to free and unobstructed access by the people** from the public streets and highways within the city. Public streets, highways, and other public rights of way shall remain open to the free and unobstructed use of the public from such waters and waterfront to the public streets and highways.

Cal Wat Code § 350 (2001)

Governing body of water supply distributor authorized to declare water shortage emergency condition

The governing body of a distributor of a **public water** supply, whether publicly or privately owned and including a mutual water company, may declare a water shortage emergency condition to prevail within the area served by such distributor whenever it finds and determines that the ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation, and fire protection.

Cal Wat Code § 1201 (2001)

Water declared public and subject to appropriation

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby **declared to be public water of the State and subject to appropriation** in accordance with the provisions of this code.

Cal Wat Code § 1241 (2001)

Reversion of unused water

When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may **revert to the public** and shall, if reverted, be regarded as **unappropriated public water**. Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by the permittee.

Cal Const, Art X § 2 (2001)

Water resources; Riparian rights

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, *and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the **interest of the people and for the public welfare.*** The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

IV. Colorado

Strength of language grade: C

C.R.S. 25-10-102 (2001)

Legislative declaration

In order to preserve the environment and protect the public health and water quality; to eliminate and control causes of disease, infection, and aerosol contamination; and to reduce and control the pollution of the air, land, and water, it is declared to be in the **public interest** to establish minimum standards and rules for individual sewage disposal systems in the state of Colorado and to provide the authority for the administration and enforcement of such minimum standards and rules.

C.R.S. 33-10-107 (2001)

Powers of board

(1) The board has power to:

(a) Acquire by gift, transfer, lease, purchase, or long-term operating agreement such land and water, or interests in land and water, as the director, with the approval of the executive director, deems necessary, suitable, or proper for parks and outdoor recreation purposes or for the preservation or conservation of sites, scenes, open space, and vistas of **public interest**. As used in this section, "interest in land and water" means any and all rights and interest in land less than the full fee interest, including but not limited to future interests, easements, covenants, and contractual rights. Every such interest in land and water held by the board when properly recorded shall run with the land or water to which it pertains for the benefit of the citizens of this state and may be protected and enforced by the board in the district court of the county in which the land or water, or any portion thereof, is located.

(b) Lease, exchange, or sell any property, water rights, land, or interest in land or water rights, including oil, gas, and other organic and inorganic substances which now are or may become surplus or which, in the proper management of the division, the board desires to lease, exchange, or sell. All sales of property, water rights, or lands shall be at public sale, and the board has the right to reject any or all bids. As used in this paragraph (b), "exchange" means the transferring of property, water rights, land, or interest in land or water rights to another person in consideration for the transfer to the board

C.R.S. 25-8-102 (2001)

Legislative declaration

(1) In order to foster the health, welfare, and safety of the inhabitants of the state of Colorado and to facilitate the enjoyment and use of the scenic and natural resources of the state, it is **declared to be the policy of this state to prevent injury to beneficial uses made of state waters, to maximize the beneficial uses of water**, and to develop waters to which Colorado and its citizens are entitled and, within this context, **to achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state**. It is further declared that pollution of state waters may constitute a menace to public health and welfare, may create public nuisances, may be

harmful to wildlife and aquatic life, and may impair beneficial uses of state waters and that the problem of water pollution in this state is closely related to the problem of water pollution in adjoining states.

(2) It is further declared to be **the public policy of this state to conserve state waters** and to protect, maintain, and improve, where necessary and reasonable, the quality thereof for public water supplies, for protection and propagation of wildlife and aquatic life, for domestic, agricultural, industrial, and recreational uses, and for other beneficial uses, taking into consideration the requirements of such uses; to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to reasonably protect the legitimate and beneficial uses of such waters; to provide for the prevention, abatement, and control of new or existing water pollution; and to cooperate with other states and the federal government in carrying out these objectives.

(3) It is further declared that protection of the quality of state waters and the prevention, abatement, and control of water pollution are matters of statewide concern and affected with a **public interest**, and the provisions of this article are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

C.R.S. 33-33-102 (2001)

Legislative declaration

The general assembly hereby finds and declares that certain lands and waters of this state representing diverse ecosystems, ecological communities, and other natural features or phenomena, which are our natural heritage, are increasingly threatened with irreversible change and are in need of special identification and protection and that it is in the **public interest** of present and future generations to preserve, protect, perpetuate, and enhance specific examples of these natural features and phenomena as an enduring resource. It is the intent of this article to provide a means by which these natural features and phenomena can be identified, evaluated, and protected through a statewide system of designated natural areas.

C.R.S. 36-3-110 (2001)

Examination of proposal – report

(1) Immediately upon the receipt of any request and proposal as designated in section 36-3-107, it is the duty of the secretary of the board to examine the same and ascertain if it complies with the rules of the board and the regulations of the department of the interior. If it does not, it is to be returned for correction. If it does comply, it shall be submitted to the state engineer, who shall examine the same and make a written report to the board, stating whether the proposed works are feasible; whether the proposed diversion of the **public waters of the state will prove beneficial to the public interest**; whether there is sufficient unappropriated water in the source of supply; whether a permit to divert, store, and appropriate water through or by the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; and whether the maps filed comply with the requirements of his office and the regulations of the department of the interior. He shall determine whether the lands proposed to be irrigated are desert in character and such as may properly be set apart under the

provisions of the act of congress referred to in section 36-3-103 and the rules and regulations of the department of the interior.

C.R.S. 37-95-102 (2001)

Legislative declaration

(1) It is hereby declared to be **the public policy of the state** to preserve, protect, upgrade, conserve, develop, utilize, and manage the water resources of the state, to promote the beneficial use of waters of the state for the protection and preservation of the public health, safety, convenience, and welfare, to create or preserve jobs and employment opportunities or to improve the economic welfare of the people of the state, and to assist and cooperate with governmental agencies in achieving such purposes. In furtherance of such **public policy**, the Colorado water resources and power development authority is created in this article to initiate, acquire, construct, maintain, repair, and operate projects or cause the same to be operated pursuant to a lease, sublease, or other agreement with any person or governmental agency and may issue its bonds and notes payable solely from revenues to pay the cost of such projects.

(2) The general assembly finds and declares that the authority and powers conferred under this article and the expenditures of public moneys pursuant thereto constitute a serving of a valid public purpose and that the enactment of the provisions set forth in this article is in the **public interest** and is hereby so declared to be such as a matter of express legislative determination

C.R.S. 40-3-104.4 (2001)

Simplified regulatory treatment for small, privately owned water companies

The commission, with due **consideration to public interest**, quality of service, financial condition, and just and reasonable rates, shall grant regulatory treatment that is less comprehensive than otherwise provided for under this article to small, privately owned water companies that serve fewer than one thousand five hundred customers. The commission, when considering policy statements and rules, shall balance reasonable regulatory oversight with the cost of regulation in relation to the benefit derived from such regulation.

