

To: Steve Clyde
From: Jon Clyde
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Re: Treatment of Change Applications in Various States

The various prior appropriation states all provide for the change in use of an appropriated right. However, each state handles the approval process differently. The biggest difference in treatment is how the decision making body investigates the appropriated right and determines whether to approve or reject the change application. Of particular interest is the authority of the decision maker to look at the historical use of the water right, when deciding whether to approve or reject a change application. The purpose of this memorandum is to survey the seventeen prior appropriation states and to document the decision maker's authority. This review is primarily based on individual state statutes with only a limited review of case law and administrative rules as noted.

The memo will discuss each state individually and then summarize any general themes that have arisen. In particular this memo will focus on: 1) whether the change application is treated the same as an application to appropriate; 2) whether or not there is an inquiry into nonuse during the administrative process that might result in a reduction or forfeiture of the right, and 3) whether or not the non-impairment doctrine applies.

1) Arizona

Director approval is required for any change in use, point of diversion, or place of use.¹ The Director is allowed to condition approval of applications for less water than was applied for.² Further, there is a non-enlargement/ non-impairment requirement.³ There does not appear to be a direct inquiry into historical beneficial use, but changes in use are limited to perfected rights.⁴ This means that an inquiry into historical use has already occurred at the time of perfection, but current usage is not examined. However, before the Director can decide upon any change application a notice and comment period is required.⁵ A hearing may be held at the discretion of the director.⁶ This does not amount to an investigation into historic uses, but it may allow the issue of historic use to back into the discussion.

2) California

In California does not require a demonstration of historical use as a condition to approving a change of use. Changes may be made only upon permission of the board.⁷ There are several conditions for approval. The petitioner shall establish, to the

¹ Ariz. Rev. Stat. Ann. § 45-172(A)(1) (West 2007).

² *Id.* at § 45-153(A-B).

³ *Id.* at § 45-172(A)(2).

⁴ *Id.* at § 45-173(A)(3).

⁵ *Id.* at § 45-172(A)(7).

⁶ *Id.*

⁷ Cal. Water. Code § 1701 (2007).

satisfaction of the board that the change will not injure other water users.⁸ There is also a notice and comment period regarding the proposed use.⁹ When evaluating a change application the Board is limited to evaluating the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, water quality, and instream flows, and other changes that are likely to occur because of the proposed temporary change.¹⁰ This inquiry is focused on potential adverse impacts resulting from the change of use, rather than a review of historic use of the water. Whether or not this may result in abandonment or forfeiture is unclear.

3) Colorado:

In Colorado any person, including the State Engineer, may file with the water clerk a verified statement of opposition setting forth the facts as to why a change application should not be granted.¹¹ Case law indicates that the statement of opposition may be based upon an abandonment theory.¹² Subsequently, the water referee, without conducting a formal hearing, shall make such investigations as are necessary to determine whether the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition.¹³ The Water Referee is authorized to look at the historical uses in his attempts to verify the contents of the application and the opposition. Also, unique to Colorado (and also Texas) is the statutory requirement that change application forms shall require a map showing the approximate location of historic use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist.¹⁴ By requiring documentation of the past diversions, the statute forces the applicant to show that the water right has been exercised and has not been abandoned under the common law. Colorado does not have a statutory forfeiture provision.

4) Idaho

In Idaho both the district water master and the Director of the Department of Water rights are to review every change application.¹⁵ The Director is not to take any action without the recommendation of the water master.¹⁶ The water right must be a licensed, claimed or a decreed right in order for it to be changed.¹⁷ This ensures that the water right was at some point evaluated for the extent of the beneficial use occurring at the time the right was perfected or decreed. It appears that the historical use and also the current usage are susceptible to review by the decision maker prior to approval. This

⁸ *Id.* at § 1702.

⁹ *Id.* at § 1703.1.

¹⁰ *Id.* at § 1726(e).

¹¹ Colo. Rev. Stat. § 37-92-302(b) (2007).

