

To: Steve Clyde
From: Jon Clyde
Date: 6-11-2008

Memorandum

Re: Use Preferences in the 17 Prior Appropriation States

Introduction:

Of the seventeen prior appropriation states, there are only five do not have express use preference lists. These states are Montana, Nevada, Oklahoma, South Dakota and Washington. Both Montana and Nevada have adopted use preferences for ground water only;¹ South Dakota has declared domestic use the preferred use, but has declined to elaborate; and² Washington has given authority to the Department of Ecology to reserve water for future uses, which implies a preference should be made.³ The remaining prior appropriation states all have use preference lists of one sort or another.

In general, use preferences have been applied in a number of ways: 1) as a factor in weighing which pending applications for appropriative rights should be approved when the resource is inadequate to support all applied for uses; 2) in the granting of conditional appropriation rights-made subject to subsequent preferred uses; and 3) as a basis for exercising the sovereign power of eminent domain.⁴ I will discuss the laws of each state individually and will analyze how each individual state fits into this rubric.

Some general observations and rules do exist. Generally, every state prefers domestic and municipal uses to other uses.⁵ In general, consumptive uses appear to be favored, with non-consumptive uses such as navigation, recreation and power generation usually near the bottom of the list.⁶ Actual use of the preference lists differs from state to state. The majority of the states use their respective preference statutes to determine priority when competing applications to appropriate are being considered.⁷ A smaller majority use the preferences to determine priority among actual uses allowing a higher use to condemn and existing lower preferred but prior use.⁸ The only instance, in which a preferred use list may lead to a true preference, is when the list may be used to curtail an

¹ See Mont. Code Ann § 85-2-506 (2007), and Nev. Rev. Stat. Ann. § 534.120(2) (2007).

² S.D. Codified Law § 46-1-5 (2007).

³ See Wash. Rev. Code. Ann. § 90.54.050 (2007).

⁴ Robert E. Beck, *Use Preferences for Water*, 76 N.D. L. Rev. 753, 770-1 (2000) (citing Alan D. Gross, *Condemnation of Water Rights for Preferred Uses- A replacement for Prior Appropriation?*, 3 Willamette L.J. 263 (1965)).

⁵ *Id.* at 770.

⁶ *Id.*

⁷ See Attachment A.

⁸ *Id.*

existing lower but prior use in favor of an existing higher but junior priority use during a drought or other water emergency.⁹ Beyond these general observations, each state will treat use preference in a different manner.

Thus, I will discuss each state individually. For each state I will explain; 1) whether the use preference applied to approval of pending applications or creates a preference in use under certain circumstances; 2) what uses are preferred; 3) whether or not condemnation is required to exercise the use preference; and 4) any special considerations in that state.

Arizona:

Arizona has a very well defined preference statute. However, the statute only applies to the application process. It provides that, "As between two or more pending conflicting applications for the use of water from a given water supply, when the capacity of the supply is not sufficient for all applications, preference shall be given by the director according to the relative values to the public of the proposed use."¹⁰ The preferred use is domestic and municipal (including gardens not exceeding one half acres to each family).¹¹ Because the preferences are not applied to uses under existing water rights, no property right is being disrupted, and therefore no condemnation requirement appears to exist in Arizona.

California:

The California statute applies to both use of existing rights and application preferences. Municipal and domestic needs are preferred over any other needs. In addition, California recognizes Pueblo Rights. The statute gives preference to a qualifying municipality to the water necessary for municipal uses within its territorial boundaries.¹² The California code states that the application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time.¹³ When any application to appropriate is filed the board shall allow the appropriation for beneficial purposes under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.¹⁴ In acting upon applications to appropriate water the board shall be guided by the policy that the domestic use is the highest use and irrigation is the next highest use

⁹ Beck, *supra* n. 4 at 771. (see e.g. U.C.A § 73-3-21 (2007)).

¹⁰ Az. Rev. Stat. Ann. § 45-157(A).

¹¹ Id. at 157(B)(1).

¹² See e.g. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975).

¹³ Cal. Water Code Ann. § 1460 (West 2007).