V. Idaho

Strength of language grade: C+

Comments: The Idaho Code contains provisions explicitly limiting the application of the public trust doctrine to water rights adjudications, much like those in the Arizona Code. However, unlike the case in Arizona, the Idaho Court has yet to rule on the constitutionality of these provisions.

Idaho Code § 42-108 (2000)

Change in point of diversion, place of use, period of use, or nature of use -- Application of act

The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

Idaho Code § 42-1425 (2000)

Accomplished transfers

1) Legislative findings regarding accomplished transfers and the **public interest.**

(a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.

(b) The legislature finds that many of these changes occurred with the knowledge of other

water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local **public interest** provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

(c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.

(2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(b) This section is not applicable to any claim based upon an enlargement of use.

Idaho Code § 58-1203 (2000)

Limitations to the Public Trust Doctrine (PTD)

The PTD is a limitation on the power of the state to alienate or encumber the title of the beds of navigable waters as defined in this chapter.

The PTD shall **not apply to the appropriation or use of water** or the granting, transfer, administration, or adjudication of water or water rights-provided in *Article XV of Constitution of Idaho, or any other law applicable to water rights in the State.

Nothing shall be construed as repealing, limiting, or otherwise altering any statutory or constitutional provisions of the State of Idaho concerning the appropriation, transfer and use of the waters of Idaho.

Idaho Constitution Article XV 1 (2000)*

The use of all waters now appropriated of that may be appropriated for sale, rental, or distribution, also all water originally appropriated for private use, is hereby **declared to be of public use.**

Idaho Constitution Article XV 3 (2000)*

The right to divert water and appropriate the unappropriated waters of any stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters are not sufficient, those using the water for domestic purposes shall have the preferences over those using the same for manufacturing purposes. Those using the water for mining purposes or milling purposes shall have preferences over those using the same for manufacturing or agricultural purposes. Uses shall be subject to law regulating the taking of private property for public and private use.

VI. Kansas

Strength of language grade: B

K.S.A. § 82a-927 (2000)

State water plan; long-range goals

The long-range goals and objectives of the state of Kansas for management, conservation and development of the waters of the state, are hereby declared to be:

- (a) The development, to meet the anticipated future **needs of the people of the state**, of sufficient supplies of water for beneficial purposes;
- (b) the reduction of damaging floods and of losses resulting from floods;
- (c) the protection and the improvement of the quality of the water supplies of the state;
- (d) the sound management, both public and private, of the atmospheric, surface, and groundwater supplies of the state;
- (e) the prevention of the waste of the water supplies of the state;
- (f) the prevention of the pollution of the water supplies of the state;
- (g) the efficient, economic distribution of the water supplies of the state;
- (h) the sound coordination of the development of the water resources of the state with the development of the other resources of the state; and
- (i) the protection of the public interest through the conservation of the water resources of the state in a technologically and economically feasible manner.

K.S.A. § 82a-711 (2000)

Permits to appropriate water; standards for approval of use; review of action on application

(a) If a proposed use neither impairs a use under an existing water right nor prejudicially and unreasonably **affects the public interest**, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purpose, within reasonable limitations except that the chief engineer shall not approve any application submitted for the proposed use of fresh water in any case where other waters are available for such proposed use and the use thereof is technologically and economically feasible. Otherwise, the chief engineer shall make an order rejecting such application or requiring its modification to conform to the **public interest** to the end that the highest public benefit and maximum economical development may result from the use of such water.

(b) In ascertaining whether a proposed use will prejudicially and unreasonably **affect the public interest**, the chief engineer shall take into consideration:

- (1) Established minimum desirable streamflow requirements;
 - (2) the area, safe yield and recharge rate of the appropriate water supply;
 - (3) the priority of existing claims of all persons to use the water of the appropriate water supply;
 - (4) the amount of each claim to use water from the appropriate water supply; and
 - (5) all other matters pertaining to such question.
- (c) With regard to whether a proposed use will impair a use under an existing water

right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit. Any person aggrieved by any order or decision by the chief engineer relating to that person's application for a permit to appropriate water may petition for review thereof in accordance with the provisions of K.S.A. 2000 Supp. 82a-1901 and amendments thereto.

K.S.A. § 42-315 (2000)

Right of use of water subject to eminent domain

Every right of use of water under this act shall be subject as to the right of eminent domain, and, as **public interest** and economy may require, may be condemned and compensated for as any other private right or property.

K.S.A. § 82a-1020 (2000)

Legislative declaration

It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas. It is, therefore, declared that in the **public interest** it is necessary and advisable to permit the establishment of groundwater management districts.

VII. Montana

Strength of language grade: A

Mont. Code Anno. § 70-1-202 (2001)

Property of the state -- what is included

- (1) all land below the water of a navigable lake or stream;
- (2) all property lawfully appropriated by it to its own use;
- (3) all property dedicated or granted to the state; and
- (4) all property of which there is no other owner

The **public has a right** of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact.

Mont. Code Anno. § 85-2-101 (2001)

Pursuant to Article IX of the Montana constitution, the legislature declares that any **use of water** is a **public use and that the waters** *within the state are the property of the state for the use of its people* and are subject to appropriation for beneficial uses as provided in this chapter.

Mont. Code Anno. § 85-2-414 (2001)

The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefore may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use. If it is necessary to conduct the water across the right-of-way of any railroad, it shall be the duty of the owners of the ditch or flume to give 30 days' notice in writing to the owner or owners of such railway of their intention to construct a ditch or flume across the right-of-way of such railroad, the point at which the ditch or flume will cross the railroad, and the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fail to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of the said flume or ditch to construct the same across the right-of-way of such railroad without further notice to said owner or owners of the railroad.

Mont. Code Anno. § 85-7-1931 (2001)

Use of **water** for irrigation a **public use**

- (1) The use of all **water** required for the irrigation of the land of any district formed under the provisions of part 1, together with the rights-of-way for canals and ditches, sites for reservoirs, and all property required in fully carrying out the provisions of this chapter, is hereby declared to be a **public use**, subject to the regulations and control of the state in the manner prescribed by law.

