

THE STATUS OF SURFACE WATER RIGHTS LAWS IN TEXAS: A Comparison to other Prior Appropriation States

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I. Introduction

The Concho Water Snake's days may be numbered. The snake's habitat includes deep flowing water, shallows with rocks and boulders, stream banks, and protected pools with rock piles.¹ This species is dependent on sufficient flows of fresh water for the survival of its riparian habitat. The human population of Texas has been on the rise since the 1960s and is forecasted to continue growing through the foreseeable future.² This population growth will increase the strain on the Texas' already limited water supply. Competing interests of industry, agriculture, and expanding urban areas may threaten to relegate some of the state's most fragile environmental assets to a lower priority as water resources become increasingly scarce. The Concho Water Snake's habitat is in danger due to greater demands on already scarce water in West Texas. At the heart of the problem is the set of laws regulating the distribution and the use of water resources in Texas.

Texas water rights law is anomalous among prior appropriation states. Texas should amend its water rights laws to plan for increasing population in the near future. This note will examine water rights law in general in the United States, including the doctrine of riparian rights, but focusing on the doctrine of prior appropriation. It will consider the status of vested rights and the constitutional implications of vested water

¹ Environmental Impact on Endangered Animals, Concho Water Snake, http://library.thinkquest.org/2878/tx_concho_water_snake.html (last visited Aug. 26, 2010).

² C. Richard Bath, *A Commentary on Texas Water Law and Policy*, 39 NAT. RESOURCES J. 121, 121 (1999).

rights. This note compares water rights laws in various prior appropriation states, including Colorado, California, and New Mexico, and demonstrates both the similarities and differences between these states' laws and Texas' water rights law. This note will focus on the detrimental effects to junior water right holders and the environment; as well as the economic effect on the public if the law remains unchanged. As currently structured, Texas water rights law is ill-equipped to handle a future of increasingly scarce water resources due to the nature of the prior appropriation conditions in place. Senior appropriators may be entitled to the full allotment of their paper permits before any junior appropriators or fragile habitats are allowed to receive their vested allotments, independent of the actual historical use of the senior appropriators.³ In light of these facts, this note concludes with a series of recommendations to amend the law to prepare for continued increases in water demand.

II. Background

Water rights in the United States are governed almost exclusively by two rules: the rule of riparian rights or the prior appropriation doctrine. The majority of states with abundant rainfall, mainly the states in the east, are primarily governed by the rule of riparian rights.⁴ By contrast, the states in the western United States, where rainfall is scarce and water supplies are limited, are governed by the prior appropriation doctrine.⁵ Riparian rights to water occur as a result of landownership. A landowner who owns land that physically touches a river, stream, pond, or lake has an equal right to that source of

³ Colorado Division of Water Resources, The Prior Appropriation System <http://water.state.co.us/wateradmin/prior.asp> (last visited Aug. 26, 2010).

⁴ Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 9 (2002).

⁵ *Id.*

water. A water right under riparian rights is merely a usufructuary right and not an actual property right.⁶ Riparian rights cannot be lost by nonuse and they last indefinitely.⁷

The rule of prior appropriation is “first in time, first in right.” Under prior appropriation, water users who are the first to obtain appropriative rights hold senior rights to use the water of a particular stream system.⁸ If senior appropriators cannot use their entire water right, the unused water must flow to those next in line according to priority.⁹ In times of shortage, an earlier appropriation receives its entire water entitlement before a latter, more junior right receives any.¹⁰

Water rights under prior appropriations are limited by the doctrine of beneficial use. A beneficial use is “the basis, measure, and limit” of a water right.¹¹ An applicant for an appropriative right must show intent to appropriate water for beneficial use and, in most states, an “overt act manifesting this intent.”¹² Common uses of water that are considered beneficial uses include just about any domestic, agricultural, or industrial activity, including sewage treatment, crop production, stock watering, hydroelectric power generation, mining and recreational pursuits.¹³

Speculative uses of water are not considered beneficial uses. All western states except Texas prohibit water speculation.¹⁴ Colorado expressly codified the anti-

⁶ National Science and Technology Center, Bureau of Land Management, Western States Water Laws: Water Appropriation Systems, <http://www.blm.gov/nstc/WaterLaws/pdf/WaterApprSystems.pdf> (last visited Aug. 26, 2010).