¹⁴ Id. at § 1253.

of water.¹⁵ This policy can include conditioning water right approval as a lesser right to a preferred use, typically a municipal use regardless of priority.¹⁶

Colorado:

Colorado has both application and use preferences. The Constitution states that when the water of any natural stream is not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.¹⁷ However, this constitutional scheme of preferences is significant only for purposes of establishing which use can be condemned upon payment of just compensation.¹⁸ Essentially this is a condemnation list, with lesser uses to be condemned in favor of preferred uses upon payment of just compensation.

Idaho:

The Constitution of Idaho grants the right to appropriate and divert the unappropriated waters of the state, and this [right] shall never be denied.¹⁹ Domestic use is the favored use, with agricultural use being the second.²⁰ However, Idaho provides that in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes.²¹ The usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use.²² Condemnation is required to assert the preference.

Kansas:

Domestic is the favored use with municipal, irrigation industrial, recreational water power uses filling out the list.²³ However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it.²⁴ The holder of a prior water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this

¹⁵ *Id.* at § 1254.

¹⁶ *Id.* at § 1463.

¹⁷ Colorado Constitution art XVI § 6.

¹⁸ 6 Waters and Water Rights 433 (2007)

¹⁹ Idaho Constitution art. XV § 3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ K.S.A. § 82a-707(b) (2007).

²⁴ *Id.*

state, other than through condemnation.²⁵ Thus the use preference is only realizable through condemnation.

In the application process, applications for domestic use receive the benefit of a priority date either from the date of the filing of the application in the office of the chief engineer or from the time the user makes actual use of water for domestic purposes, whichever is earlier. This may allow an existing domestic use to obtain an earlier priority date.

Montana:

Montana only recognizes use preferences with regard to groundwater, where domestic is the favored use. Otherwise there is no preference and priority is the only basis for use and appropriation.

Nebraska:

Nebraska favors domestic use and then agricultural uses when the waters of any natural stream are not sufficient for the use of all those desiring the use of the water.²⁶ Condemnation does not appear to be required to exercise the preference. Further, there does not appear to be any preference in use, only during the application process.

Nevada:

Nevada, like Montana, only has a use preference statute with regard to ground water.²⁷ There is no preference statute with regard to applications or uses. This is one of four states without a use preference list.

New Mexico:

New Mexico has both use and application preferences. The New Mexico statute states: [W]here it is not possible or reasonable to grant all applications, preference shall be given to the greatest need and to the most reasonable use, as may be determined by the board, subject to the approval of the court.²⁸ Preference shall be given, first, to domestic and municipal water supply, and no charge shall be made for the use of water taken by private persons for home and farmyard use, or for watering farm stock; second, to supplying water used in irrigation, processes of manufacture, for the production of steam, for refrigerating, cooling and condensing and for maintaining sanitary conditions of stream flow; third, for power development, recreation, fisheries and for other uses.²⁹

²⁵ *Id.*

²⁶ Ne. Const. art. XV § 6.

²⁷ Nev. Rev. Stat. Ann. § 534.120(2) (2003).

²⁸ N.M. Stat. Ann. § 73-14-47(1) (1978).

²⁹ *Id.*

In case any party makes greater, better or more convenient use of the waters of the district without formal application, the fact of such use shall serve all purposes of an application, and the board may proceed to determine a reasonable rate of compensation for the displaced use, the same as though formal application has been made.³⁰ Thus, a more beneficial use can be recognized despite a failure to file a formal application. However, compensation must be paid to any claimant that has followed the statutory procedure and had their application denied as a result of the more beneficial use. New Mexico has recognized Pueblo rights, but this was not held to be a statutory right.

North Dakota: N.D. Cent. Code § 64-04-06.1 (2007)

North Dakota added its preference statute in 1963 and amended it in 1977. It states that when there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the state engineer shall adhere to the following order of priority: 1) Domestic use, 2) municipal uses, 3) livestock, 4) irrigation, 5) industrial, and 6) fish, wildlife and outdoor recreational uses.³¹ North Dakota only allows a change in the purpose of use if it is for a superior use.³² This requirement is unique to North Dakota.