Mont. Code Anno. § 85-9-101 (2001)

Policy considerations

To provide for the conservation and development of the water and land resources of the state of Montana, conserve Montana's water for utilization for beneficial purposes within the state, and provide for the greatest beneficial use of water within this state, the organization of conservancy districts and the construction of works as defined by this chapter are a **public use** and will:

- (1) *be essentially for the public benefit and advantage of the people of Montana;*
- (2) benefit all industries of the state;
- (3) encourage economic growth;
- (4) indirectly benefit the state by increasing property valuations;
- (5) directly benefit municipalities by providing adequate supplies of water for domestic uses;
- (6) directly benefit lands irrigated or drained by works constructed;
- (7) *directly benefit lands now irrigated by stabilizing the flow of **water** in streams and by increasing the flow and return flow of **water** to those streams;*
- (8) enhance fish and wildlife habitat;
- (9) improve recreational facilities; and
- (10) promote the comfort, safety, and welfare of the people of Montana.

(2) All water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress, the rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

VIII. Nevada

Strength of language grade: C

Comments: In most Western States, appropriative water rights are forfeited to the state when such rights are not used for some period of time – usually around 5 years. The rationale for such forfeiture derives from the basis of the right: beneficial use. If water is not put to beneficial use, the basis of the right becomes moot. Nevada is an interesting exception to this rule. While water use is limited to that amount required for beneficial uses, Nevada’s code specifically provides that the right is not forfeited for non-use (§ 533.060(2)).

Nev. Rev. Stat. Ann. § 111.167 (2001)

Presumption of conveyance with land: Water rights, permits, certificates and applications appurtenant to land

Unless the deed conveying land specifically provides otherwise, all:

1. Applications and permits to appropriate any of the **public waters**;
2. Certificates of appropriation;
3. Adjudicated or unadjudicated water rights; and
4. Applications or permits to change the place of diversion, manner of use or place of use of water, which are appurtenant to the land are presumed to be conveyed with the land.

Nev. Rev. Stat. Ann. § 533.060 (2001)

Right to use limited to amount necessary; loss or abandonment of rights; no acquisition of prescriptive right; reservation of rights by state

1. Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch. The balance of the water not so appropriated must be allowed to flow in the natural stream from which the ditch draws its supply of water, and must not be considered as having been appropriated thereby.
2. Rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.
3. A surface water right that is appurtenant to land formerly used primarily for agricultural purposes is not subject to a determination of abandonment if the surface water right:
 - (a) Is appurtenant to land that has been converted to urban use; or
 - (b) Has been dedicated to or acquired by a water purveyor, public utility or public body for municipal use.
4. In a determination of whether a right to use surface water has been abandoned, a presumption that the right to use the surface water has not been abandoned is created upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned:
 - (a) The delivery of water;
 - (b) The payment of any costs of maintenance and other operational costs incurred in delivering the water;

(c) The payment of any costs for capital improvements, including works of diversion and irrigation; or

(d) The actual performance of maintenance related to the delivery of the water.

5. A prescriptive right to the **use of the water or any of the public water** appropriated or unappropriated may not be acquired by adverse possession. Any such right to appropriate any of the water must be initiated by applying to the state engineer for a permit to appropriate the water as provided in this chapter.

6. The State of Nevada reserves for its own present and future use all rights to the use and diversion of water acquired pursuant to chapter 462, Statutes of Nevada 1963, or otherwise existing within the watersheds of Marlette Lake, Franktown Creek and Hobart Creek and not lawfully appropriated on April 26, 1963, by any person other than the Marlette Lake Company. Such a right must not be appropriated by any person without the express consent of the legislature.

IX. New Mexico

Strength of language grade: A

Comments: Forfeiture of water rights for non-use is allowed in New Mexico after a period of four years, although the state engineer can extend this period. Also, the New Mexico code makes water rights appurtenant to the land upon which it is used, unless the landowner consents to the right being severed from the land. Such severance is permitted so long as public welfare is not adversely affected (§72-5-23).

N.M. Stat. Ann. § 72-4-20 (2001)

Water rights on interstate streams in litigation; duty of state engineer; exception
In all cases where the rights of owners of land in this state to which water rights on interstate streams are appurtenant have been the subject of litigation in the state or federal courts of an adjoining state, it shall be the duty of the state engineer to assume control of all or any part of such interstate stream and of the diversion and distribution of the waters thereof and to administer the same in the **public interest**; provided, however, that this section shall not apply to conservancy districts, irrigation districts or federal reclamation projects in this state.

N.M. Stat. Ann. § 72-5-7 (2001)

*Public welfare ~ public interest

Application; rejection; noncompliance with rules; conservation and public welfare
If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and rules and regulations. He may also refuse to consider or approve any application or notice of intention to make application or to order the publication of notice of any application if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the **public welfare** of the state.

N.M. Stat. Ann. § 72-5-23 (2001)

Water appurtenant to land; change of place of use

*Public welfare ~ public interest

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.

N.M. Stat. Ann. § 72-5-28 (2001)

Failure to use water; forfeiture

A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as **unappropriated public water**; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner; and provided that periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the Food Security Act of 1985, P.L. 99-198 shall not be computed as part of the four-year forfeiture period; and provided, further, that the condition of notice and declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the state engineer at any time and a proper showing of reasonable cause for delay or for nonuse or upon the state engineer finding that it is in the **public interest**, the state engineer may grant extensions of time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated.

N.M. Stat. Ann. § 72-12-1 (2001)

Underground waters **declared to be public**; applications for use to state engineer; hearings

The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, are **declared to be public waters** and to **belong to the public** and to be subject to appropriation for beneficial use. By reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock; in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use; and in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state, application for any such use shall be governed by the following provisions:

A. a person, firm or corporation desiring to use public waters described in this section for watering livestock; for irrigation of not to exceed one acre of noncommercial trees, lawn or garden; or for household or other domestic use shall make application to the state engineer on a form to be prescribed by him. Upon the filing of each application describing the use applied for, the state engineer shall issue a permit to the applicant to so use the waters applied for; provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978; and provided that as part of an application for livestock watering use on state or federal land, the applicant shall submit proof that he:

(1) is legally entitled to place his livestock on the state or federal land where the water is to be used; and

(2) has been granted access to the drilling site and has permission to occupy the portion of the state or federal land as is necessary to drill and operate the well; and

B. whenever a person, firm or corporation or the state desires to use not to exceed three acre-feet of public water described in this section for a definite period of not to exceed one year in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural mineral resources of the state, only the application referred to in Section 72-12-3 NMSA 1978 shall be required. Separate application shall be made for each proposed use, whether in the same or in different basins.