⁷ *Id.*

⁸ Jennifer L. Cordua, *The Search for New Supplies: Salvaging the Remains of Agricultural Water Conservation in California*, 31 U.C. DAVIS L. REV. 591, 596 (1998).

⁹ *Id.*

¹⁰ James N. Corbridge, *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law*, 69 U. COLO. L. REV. 503, 505 (1998).

¹¹ Sandra Zellmer, *The Antispeculation Doctrine and Its Implications for Collaborative Water Management*, 8 NEV. L.J. 1004 (2008).

¹² *Id.*

¹³ *Id.* at 1004.

¹⁴ *Id.* at 1011.

speculation doctrine, now referred to as the ‘can and will’ doctrine, which requires that a project to divert water be completed diligently and within a reasonable time.¹⁵ Water speculators do not acquire water rights to utilize their water for a beneficial use immediately, but instead retain the rights with the hope that water values will increase over time, allowing the water rights holder to sell those rights in the future for a profit. Speculation in water can preclude that same water from being used in another manner that is immediately beneficial. As a result, speculation may cause injury to downstream water rights holders and prevent adequate instream flows.

Generally, acquisition of a water right is achieved by putting water to a beneficial use.¹⁶ Thus, a water right perfects when it is put to a beneficial use. But, in most prior appropriation states, two other requirements must be met for a water right to perfect.¹⁷

First, the potential water-rights holder is required to provide notice of intent to appropriate.¹⁸ This step generally includes acquiring a permit for the water. The permit includes a quantity limitation on the water to be appropriated.¹⁹ The quantity is based on the stated purpose of the appropriation.²⁰ However, the quantity limitation in a permit is merely an approximation.²¹ The definitive description of the water quantity and boundaries is not clear until the water is put to a beneficial use.²²

The second requirement in some states for a water right to vest is the construction of a ditch or another means of diversion.²³ Under Colorado law, for example, one is

¹⁵ COLO. REV. STAT. ANN. § 37-92-305(9)(b) (West 2009).

¹⁶ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 223 (2007).

¹⁷ *Id.* at 221-22.

¹⁸ *Id.* at 221.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Johnson, *supra* note 16, at 222.

²³ *Id.* at 222.

required to remove “water from its natural course or location, or control[] water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump or other structure or device.”²⁴ The diversion structure is especially important because it indicates the quantity of water being removed from the body of water.²⁵ Therefore, it follows that the perfected water right is limited to the capacity of the ditch because a water right holder could not possibly put more water to a beneficial use than is diverted.²⁶ Some states include instream flows—in which a diversion structure is unnecessary—as a beneficial use.²⁷

Finally, the amount of water claimed in the permit must be put to a beneficial use for the water right to vest.²⁸ The date that a water right vests is governed by the doctrine of relation. The vesting date is either the date of the use of the water or the date when the right-holder begins construction on a dam, ditch, or flume.²⁹ This requirement has been a long standing rule.³⁰

Once water is put to a beneficial use, that use must continue. An appropriator can lose that water right if beneficial use lapses for a specified period. In most prior appropriation states that period is four or five years,³¹ however in Texas, it is ten.³²

III. The Status of a Vested Water Right

²⁴ COLO. REV. STAT. ANN. § 37-92-103(7) (West 2009).

²⁵ Johnson, *supra* note 16, at 222.

²⁶ *Id.*

²⁷ See e.g. BECK, *infra* note 51, at 418 (citing CAL. FISH & GAME CODE § 5937 (1998)); BECK, *infra* note 51, at 440 (citing COLO. REV. STAT. ANN. § 37-92-102(3) (1991)).