¹² *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

¹³ *Id.* at § 37-92-302(4).

¹⁴ *Id.* at § 37-92-302(2)(a).

¹⁵ Idaho Code Ann. § 42-222(1) (Lexis ????)

¹⁶ *Id.*

¹⁷ *Id.*

means that an inquiry into non-use is probably allowable. In addition there are non-impairment and non-enlargement provisions.¹⁸

5) Kansas

Kansas requires that the applicant: 1) apply in writing to the chief engineer for approval of any proposed change; 2) demonstrate to the chief engineer that any proposed change is reasonable and will not impair existing rights; (3) demonstrate to the chief engineer that any proposed change relates to the same local source of supply as that to which the water right relates; and (4) receive the approval of the chief engineer with respect to any proposed change.¹⁹ In approving or denying a change application the Chief Engineer has substantial discretion as to what information may be reviewed.²⁰ There is a non-impairment clause and an inquiry into the amount of each claim to use water from the appropriated water supply; and all other matters pertaining to such question.²¹ Arguably this language allows the chief engineer to look into the historic uses, but the limits of this authority are not expressly stated.

6) Montana

In Montana an appropriator may not make a change in an appropriated right without the approval of the department or, if applicable, of the legislature.²² Any proposed change in an appropriated right may not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued.²³ Montana allows the department or the legislature, if applicable, to approve a change in appropriated rights subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change in appropriated right.²⁴ There does not appear to be much review of the actual usage in the Montana statutes.

7) Nebraska

Nebraska requires that any change be for a beneficial use. In addition to this requirement, Nebraska requires that any right proposed to be changed, is not subject to termination or cancellation.²⁵ This statute expressly calls for an inquiry into the historic use to determine whether the right is subject to termination or cancellation for non-use. Changes may also be denied for impairment of other rights or due to the enlargement of the base right.²⁶ Further, any approved change requires that a report be filed with the

¹⁸ *Id.*

¹⁹ Kan. Stat. Ann. § 82a-708(b)(a) (2007).

²⁰ *Id.* at § 82a-711.

²¹ *Id.*

²² Mont. Code Ann. § 85-2-402(1)(a) (2007), changes in excess of 4,000 ac-ft for interstate exportation.

²³ *Id.* at § 85-2-402(2)(a).

²⁴ *Id.* at § 85-2-402(8).

²⁵ *Id.* at § 46-294(f).

²⁶ *Id.* at §46-294(e).

department every five years to document that a beneficial use exists and continues despite the change.²⁷ Nebraska appears to require express inquiry into historic use as a condition to the approval of a change of use.

8) Nevada

Nevada requires that every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer.²⁸ In order for a change application to be approved by the director, the application must: (b) be in the public interest; and (c) the temporary change must not impair the water rights held by other persons.²⁹ There does not appear to be a substantial inquiry into the historical uses as a condition for approval. The change application is typically approved if it meets statutory form. There are however, notice and comment procedures,³⁰ which may require a hearing to resolve.³¹ In this hearing, those who protest the change may presumably assert that the right has been forfeited which would prompt an inquiry into the historical uses.

9) New Mexico

New Mexico allows changes in place of use and point of diversion as long as such changes can be made without detriment to existing water rights and are not contrary to conservation of water and not detrimental to the public welfare. Any such change requires the approval of an application by the state engineer.³² Such changes are subject to the notice and comment provisions.³³ If objections are received a hearing will be scheduled. However, the issues to be addressed at such a hearing appear to be limited to questions of injuries to neighboring water users.³⁴ Again, presumably an objector could raise abandonment or forfeiture questions. This would allow the State Engineer to look into the historical uses otherwise this inquiry is not expressly authorized or required as a condition to approval of a change of use.

10) North Dakota

North Dakota provides that the state engineer may approve the proposed change if the state engineer determines that the proposed change will not adversely affect the rights of other appropriators.³⁵ Unique to North Dakota is the requirement that a change in the

²⁷ Neb. Rev. Stat. Ann. § 46-290(5) (2007).