N.M. Stat. Ann. § 72-12-8 (2001)

Water right forfeiture

A. When for a period of four years the owner of a water right in any of the waters described in Sections 72-12-1 through 72-12-28 NMSA 1978 or the holder of a permit from the state engineer to appropriate any such waters has failed to apply them to the use for which the permit was granted or the right has vested, was appropriated or has been adjudicated, the water rights shall be, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, forfeited and the water so unused shall revert to the public and be subject to further appropriation; provided that the condition of notice and declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the state engineer at any time and a proper showing of reasonable cause for delay or for nonuse or upon the state engineer finding that it is in the **public interest**, the state engineer may grant extensions of time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a **water right has vested, was appropriated or has been adjudicated.**

N.M. Stat. Ann. § 72-12A-2 (2001)

Purpose of act

A. The legislature hereby determines that:

(1) the production of minerals in New Mexico at times requires the diversion and associated treatment of large quantities of water;

(2) the diversion of water to permit mineral production is affected with a **public interest**;

(3) existing principles of prior appropriation, beneficial use and impairment of water rights, when applied to the diversion of water to permit mineral production, may cause severe economic hardship and impact to persons engaged in mineral production, to the owners of water rights and to the citizens of New Mexico;

X. Oklahoma

Strength of language grade: C

27A Okl. St. § 2-6-310.1 (2000)

Legislative findings and declaration

A. The Oklahoma Legislature finds that a **safe public groundwater supply is one of the most valuable natural resources in this state.**

B. The Legislature recognizes and declares that the management, protection and **conservation of public groundwater supplies and the beneficial uses** thereof are essential to the economic prosperity and future well being of the state. As such, the **public interest** demands procedures for the development and implementation of management practices to conserve and protect public groundwater supplies.

82 Okl. St. § 105.5 (2000)

Impairment of water rights--Suits in district court

Any person having a right to the use of water from a stream as defined by this act or Section 60 in Title 60 of the Oklahoma Statutes whose right is impaired by the act or acts of another, or others, may bring suit in the district court of any county in which any of the acts complained of occurred. Provided, however, that nothing herein contained shall be construed to empower district courts to recognize rights to use the water of a stream unless such rights have heretofore been established pursuant to this act or are claimed under Section 60 in Title 60 of the Oklahoma Statutes. Provided, however, that the Attorney General shall intervene on behalf of the state in any suit for the adjudication of rights to the use of water if notified by the Board that the **public interests** would be best served by such action.

XI. Oregon

Strength of language grade: A

ORS § 509.645 (1999)

Filing protest with Water Resources Commission; review and determination by Water Resources Commission as to whether fishway or hatchery facilities in **public interest**.

(1) Any owner or occupant of a dam or artificial obstruction may file a protest with the Water Resources Commission within 10 days after receipt of notification from the State Fish and Wildlife Director as provided in ORS 509.605 (2), or within 10 days after receiving notice of the requirement by the State Fish and Wildlife Commission under ORS 509.640, on the ground that providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, would impair or be **detrimental to the public interest**.

(2) Within a reasonable time after the filing of the protest under subsection (1) of this section, the Water Resources Commission shall hold a public hearing thereon. The Water Resources Commission shall give written notice of the hearing to each owner or occupant of the dam or artificial obstruction, who is known to or can be reasonably ascertained by the Water Resources Commission, and to the State Fish and Wildlife Commission at least 10 days prior to the hearing.

(3) The Water Resources Commission, after the hearing, shall make a determination as to whether providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, **would impair or be detrimental to the public interest**. The determination shall be binding upon each owner or occupant of the dam or artificial obstruction and the State Fish and Wildlife Commission. The determination shall approve the requirement of the fishway or the hatchery facilities, as the case may be, approve the requirement subject to conditions specified in the determination or disapprove the requirement. If each owner or occupant of the dam or artificial obstruction complies with the determination, such owner or occupant shall be deemed not in violation of ORS 509.605 or 509.640, as the case may be.

(4) In determining whether providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, **would impair or be detrimental to the public interest**, the Water Resources Commission shall have due regard for:

(a) The state water resources policy formulated under ORS 536.295 to 536.350.

(b) The considerations set forth in ORS 536.310.

(5) In the event protests are filed with the Water Resources Commission under both subsection (1) of this section and ORS 498.351, the Water Resources Commission may consider and determine the protests in a combined proceeding under this section and ORS 498.351

ORS § 536.310 (1999)

Purposes and policies to be considered in formulating state **water** resources program.

In formulating the water resources program under ORS 536.300 (2), the Water Resources

Commission shall take into consideration the purposes and declarations enumerated in ORS 536.220 and also the following additional declarations of policy:

- (1) Existing rights, established duties of water, and relative priorities concerning the use of the waters of this state and the laws governing the same are to be protected and preserved subject to the principle that **all of the waters within this state belong to the public for use by the people for beneficial purposes without waste;**
- (2) It is in the **public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole;**
- (5) Competitive exploitation of water **resources of this state for single-purpose uses is to be discouraged when other feasible uses are in the general public interest;**
- (7) The maintenance of minimum perennial stream flows sufficient to support aquatic life, to minimize pollution and to maintain recreation values shall be fostered and encouraged if existing rights and priorities under existing laws will permit;
- (8) Watershed development policies shall be favored, whenever possible, for the preservation of balanced multiple uses, and project construction and planning with those ends in view shall be encouraged;
- (12) When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use, and thereafter other beneficial purposes in such order as may be in the **public interest** consistent with the principles of chapter 707, Oregon Laws 1955, under the existing circumstances; and

ORS § 536.410 (1999)

Withdrawal of unappropriated waters from appropriation by commission order

- (1) When the Water Resources Commission determines that it is necessary to insure compliance with the state water resources policy or that it is otherwise necessary in the **public interest to conserve the water resources of this state for the maximum beneficial use and control thereof that any unappropriated waters** of this state, including unappropriated waters released from storage or impoundment into the natural flow of a stream for specified purposes, be withdrawn from appropriation for all or any uses including exempt uses under ORS 537.545, the commission, on behalf of the state, may issue an order of withdrawal.
- (2) Prior to the issuance of the order of withdrawal the commission shall hold a public hearing on the necessity for the withdrawal. Notice of the hearing shall be published in at least one issue each week for at least two consecutive weeks prior to the hearing in a newspaper of general circulation published in each county in which are located the waters proposed to be withdrawn.
- (3) The order of withdrawal shall specify with particularity the waters withdrawn from appropriation, the uses for which the waters are withdrawn, the reason for the withdrawal and the duration of the withdrawal. The commission may modify or revoke the order at any time.
- (4) Copies of the order of withdrawal and notices of any modification or revocation of the order of withdrawal shall be filed in the Water Resources Department.

(5) While the order of withdrawal is in effect, no application for a permit to appropriate the waters withdrawn for the uses specified in the order and no application for a preliminary permit or license involving appropriations of such waters shall be received for filing by the Water Resources Commission.