Oklahoma:

Oklahoma has no express preference statute. However, in 1990 the Supreme Court of Oklahoma resurrected the riparian doctrine, making Oklahoma a dual system state. This change allowed all riparian owners to divert water for domestic uses under the riparian rights doctrine which recognized domestic use as an “elemental right” without a permit, but no “true” preference was created. Oklahoma still requires that a beneficial use be demonstrated for any appropriation, but there is no preference in uses when approving or rejecting applications.

Oregon:

Oregon has a preference statute that applies to the application process. It provides: 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.³³ This is distinctly an application preference, but Oregon also has a use preference statute that comes into play during times of drought. Under this statute, Oregon may after a declaration that a severe, continuing drought exists, notwithstanding the priority of water rights, grant preferences of use to rights for human consumption or

³⁰ *Id.*

³¹ N.D. Cent. Code § 64-04-06.1 (2007).

³² N.D. Cent. Code § 64-04-015.1 (2007).

³³ O.R.S. 536.310(12) (1987).

stock watering use.³⁴ Oregon also provides for temporary changes in use, place of use or point of diversion of water without complying with the notice and waiting requirements during a severe drought.³⁵

South Dakota:

South Dakota has declared that the use of water for domestic purposes is the highest use of water and that it takes precedence over all appropriative rights, if it is exercised in a manner consistent with public interest.³⁶ Beyond this South Dakota does not recognize preferences in use or in considering applications. Priority is determined by date, but water appropriated for domestic purposes does not require a permit from the Water Management Board.³⁷ Presumably priority would attach to a domestic right on the date the first work occurred towards making the appropriation.

Texas:

Texas has application preferences, which are based on a comprehensive public policy. The preferences are typical of the other states: 1) Domestic and municipal, 2) agriculture, 3) mining, 4) Hydroelectric power, 5) navigation, 6) Recreation and pleasure, and 7) Other beneficial uses.³⁸ Texas has adopted this public policy in order to preserve and properly utilize State water.³⁹ The uses stated above are to be used when making decisions regarding the appropriation of water. Texas Water Code Ann. § 11.139 provides that during times of emergency, authorizations may be made to deal with the drought, but these may require payment of compensation. Compensation may include the fair market value of the water transferred as well as for any damages caused by the transfer of use.⁴⁰

Utah:

Utah has a preference statute that only applies during times of shortage. Domestic uses are preferred to agricultural uses and any other beneficial uses.⁴¹ Priority of appropriation still shall give the better right as between those using water for the same purpose.⁴² Utah also allows its State Engineer to weigh whether a pending application to appropriate would be detrimental to the public welfare or would interfere with a more

³⁴ O.R.S. 536.750(c).

³⁵ *Id.* at 536.750(b).

³⁶ S.D. Codified Law 46-1-5 (2007).

³⁷ S.D. Codified Law 46-5-8 (2007).

³⁸ Texas Water Code Ann. § 11.024 (2007).

³⁹ *Id.*

⁴⁰ Texas Water Code Ann. § 11.139 (2007).

⁴¹ U.C.A. 73-3-21 (2007).

⁴² *Id.*

beneficial use of the water.⁴³ Utah statutes provide no guidance in determining which use would be more or less detrimental to the public welfare, or interfere with a more beneficial use of water. However, in light of the domestic preference among existing water rights of equal priority, an argument can certainly be made that domestic use would be considered as more in the public interest than some other use of water. Utah Code Ann. §73-3-21 does not require condemnation or that compensation be paid as a condition to asserting the use preference in times of shortage. This law was originally part of the compilation of Utah laws in 1907. According to the annotations, the wording of the proviso of the present section differs materially from the proviso of the former section; in other respects, however, the two sections are identical.⁴⁴ I was unable to find any legislative history for this section. Utah also allows the State Engineer to withdraw unappropriated waters from appropriation to preserve for future use.⁴⁵ Once the water is made available for appropriation, the State Engineer might condition approval of a new appropriation on whether the proposed use of water was considered to be in the public interest (not detrimental to the public welfare).