²⁸ Nev. Rev. Stat. Ann. § 533.345(1) (1989).

²⁹ *Id.* at § 533.345(2)(b-c).

³⁰ *Id.* at § 533.360.

³¹ *Id.* at § 533.365.

³² N.M. Stat. Ann § 72-5-23, 24 (1978).

³³ *Id.*

³⁴ *Id.* at § 72-5-5.

³⁵ N.D. Cent. Code § 61-04-15.1(2) (2007).

purpose of use may be authorized only for a superior use as defined by statute.³⁶ Any applications for a change in the point of diversion or any purpose of use shall be processed and evaluated in the same manner as an application for a water permit.³⁷ The requirements for approval are fairly typical and include a non-impairment clause, a public welfare clause, but there is no required inquiry into historic use.³⁸

11) Oklahoma:

An appropriator in Oklahoma is allowed to change his water right only if it has become impracticable to beneficially or economically use water for the irrigation of any land to which the right of use of is appurtenant.³⁹ Any change application must be approved by the Board.⁴⁰ Public notice of the proposed change is published. The notice must include the time and place of hearing; the source and quantity or volume of the use of the water involved; the point of diversion; the place and kind of use; and a description of the nature of the proposed change.⁴¹ No inquiry into historic use is required by statute, but there is nothing to preclude a protesting party from raising issues of non-use.

12) Oregon

Oregon does not require that the Director approve of the proposed change. All that is required is that the proposed change does not a) result in injury to an existing water right; b) for a proposed change in place of use the land on which the water is to be used is owned or controlled by the holder of the permit and is contiguous to the land to which the permit is appurtenant; c) all other terms of the permit remain the same, including but not limited to the beneficial use for which the water is used and the number of acres to which water is applied, and ... e) the holder of the permit provides written notice to the department at least 60 days before making any changes to the lands, point of diversion or point of appropriations described in the permit.⁴² There does not appear to be a searching review of the water use. All that is required is non-impairment and non-enlargement.

13) South Dakota:

A change of use or place of diversion in South Dakota must be made in a manner and under conditions approved by the Water Management Board.⁴³ There are separate requirements for irrigation rights. Under South Dakota law an irrigation right may only be separated from the land if it should become impracticable to use all or any part of the

³⁶ *Id.* at § 61-04-15.1(3).

³⁷ *Id.*

³⁸ *Id.* at § 61-04-06,

³⁹ Okl. Stat. Ann. tit. 82 § 105.22 (1990).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² O.R.S. § 537.211(4) (1981).

⁴³ S. D. Codified Laws § 46-5-31 (1983).

water beneficially or economically for irrigation of any land to which the right of its uses is appurtenant.⁴⁴ Only then may water be severed from the land pending approval from the Water Management Board.⁴⁵ Thus, the only requirement is that there is reasonable probability that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.⁴⁶

14) Texas:

Texas requires that all holders of permits, certified filings, and certificates of adjudication issued under this code shall obtain from the commission authority to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right.⁴⁷ Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit was fully exercised according to its terms and conditions as they existed before the requested amendment.⁴⁸ In addition to these requirements the chapter requires a pretty standard statutory form for applications, the unusual requirement is the maps and plats must be submitted.⁴⁹

There does not appear to be a statute authorizing the commission to look at the historical use or to make a determination of forfeiture or abandonment.

15) Utah:

Under Utah law no change of use may occur without the prior approval of the state engineer.⁵⁰ When evaluating a proposed change in use the state engineer is required to undertake the same investigation for permanent change applications that the statute mandates for applications to appropriate.⁵¹ This means that a change application may be approved only when it satisfies the criteria of both U.C.A. §73-3-3 and § 73-3-8.⁵² This later section requires an evaluation of several factors, including a finding that there is unappropriated water in the source that may be used without impairment of other rights; that the proposed new use will not interfere with a more beneficial use of water; and that it is in the public welfare.⁵³ Arguably this gives the state engineer broad latitude to

⁴⁴ *Id.* at § 46-5-34.