ORS § 536.420 (1999)

Representation of state in carrying out compacts and agreements with other governmental agencies regarding water resources

(2) The representative or representatives designated by the Governor under subsection (1) of this section shall make every effort practicable to ensure that the compact or other agreement, as formulated, entered into and carried out, is in harmony with the state **water resources policy and otherwise with the public interest in encouraging, promoting and securing the maximum beneficial use and control of the water resources of this state.**

ORS § 536.450 (1999)

Assistance by commission to other persons and agencies

The Water Resources Commission may make available technical advice and information for the purpose of assisting any person, local voluntary committee or association, state agency or public corporation of this state, any interstate agency or any agency of the federal government in the preparation, carrying into effect and properly sustaining any plan, program or project concerning the use or control of the **water resources of this state in harmony with the state water resources policy or otherwise with the public interest in encouraging, promoting and securing the maximum beneficial use and control of the water resources of this state.**

ORS § 537.135 (1999)

Permit required to appropriate water for recharging ground water sources; minimum perennial stream flow required for permit; exception

(1) The appropriation of water for the purpose of recharging ground water basins or reservoirs is declared to be for a beneficial purpose. Permits for such appropriation may be granted by the Water Resources Department on application made therefor. Any such application shall substantially comply with ORS 537.140 and shall be subject to the provisions of ORS 537.150 to 537.230, as are other applications and permits to appropriate water.

(2) Any person proposing to apply to a beneficial use the water stored artificially in any such ground water basin or reservoir shall file an application for permit, to be known as the secondary permit, in compliance with the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.230. The application shall refer to the artificially recharged ground water basin or reservoir as a supply of water and shall include the written consent of the holder of the recharge permit or certificate to appropriate the artificially recharged water.

(3) The Water Resources Commission shall develop standards that an applicant must meet before the department approves a permit to appropriate water for the purpose of recharging ground water.

(4) Before issuing a permit for the purpose of recharging ground water, the department shall determine, under ORS 537.170, whether the proposed ground water recharge project would impair or be detrimental to the **public interest**.

(5) The department shall not issue a ground water recharge permit unless the supplying stream has a minimum perennial stream flow established for the protection of aquatic and fish life. The State Department of Fish and Wildlife may waive this prerequisite if a minimum perennial stream flow for protection of aquatic and fish life is not required for the supplying stream.

ORS § 537.153 (1999)

Review of application; proposed final order; presumption that use will not impair or be detrimental to public interest; standing; protest; final order; contested case hearing

(1) Within 60 days after the Water Resources Department proceeds with the application under ORS 537.150 (5), the department shall complete application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. The department may request the applicant to provide additional information needed to complete the review. If the department requests additional information, the request shall be specific and shall be sent to the applicant by registered mail. The department shall specify a date by which the information must be returned, which shall be not less than 10 days after the department mails the request to the applicant. If the department does not receive the information or a request for a time extension under ORS 537.175 by the date specified in the request, the department may reject the application and may refund fees in accordance with ORS 536.050 (3). The time period specified by the department in a request for additional information shall allow the department to comply with the 60-day time limit established by this subsection.

(2) In reviewing the application under subsection (1) of this section, the department shall presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either:

(a) One or more of the criteria for establishing the presumption are not satisfied; or
(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:

(A) The specific public interest under **ORS 537.170** (8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

ORS § 537.170 (1999)

Contested case hearing on application; final order; appeal

(6) If, after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the director determines that **impair or be**

detrimental to the public interest, the director shall issue a final order rejecting the application or modifying the proposed final order to conform to the public interest.

(8) If the presumption of public interest under ORS 537.153 (2) is overcome, then before issuing a final order, the director or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order **would impair or be detrimental to the public interest by considering:**

(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a **special value to the public.**

(b) The maximum economic development of the waters involved.

(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

(d) The amount of waters available for appropriation for beneficial use.

(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.

(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

ORS § 537.190 (1999)

Terms and conditions of approval; municipal water supplies; release of stored water

(1) The Water Resources Department may approve an application for less water than applied for, or upon terms, limitations and conditions necessary for the **protection of the public interest**, including terms, limitations and conditions relating to the release of water from an impoundment or diversion structure necessary to prevent rapid fluctuation in the stream level below the structure which may create a hazard to life or property, if there exists substantial reason therefore. In any event the department shall not approve an application for more water than can be applied to a beneficial use.

ORS § 537.334 (1999)

The people of the State of Oregon find and declare that:

(1) Public uses are beneficial uses.

(2) The recognition of an **in-stream water right** under ORS 537.336 to 537.348 **shall not diminish the public's rights** in the ownership and control of the waters of this state or the **public trust** therein. The establishment of an in-stream water right under the provisions of ORS 537.332 to 537.360 shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any waters vested prior to the date the in-stream water right is established pursuant to the provisions of ORS 537.332 to 537.360.

ORS § 537.336 (1999)

State agencies authorized to request in-stream water rights; agreement required when supply is stored water

(1) The State Department of Fish and Wildlife may request the Water Resources Commission to issue water right certificates for in-stream water rights on the waters of this state in which there are public uses relating to the conservation, maintenance and enhancement of aquatic and fish life, wildlife and fish and wildlife habitat. The request shall be for the **quantity of water necessary to support those public uses** as recommended by the State Department of Fish and Wildlife.

ORS § 537.358 (1999)

Rules for reservation for future economic development; application for use of reserved water

(1) In adopting a rule under ORS 537.356 to reserve unappropriated water for multipurpose storage for future economic development, the Water Resources Commission shall include a **public interest** review that takes into consideration the factors described under ORS 537.170.

ORS § 538.010 (1999)

Waters diverted from Ditch Creek; rights of use and appropriation; certificate; time limitation

(1) The waters of Ditch Creek which were diverted to and became a part of the waters of Willow Creek, under the provisions of chapter 324, Oregon Laws 1939, are subject to the same rights of use and appropriation as the original waters of Willow Creek.

(2) The right of the county court of Morrow County to divert and store the waters of Ditch Creek, acquired under the certificate issued by the Water Resources Director licensing such diversion and storage, shall date from the time the application to divert and store such waters was filed. The waters shall be used for the purposes, in the manner and under the conditions set forth in the certificate, for such time as the **use is for the public interest. If the waters are not used under the license for a five-year period, the license shall expire.**

XII. Texas

Strength of language grade: B

Comments: Texas appears to be unique in the manner in which water in the public trust is handled. Seemingly, the state has established a formal Water Trust, which holds water rights that are purchased or donated by (to) the state. Moreover, private rights holders can deposit unused water rights into the Water Trust, thereby avoiding provisions for the forfeiture of rights for non-use.