Washington:

Washington does not have a use preference list. The governing statute is very vague as to how water is to be appropriated. The statute gives authority to the Department of Ecology to reserve water for future use.⁴⁶ These reservations of water may be for agriculture, hydroelectric energy, municipal, industrial and any other beneficial uses, and shall constitute appropriations.⁴⁷ Thus, it seems that the Department may decide what uses to reserve water for, and may deny applications to appropriate as a result, creating a statutory use preference. There is no condemnation language and it does not appear that one use may trump another, even during times of shortage.

Wyoming:

Wyoming provides that preferred uses shall include rights for domestic and transportation purposes, steam power plants, and industrial purposes; existing rights not preferred, may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation.⁴⁸ Preferred water uses shall have preference rights in the following order: i) water for drinking purposes for both man and beast; ii) water for municipal purposes, iii) water for the use of steam engines and for general railway use, water for culinary, laundry, bathing, refrigeration (including manufacture of ice), for steam and hot water heating plants, and steam power plants; and

⁴³ U.C.A. 73-3-8.

⁴⁴ U.C.A. § 73-3-21 (compiler's notes).

⁴⁵ U.C. A. 73-6-1.

⁴⁶ Wash. Rev. Code. Ann. § 90.54.050 (2000).

⁴⁷ *Id.* at § 90.03.345 (2000).

⁴⁸ Wyoming Stat. Ann. § 43-3-102(a) (2007).

iv) industrial purposes.⁴⁹ It is important to note that the Wyoming statute does not grant an express right of condemnation for the preferred uses of steam power plants and industrial purposes.⁵⁰ However, if a party seeks a change of use to a preferred use and the application is approved, just compensation shall be paid and under the direction of the board.⁵¹ Thus Wyoming allows for changes in use to preferred uses, but compensation is required for these changes.

Conclusion:

Overall, fourteen of the 17 prior appropriation states had a use preference list. Oklahoma, has just recently abandoned its preference list. The preference statutes of the various prior appropriation states are materially the same. The uses are typically preferred in the same general order. There are of course local differences, like the mining emphasis in Idaho. The significant difference is in the application of the preference lists. A majority of the states allow the preferences to determine which of two competing applications will be approved. This seems to be the dominant purpose of the lists. Utah is in the minority in that it allows an actual preference in uses in times of shortage. However, applications can be denied if they are deemed detrimental to the public welfare or would interfere with a more beneficial use of water. Therefore, the Utah State Engineer arguably has the authority to give domestic use a preference in approving competing applications. In general, domestic uses are universally preferred, with economic activities next, and recreational uses (when this is recognized as a beneficial use) being the least preferred. The obvious intent of these statutes is to make sure that domestic, or drinking water for human consumption, is protected. This is accomplished by approving applications for domestic and municipal uses over other uses, favoring domestic and municipal uses during times of shortage and in a few cases conditioning approval on a conditional right of condemnation (typically only California does this).

⁴⁹ *Id.* at § 43-3-102(b).

⁵⁰ *Id.* at § 43-3-102(c).

⁵¹ *Id.* at § 43-3-103.