⁴⁵ *Id.*

⁴⁶ *Id.* at § 46-2A-9

⁴⁷ Texas Water Code Ann. § 11.122(a) (1977).

⁴⁸ *Id.* § 11.122(b).

⁴⁹ *Id.* at § 11.125.

⁵⁰ U.C.A. § 73-3-3 (4)(a) (2005).

⁵¹ *Bonham v. Morgan*, 788 P.2d 497, 503 (Utah 1989).

⁵² U.C.A. § 73-3-8 (2007).

⁵³ *Bonham*, at 499.

inquire into the historic use of the base water right to insure the change meets the criteria of §73-3-8.

The law requires much less review when a temporary change application is involved. A temporary change application shall be approved if it meets the statutory requirements § 73-3-3.⁵⁴ This statute states that temporary change applications shall be approved if the state engineer finds that the temporary change will not impair any vested rights of others.⁵⁵ However, the state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.⁵⁶ If the injury can be mitigated or compensated the change can be approved.

Both types of change applications are required to describe the place, purpose, and extent of the present use and also the place, purpose and extent of the proposed use.⁵⁷ The state engineer is required to investigate the application⁵⁸ and has the authority to reject an application upon a finding that a water right has not been used, and is subject to abandonment or forfeiture.⁵⁹ In an earlier decision, the Court in *Tanner v. Humphreys*, held that a protestant may show evidence of non-use, and by implication, where non-use is demonstrated, the State Engineer should deny the change application.⁶⁰ This allows an opposing party to bring up the issue of abandonment or forfeiture of the water right during the administrative process. In addition, Utah has enacted an administrative rule that requires maps to be filed with change applications that show areas of historic use and the lands that are to be retired to accommodate the proposed new use.⁶¹ This requirement lends itself to an investigation into historic uses. If the state engineer can find no or little evidence of water use on the lands so identified, he should arguably deny the change application based on impairment to other rights since the underlying right appears to have been lost to abandonment or forfeiture.

Thus, even though the state engineer lacks express statutory authority to review historical uses, the case law has been construed to grant this power and the administrative rules certainly opens the door by requiring a certified map of where the water has been historically used.

16) Washington:

In Washington, a water right may be changed if such change can be made without detriment or injury to existing rights.⁶² Further there may be no increase in the annual

⁵⁴ *Id.* at 501.

⁵⁵ U.C.A. § 73-3-3(6)(b).

⁵⁶ *Id.* at § 73-3-3(7)(a).

⁵⁷ *Id.* at § 73-3-3(4)(b)(vii).

⁵⁸ *Id.* at § 73-3-

⁵⁹ *Nephi City v. Hansen*, 779 P.2d 673 (Utah 1989).

⁶⁰ 87 Utah 164, 48 P.2d 484 (1935).

⁶¹ Utah Admin. Code Rule R655-5-3 (2008).

⁶² R.C.W. §90.03.380 (2007).

consumptive quantity of water used under the water right.⁶³ There is a notice and filing requirement for any proposed changes, but there does not appear to be any inquiry in the historical use of the water right. There is a notice and comment requirement,⁶⁴ which as discussed above may allow the issue of historical use to back its way into the discussion.

17) Wyoming

Wyoming requires the filing of a petition requesting permission to make a change of use.⁶⁵ The petition shall set forth all pertinent facts about the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and the proposed place of use.⁶⁶ The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.⁶⁷ There is also a notice and comment period, during which, presumably, abandonment can be used as a defense to the proposed change. Thus the extent of the historic use appears to be a significant part of the Wyoming change application process.

Conclusion:

In general, the various states all have similar statutes in that the requirements for approval are substantially the same. Nearly every state treats a change application the same as an application to appropriate. This will usually necessitate a notice and comment period during which opposing petitions may be filed. Protesting parties are not precluded in any state from raising issues of non-use, forfeiture or abandonment of the base water rights during the administrative process even though there is typically little express authority given to state engineers to inquire into the extent of historic use. However, once facts are presented demonstrating that non-use has occurred, state engineers appear to have discretion to delve into this issue.