Tex. Water Code § 15.7031 (2000)

Texas Water Trust

- (a) The Texas Water Trust is established within the water bank to hold water rights dedicated to environmental needs, including instream flows, water quality, fish and wildlife habitat, or bay and estuary inflows.
- (b) The board, in consultation with the Parks and Wildlife Department and the commission, shall adopt rules governing the process for holding and transferring water rights.
- (c) The dedication of any water rights placed in trust must be reviewed and approved by the commission, in consultation with the board and the Parks and Wildlife Department. In addition, the Department of Agriculture may provide input to the commission, as appropriate, during the review and approval process for dedication of water rights.
- (d) Water rights may be held in the trust for a term specified by contractual agreement or in perpetuity.

Tex. Water Code § 15.704 (2000)

Transfers and Conditions

- (a) A water right may be deposited in the water bank for an initial term of up to 10 years, unless otherwise held in the Texas Water Trust as established under Section 15.7031 of this code, during which time the water right is exempt from cancellation by the commission under the terms of Subchapter E of Chapter 11 [FN1] of this code. A water right is exempt from cancellation under this subsection only once even if it has been transferred or redeposited.

XIII. Utah

Strength of language grade: A

Comments: The Utah code appears to be unique in the manner in which forfeiture for non-use is administered. While the code provides for forfeiture when rights have not been exercised for a period of five years, the state also faces a time line: forfeiture provisions are voided if judicial action to declare the right forfeited is not commenced within 15 years from the end of the latest period of non-use of at least five years.

Utah Code Ann. § 73-1-1 (2001)

Waters declared property of public

All waters in this state, whether above or under the ground, are hereby declared to be the **property of the public**, subject to all existing rights to the use thereof.

Utah Code Ann. § 73-1-4 (2001)

Reversion to public by abandonment or forfeiture for nonuse within five years --
Extension of time

(1) (a) When an appropriator or the appropriator's successor in interest abandons or ceases to use water for a period of five years, the **water right ceases** and the **water reverts to the public**, unless, before the expiration of the five-year period, the appropriator or the appropriator's successor in interest files a verified application for an extension of time with the state engineer.

(b) (i) A water right may not be forfeited unless a judicial action to declare the right forfeited is commenced within 15 years from the end of the latest period of nonuse of at least five years.

(ii) If forfeiture is asserted in an action for general determination of rights in conformance with the provisions of Chapter 4, the 15-year limitation period shall commence to run back in time from the date the state engineer's proposed determination of rights is served upon each claimant.

(iii) A decree entered in an action for general determination of rights under Chapter 4 shall bar any claim of forfeiture for prior nonuse against any right determined to be valid in the decree.

(c) The extension of time to resume the use of that water may not exceed five years unless the time is further extended by the state engineer.

(d) The provisions of this section are applicable whether the unused or abandoned water is permitted to run to waste or is used by others without right.

(3) (iv) the holding of a water right without use by any municipality, metropolitan water district, or other public agency to meet the reasonable **future requirements of the public**.

(5) The appropriator's water right ceases and the **water reverts to the public** if the:

(a) appropriator or the appropriator's successor in interest fails to apply for an extension of time;

(b) state engineer denies the application for extension of time; or

(c) appropriator or the appropriator's successor in interest fails to apply for a further extension of time.

Utah Code Ann. § 73-3-1 (2001)

Appropriation -- Manner of acquiring water rights

Rights to the use of the **unappropriated public waters** in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in Section 73-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.

Utah Code Ann. § 73-10c-1 (2001)

Legislative findings

The Legislature finds that the conservation, development, treatment, restoration, and protection of the waters of this arid state are a **state purpose and a matter of statewide concern**. The needs and requirements associated with conserving, developing, treating, restoring, and protecting the waters of this state are of such magnitude and complexity that they justify state participation and assistance. The Federal Safe Drinking Water Act, 42 United States Code Annotated Secs. 300f et seq. (federal drinking water act) establishes a national policy to ensure delivery of safe drinking **water to the public**, establishes maximum pollution levels, monitoring and reporting requirements and provides penalties, including the assessment of fines, for political subdivisions that violate the act. The Federal Water Pollution Control Act, Title 33, Chapter 26, United States Code (federal water pollution control act), establishes a national policy and program for the restoration, preservation, and protection of the nation's waters. The political subdivisions of this state are prohibited by the federal water pollution control act from polluting the navigable waters of the United States and are subject to various penalties, including the assessment of fines, for failing to meet the minimum standards of the federal water pollution control act. Pursuant to the requirements of the federal pollution control act, the state has established water quality standards and effluent limitations with respect to the waters of this state. These standards and limitations have been adopted by the United States Environmental Protection Agency for the purpose of issuing permits for wastewater projects and the state must certify compliance with these standards and limitations in order for the federal permit to be obtained. Under the federal water pollution control act, the state and its political subdivisions may receive grants, subject to the availability of funds, to meet the requirements of the federal water pollution control act if the state or its political subdivisions make contributions to the nonfederal share of construction costs of treatment works. It is desirable that the state assist in providing financing mechanisms to aid political subdivisions in securing needed water treatment and transporting water and in the acquisition and construction of drinking water projects and wastewater projects in order to accomplish the foregoing purposes, to protect

the public health and welfare, to meet the anticipated growth in the state and to encourage development of the state's resources.

XIV. Washington

Strength of language grade: C

Comments: State Code § 43.21A.064(10) says little about the scope of the public trust doctrine in the State of Washington. Reference to *Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993), which we review below, is not particularly helpful in that the Court simply states the limits of the doctrine to allowing public access to lands below and shores along navigable rivers, but there is little guidance as to how “navigable rivers” might be defined nor how the scope of the doctrine might extend to water use *per se*. For a much broader and inclusive view of the substance and scope of the public trust doctrine, however, the interested reader is invited to read the dissenting opinion in *Rettkowski v. State* written by Justice Guy.

Rev. Code Wash. (ARCW) § 35.88.010 (2001)

Authority over sources of supply

For the purpose of protecting the water furnished to the inhabitants of cities and towns from pollution, cities and towns are given jurisdiction over all property occupied by the works, reservoirs, systems, springs, branches and pipes, by means of which, and of all the lakes, rivers, springs, streams, creeks, or tributaries constituting the sources of supply from which the cities and towns or the companies or individuals furnishing water to the inhabitants thereof obtain their supply of water, or store or conduct it, and over all property acquired for any of the foregoing works or purposes or for the preservation and protection of the purity of the water supply, and over all property within the areas draining into the lakes, rivers, springs, streams, creeks, or tributaries constituting the sources of supply whether they or any of them are within the city or town limits or outside.