State	Cite	Preference Statute	Preference type	Preference Order	Condemnation Required	Notes
Arizona	Arizona Rev. Stat. Ann. § 45-157 (West 2007)	Y	Preference in Application only	<ol style="list-style-type: none"> 1. Domestic and municipal uses. Domestic uses shall include gardens not exceeding one-half acre to each family. 2. Irrigation and stock watering. 3. Power and mining uses. 4. Recreation and wildlife, including fish. 5. Nonrecoverable water storage pursuant to § 45-833.01 	No condemnation required as there does not appear to be a preference in usage	Does not give priority in use, but will give priority in application process
California	Cal. Water Code § 1253, 1460 (2007).	Y	Application and use		When the municipality desires to use the additional water granted in its application it may do so upon making just compensation for the facilities for taking, conveying, and storing the additional water rendered valueless for said purposes to the person who constructed the facilities. The compensation, if not agreed upon, may be determined in the manner provided by law for determining the value of property taken by eminent domain proceedings.	Municipalities always get preference as a result of native american "pueblo" rights. Pueblo rights give municipalities priority in filing despite earlier filings (with regard to appropriating the same water), the result is that municipal uses are always first in time
Colorado	Col. Const. art. XVI, sec. 6	Y	Application and use	1) Domestic; 2) Irrigation; 3) manufacturing	No Condemnation	
Idaho	Id. Const. art. XV, sec 3	Y		Domestic; Irrigation; manufacturing, but in mining districts, mining use comes before agriculture and manufacturing	Subject to a Takings Claim, when Domestic use is favored	
Kansas	(K.S.A. § 82a-707)	Y	Application and use	Domestic, municipal, irrigation, industrial, recreational and water power uses	The only way use can be asserted instead of priority is through condemnation	Domestic use recieves priority based on date of first use or from the time of filing, which ever is earlier. Historical use, may give you an earlier priority date.
Montana	None	N	Only with groundwater	No preference statutes, only with groundwater- then domestic and livestock have preference.	nope	This is one of five states without a water use preference list
Nebraska	Ne. Const. art. XV, sec 6	Y	Application only??	Domestic, Irrigation, manufacturing	Does not appear that condemnation is required	
Nevada	None		Groundwater preference			This is one of five states without a water use preference list

State	Cite	Preference Statute	Preference type	Preference Order	Condemnation Required	Notes
New Mexico	N.M. Stat. Ann. § 73-14-47(l) (1978).	Y	Application process preference, can also gain priority through using water in a beneficial manner, prior to filing an application	1) domestic and municipal water supply, 2) irrigation, manufacture, for the production of steam, for refrigerating, cooling and condensing and for maintaining sanitary conditions of stream flow, and 3) for power development, recreation, fisheries and for other uses.	Condemnation is req	Also has pueblo rights, not a statutory right
North Dakota	N.D. Cent Code sec 64-04-06.1	Y	Application/ change in use	1) Domestic; 2) municipal; 3) Livestock; 4) Irrigation; 5) Industrial; 6) fish, wildlife, and outdoor recreational uses	No mention of condemnation	
Oklahoma	None					Repealed preference statute in 1990, now is a dual system state (resurrected riparian doctrine in 1990).
Oregon	O.R.S. 536.310(12) (1987).	Y	Use in time of drought	Grants preference for human consumption or stock watering use	Allows for temporary changes in use during times of shortage, on an expediated basis.	Very similar to Utah in its application
South Dakota	S.D. Codified Law 46-1-5 (2007).	Y	Use	Domestic is the highest use of water and takes precedence over all appropriative rights, if it is exercised in a manner consistent with public interest....		This is one of five states without a water use preference list: But does provide that domestic is the highest use
Texas	Texas Water Code Ann. § 11.024 (2007)	Y	Application and use	1) Domestic and municipal; 2) Agricultural; 3) mining and recovery of minerals; 4) Hydroelectric power; 5) Navigation; 6) recreation and pleasure; and 7) other beneficial uses	Compensation may include the fair market value of the water transferred as well as for any damages caused by the transfer of use.	Public Welfare requires not only recognition of beneficial uses but also a constructive public policy regarding the preferences between these uses....
Utah	U.C.A. 73-3-21 and 73-3-8 Wash. Rev. Code Ann. § 90.54.050 (2000).	Y	Application (public welfare standard) and use	In times of scarcity, Domestic, agricultural	No condemnation required	
Washington	Code Ann. § 90.54.050 (2000).	Y	Very Vague	Allows reservations for future use	No	This is one of five states without a water use preference list
Wyoming	Wyoming Stat. Ann. § 43-3-102(b).	Y		Water for drinking purposes for both man and beast; 2) water for municipal purposes; 3) water for the use of steam engines and for general railway use, water for culinary, laundry, bathing, refrigeration (including the manufacture of ice), for steam and hot water heating plants, and steam power plants; and 4) industrial purposes. The use of water for irrigation shall be superior and preferred to any use where water turbines or impulse water wheels are installed for power purposes;	Condemnation is required for public and semi-public purposes except as provided; however, that the preferred use of steam power plants and industrial purposes herein granted shall not be construed to give the right of condemnation	