⁶³ *Id.*

⁶⁴ *Id.* at §90.03.280.

⁶⁵ Wyo. Stat. Ann. § 43-3-104(a) (2007).

⁶⁶ *Id.*

⁶⁷ *Id.*

State	Historical use review required?	Review Process	Non-enlargement/ non-impairment	Special notes
Arizona	Not required by statute	1) Director approval is required, 2) May only change a perfected right, 3) Notice and comment required, 4) May require an administrative hearing (discretionary), and 5) may condition approvals	Y/Y	
California	Does not appear to have authority, mostly looks to effects of proposed use	1) Board approval is required, 2) Notice and comment period, and 3) Specific board inquiry into water quality and potential effects of change	?/Y	
Colorado	Water Referee does not have the authority to look at the historical uses, but maps and records showing historical uses are required.	1) Anyone may file a statement of opposition (may be based upon an abandonment theory), 2) Referee shall investigate claims in opposition, and also in applications, 3) records of use need to be supplied, and 4) there is a publication requirement	?/Y only seems to appear for groundwater	Has the unique requirement of records demonstrating historical use
Idaho	It seems that there is ample room for review	1) Both water master and district engineer must review, and 2) must be a perfected right 1) Chief engineer must approve, 2) proposed change is reasonable and will not impair existing rights, and (3) proposed change relates to the same local source of supply as that to which the water right relates	Y/Y	
Kansas	Seems that this is available, although not expressly stated	1) May require department or legislative approval, and 2) May condition a change app. 1) Change must be for a superior use, 2) Right may not be subject to termination or cancellation, and 3) Must file a report demonstrating use every five years	Y/Y	
Montana	No express authority, seems to be lacking There is express authority to make an abandonment/ forfeiture inquiry	1) Approval is required, 2) Notice and Comment procedures, 3) Hearing may be required, and 4) Such information as is required to gain a full understanding of the proposed change.	Y/Y	
Nebraska	Not authorized, but may come up during the notice and comment period	1) Notice and comment Required, and 2) Hearing if objected to	Y/Y	Generally seem to be approved if the change meets statutory form
Nevada	May come in through Hearing process, not otherwise authorized	Change may only be to a superior use, and is treated the same as an application to appropriate, There is a public welfare clause	?/Y	Hearing seems to be limited to detrimental impact of change
New Mexico	Not authorized			
North Dakota	Not authorized			

State	Historical use review required?	Review Process	Non-enlargement/ non-impairment	Special notes
Oklahoma	No express authority, may arise in hearing proceedings	1) Approval is required, 2) Publication of time of hearing, change involved and amount of water involved, and 3) hearing is required	?/?	
Oregon	No review process	1) May not result in injury to an existing water right, 2) new land must be contiguous to the current land, 3) all other terms of permit stay the same, and 4) must notify the department of change	Y/Y	No Director approval is required.
South Dakota	There does not appear to be a review process for historical uses	1) Approval is required, 2) different requirements for an irrigation right, 3) may not impair an existing right, and 4) must be a beneficial use	?/Y	Generally only required to not injure an existing right, and be in the public welfare
Texas	No express authority to inquire about historical uses	1) Approval is required for any change, 2) May not injure another water user or the environment, and 3) does require maps and plats with application.	Y/Y	
Utah	Case law has been construed to allow this inquiry. The Statute makes no mention of it.	1) Approval is required, 2) change applications are required to describe place, purpose and extent of use, 3) SE must investigate for impairment, and 4) can bring up abandonment in SE's investigation	Y/Y	
Washington	No express authority, but notice and comment may allow the inquiry to come into play	1) Notice and filing requirement and 2) non-enlargement (express) and non-impairment	Y/Y	
Wyoming	Not express, but may come in through Notice and comment period	1) Notice and comment Required, 2) express non-enlargement inquiry	Y/Y	