Rev. Code Wash. (ARCW) § 35.89.010 (2001)

Authority to issue water redemption bonds

If a public water system has been constructed within any local improvement district of any city or town for the construction of which bonds of the local improvement district were issued and are outstanding and unpaid, and if the city or town has taken over the system or is operating it as a public utility or has incorporated it into or connected it with any system operated by city or town as a public utility, from the operation of which such city or town derives a revenue, the city or town may by resolution of its council authorize the issue of bonds to an amount not exceeding the amount of the local improvement bonds issued for the construction of the water system then outstanding and unpaid with interest due and unpaid, and may redeem the outstanding local improvement bonds by exchanging therefore an equal amount at par of the bonds authorized by this chapter. The new bonds shall be called water redemption bonds.

Rev. Code Wash. (ARCW) § 43.21A.064 (2001)

Powers and duties -- Water resources

Subject to RCW 43.21A.068, the director of the department of ecology shall have the following powers and duties:

- (1) The supervision of public waters within the state and their appropriation, diversion, and use, and of the various officers connected therewith;
- (2) Insofar as may be necessary to assure safety to life or property, the director shall inspect the construction of all dams, canals, ditches, irrigation systems, hydraulic power plants, and all other works, systems, and plants pertaining to the use of water, and may require such necessary changes in the construction or maintenance of said works, to be made from time to time, as will reasonably secure safety to life and property;
- (3) The director shall regulate and control the diversion of water in accordance with the rights thereto;
- (4) The director shall determine the discharge of streams and springs and other sources of water supply, and the capacities of lakes and of reservoirs whose waters are being or may be utilized for beneficial purposes;
- (5) The director shall, if requested, provide assistance to an applicant for a water right in obtaining or developing an adequate and appropriate supply of water consistent with the land use permitted for the area in which the water is to be used and the population forecast for the area under RCW 43.62.035. If the applicant is a public water supply system, the supply being sought must be used in a manner consistent with applicable land use, watershed and water system plans, and the population forecast for that area provided under RCW 43.62.035;
- (6) The director shall keep such records as may be necessary for the recording of the financial transactions and statistical data thereof, and shall procure all necessary documents, forms, and blanks. The director shall keep a seal of the office, and all certificates covering any of the director's acts or the acts of the director's office, or the records and files of that office, under such seal, shall be taken as evidence thereof in all courts;
- (7) The director shall render when required by the governor, a full written report of the office's work with such recommendations for legislation as the director deems advisable for the better control and development of the water resources of the state;
- (8) The director and duly authorized deputies may administer oaths;
- (9) The director shall establish and promulgate rules governing the administration of chapter 90.03 RCW;
- (10) The director shall perform such other duties as may be prescribed by law.

Rev. Code Wash. (ARCW) § 35.92.010 (2001)

Authority to acquire and operate waterworks -- Generation of electricity -- Classification of services for rates

A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, That the rates charged must be uniform for the same class of customers or service. Such waterworks may include facilities for the generation of electricity as a byproduct and such electricity may be used by the city or town or sold to an entity authorized by law to distribute electricity. Such electricity is a byproduct when the electrical generation is subordinate to the primary purpose of water supply.

In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

For such purposes any city or town may take, condemn and purchase, purchase, acquire, and retain water from any public or navigable lake or watercourse, surface or ground, and, by means of aqueducts or pipe lines, conduct it to the city or town; and it may erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the purpose of storing and retaining water therein up to and above high water mark; and for all the purposes of erecting such aqueducts, pipe lines, dams, or waterworks or other necessary structures in storing and retaining water, or for any of the purposes provided for by this chapter, the city or town may occupy and use the beds and shores up to the high water mark of any such watercourse or lake, and acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easements or privileges named in this chapter, or necessary for any of said purposes, and the city or town may acquire by purchase or condemnation and purchase any properties or privileges necessary to be had to protect its water supply from pollution. Should private property be necessary for any such purposes or for storing water above high water mark, the city or town may condemn and purchase, or purchase and acquire such private property. For the purposes of waterworks which include facilities for the generation of electricity as a byproduct, nothing in this section may be construed to authorize a city or town that does not own or operate an electric utility system to condemn electric generating, transmission, or distribution rights or facilities of entities authorized by law to distribute electricity, or to acquire such rights or facilities without the consent of the owner.

Wash. Const., Art. XXI, § 1 (2001)

Public use of water

The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

PUBLIC TRUST DOCTRINE

The public trust doctrine did not justify the department of ecology's regulation of water resources, since the **Supreme Court had never previously interpreted the doctrine to extend to non-navigable waters or groundwater**. The duty imposed by the public trust doctrine devolves upon the state, not any particular agency thereof. *Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993).

Overview of:

Craig Rettkowski, et al, Respondents, v. The Department of Ecology, et al, Appellants
No. 59086-9

SUPREME COURT OF WASHINGTON

122 Wn.2d 219; 858 P.2d 232; 1993 Wash. LEXIS 221

A holder of a permit to appropriate water has a vested property interest in its water right to the extent that the water is beneficially used. The public trust doctrine imposes obligations on the State with regard to the protection of the public's access to navigable waters and shorelands. The case: A group of ranchers who water their cattle at the Sinking Creek have complained to the Department of Ecology for over two decades about the detrimental effect on the creek's flow of groundwater pumping by irrigation farmers in the surrounding area. After numerous investigations, Ecology determined that there was a connection between the groundwater withdrawals and the diminished flow of the creek. Ecology also decided that the water rights of the various ranchers were superior to those possessed by the irrigation farmers. Accordingly, Ecology issued cease and desist orders, which prohibited the irrigation farmers from making any further groundwater withdrawals. Through a complicated procedural history, the dispute was brought to this court to decide if Ecology possesses the authority to issue these orders. Sinking Creek is a **non-navigable** stream. These Ranchers claim pre-1917 riparian rights to the water in Sinking Creek. They also claim subflow irrigation rights for irrigation of pasture and annual crops on their land.

On the other side of this dispute is a group of irrigation farmers (Irrigators) who own farms and wells in the surrounding area. The Irrigators own 29 certificates of groundwater rights. The first groundwater permit for irrigation in this area was issued by Ecology's predecessor agency in the early 1950s. The last groundwater permit was issued by Ecology in 1979. These permits specify a maximum amount of groundwater that may be pumped, and state that "authorization to make use of public waters of the state is subject to existing rights". Clerk's Papers (CP), at 997. At least some of the Ranchers have actively opposed the granting of further groundwater permits since 1968. letter to the Irrigators 5 days later, which warned that Ecology had "no alternative except to issue orders regulating the use of ground water for irrigation to protect senior surface water rights." CP, at 875. 1990, Ecology issued cease and desist orders to the Irrigators. Irrigators "cease and desist from any further withdrawals of ground water. There has never been a formal adjudication of water rights in the Sinking Creek basin. The authority to adjudicate and enforce water rights in these circumstances is specifically granted to the superior courts by RCW 90.03. Accordingly, we affirm the ruling of the Superior Court. We do not find the public trust doctrine germane to resolving the issues before us today. There are two threshold problems with relying on the public trust doctrine in this situation. First, we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater. Second, the duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust. Since the water in question is being squandered, the public trust doctrine allows Ecology to regulate to preserve this precious and limited resource. However, the issue in this case has never been Ecology's

ability to regulate generally, which is admitted. Rather, at issue is Ecology's specific ability to establish and prioritize water rights unilaterally, without a general adjudication, to the detriment of other water users. The doctrine could provide no guidance as to *how* Ecology is to protect those waters. If the public trust doctrine grants Ecology plenary authority to protect waters of this state, Ecology could utilize this doctrine in the Sinking Creek dispute by taking away the riparian rights of the Ranchers, which should leave more water in the creek. Alternatively, they could shut off both the Ranchers and the Irrigators under the guise of protecting the public trust.

The restriction of the public trust doctrine to navigable waters is well founded in precedent. Nonetheless, the navigability requirement is not inherent in the doctrine and should be abandoned. This becomes clear when one considers the history and theory of the public trust doctrine. Historically, as the majority states, the public trust doctrine has been most commonly applied in relation to the public's interest in commerce over navigable waters and shorelands. The majority's decision lacks a sound legal basis, will seriously and improperly interfere with Ecology's ability to regulate water rights, and ignores the interest of the people of this state in the essential natural resource of water. The decision is bad law and bad policy.

XV. Wyoming

Strength of language grade: B

Wyo. Const. Art. 8 3 (2001)

Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the **public interest**.

Wyo. Stat. § 41-7-801 (2001)

Declaration of Policy

Conservation of the states water resources is declared to be a state function and the public interest, welfare, convenience require the creation of public irrigation districts and the construction of a system of works for the conservation, storage, and distribution & utilization of water. The construction is declared to be in all **respects for the welfare and benefit of the people**.

Wyo. Stat. § 41-2-108 (2001)

Water resources plans; powers of commission

(a) In the formulation of these plans the commission may:

(ii) Consult with and receive the views of persons, local groups and organizations representing water users, special interests, industries and the **public interest**, and acquire data and information relating to water, **water use**, water conservation, and water quality from government agencies, departments and other sources;

Wyo. Stat. § 41-3-101 (2001)

Nature of water rights and beneficial use

A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding the statutory limit except as provided by W.S. 41-4-317. In addition to any beneficial use specified by law or rule and regulation promulgated pursuant thereto, the use of water for the purpose of extracting heat therefrom is considered a beneficial use subject to prior rights. **Water being always the property of the state**, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition, under the law and the administration provided thereby. Water rights for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place or purpose for which they are acquired, except as provided in W.S. 41-3-102 and 41-3-103, pertaining to a change to preferred use, and except as provided in W.S. 41-4-514.

Wyo. Stat. § 41-4-503 (2001)

Recordation; approval or rejection generally

All applications which shall comply with the provisions of this chapter shall be recorded

in a suitable book kept for that purpose; and it shall be the duty of the state engineer to approve all applications which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise **detrimental to the public welfare**. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the **public interest**, it shall be the duty of the state engineer to reject such application and refuse to issue the permit.

Wyo. Stat. § 41-4-514 (2001)

Petition for amendment of permits; petition for amended certificate of appropriation; hearings on petition; notice; costs

(a) The state engineer may correct clerical errors and, upon written petition of the permit holder, amend any permit to appropriate water at any time prior to adjudication by the state board of control when in the judgment of the state engineer the amendment appears necessary, and providing:

- (i) No petition to amend shall be granted if existing water appropriators who have adjudicated water rights or valid permits are injuriously affected;
- (ii) The priority date of the permit shall not be improved;
- (iii) The total amount of the appropriation of water shall not exceed the amount set forth in the original permit and, for irrigation permits, the total area of land shall not exceed the total area described in the original permit;
- (iv) The changes shall be limited to those within the area and concept of the original application for permit or development plan; and
- (v) No change of use shall be granted;
- (vi) A reasonable filing fee not to exceed fifty dollars (\$50.00) shall accompany each petition filed with the state engineer.

(b) The state engineer may hold a public hearing on a petition under subsection (a) of this section to gather facts to determine if other appropriators will be injuriously affected. The state engineer shall hold a public hearing on a petition under subsection (a) of this section if requested to do so by any affected appropriator. If the state engineer holds a public hearing, the state engineer shall cause to be published no less than fifteen (15) days before the hearing a notice of the hearing to be advertised in at least one (1) issue of any newspaper having general circulation in the community where the water right or valid permit involved is situated. The petitioner shall pay the cost of the advertisement prior to the time of hearing, and provide a record of proceedings to be transmitted to the state engineer. Following receipt of the record, the state engineer shall promptly review the record and issue a written order granting or denying the permit amendment.

(c) Any decision by the state engineer granting or denying a permit amendment under this section may be appealed to the board of control which shall conduct a contested case hearing in accordance with its rules and regulations and the Wyoming Administrative Procedure Act.

(d) The state board of control is authorized, upon the written petition of the owner, to issue amended certificates of appropriation for water rights that have been adjudicated for the purpose of correcting clerical errors and when in the judgment of the board it appears necessary. The total amount of the appropriation of water shall not exceed the amount set forth in the original certificate of appropriation and, in the case of an appropriation for

irrigation use, the total area of the lands shall not exceed the total area described in the original certificate of appropriation. The amended area shall not exceed the area actually irrigated under the original right. Any petitioner shall be the owner of all the land involved in the petition, except that in cases where amendments are petitioned for in a regularly organized conservancy or irrigation district, the consent of the district board and the consent or agreement of the land owners directly involved is sufficient. Proper adjustments shall be made in any assessment levied against lands affected by the amendment. The rights of other appropriators shall not be injuriously affected thereby.

(e) Upon petition for an amended certificate of appropriation of water, the state board of control may cause a public hearing to be held on the petition before the superintendent of the water division in which such appropriation is located, with notice of the hearing to be advertised in at least one (1) issue of a newspaper having general circulation in the community where the water right involved is situated. The state board of control shall hold a public hearing if requested to do so by any affected appropriator. The petitioner shall pay the cost of the publication prior to the time of hearing and provide a record of proceedings to be transmitted by the division superintendent to the state board of control, together with his report. At the time the petition is filed a fee not to exceed fifty dollars (\$50.00) for each amended certificate issued shall be collected by the state board of control with a deposit of sufficient funds to cover the cost of preparing and recording a certified copy of the order. The fees for recording shall be returned to the petitioner in case the petition is not granted.