²⁸ Johnson, *supra* note 16, at 223.

²⁹ WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 367 (*completed by* Harold H. Ellis & J. Peter DeBaal, The Lawbook Exchange 2004) (1971).

³⁰ *Id.*

³¹ See e.g. N.M. STAT. ANN. § 72-5-28, 72-12-8 (West 2009) (forfeiture of permit after 4 years of nonuse).

³² TEX. WATER CODE ANN. § 11.173 (Vernon 2008).

The focus of this note is the status of water rights that have been appropriated, but not yet perfected. To understand fully an unperfected water right, it is necessary to know the status of a vested or perfected right.³³ Under the prior appropriation doctrine, a vested water right is characterized as usufructuary.³⁴ A usufructuary right is a right of possession and use only. When a right-holder acquires a usufructuary right (“a usufruct”), the right-holder does not acquire a specific property in the actual water itself. Instead, the right-holder acquires a right of diversion and use of some specific quantity of water that at that time may be flowing in the body of water.³⁵ However, the general rule for private rights of water ownership is that once a water-right holder diverts water from a natural stream as allowed by its permit, it becomes the owner of the actual particles of water.³⁶ At this point, the water right holder has a perfected water right.

A simplified example will help illustrate the difference between water in a water permit that has been appropriated, put to a beneficial use, and perfected and water in a water permit that has been appropriated but not yet perfected or vested. Take, for instance, a scenario in which a state issues a water permit to landowner “A” for 1,000 acre-feet of water in 1990. “A” puts only 500 acre-feet of water to a beneficial use by irrigating his farm. The state then issues a water permit for 1,000 acre-feet of water to landowner “B” in 2000. Landowner “B” is on the same river as “A”, but “B” is downstream from “A.” “B” puts his entire 1,000 acre-feet of water to a beneficial use, also by irrigating his farm. “A” has a vested water right for the 500 acre-feet and “B” has a vested water right for the entire 1,000 feet.

³³ The terms ‘perfected’ and ‘vested’ are often used interchangeably even though they may not have the same connotation. The difference between the two is beyond the scope of this note.

³⁴ HUTCHINS, *supra* note 29, at 441.

³⁵ *Id.*

³⁶ *Id.* at 144.

Complications arise when “A” finally chooses to use his remaining appropriated but unperfected 500 acre-feet when “B” has been relying on that water downstream. Still another issue arises when “A” decides not to put his remaining 500 acre-feet of water to use, but instead transfers that remaining water to person “C.” All of these scenarios can have a harmful economic effect to those relying on the water as a public good. The answers to these issues are provided by state law. The different ways that states define the different forms of water rights determine the methodology for resolving these disputes over water rights in that state.

All prior appropriation states treat at least the vested right as a property right. Since vested water rights are treated as property rights, the question arises as to the types of protections that these water rights are afforded. A United States Court of Federal Claims in Nevada found that vested water rights are constitutionally protected property interests subject to protection under the Takings Clause.³⁷ If a vested right is a constitutionally protected right, then it would follow that once a junior water-right holder vests his water right it is constitutionally protected. This conclusion would apply when that vested water right could have also been a portion of the senior water right holder’s appropriated--but not yet vested--water right under the senior appropriator’s control. In that scenario, the junior water-right holder has a greater interest in that vested portion than the senior water-right holder does.³⁸

IV. Water Rights Laws in the Western States

³⁷ See Hage v. United States, 35 Fed. Cl. 147, 172 (1996).

³⁸ Corbridge, *supra* note 10, at 505.

The treatment of water rights among prior appropriation states varies from state to state. The stricter a state's water rights laws are concerning its definition of beneficial use, change in use, speculation, and vested water rights, the less likely that water right holders will be able to transfer their water rights to a third party without substantial scrutiny from the state water commission. If a state is too lax in water permit granting, the implications could be detrimental to a community and its environment. Texas' water rights law is the most generous in terms of flexibility for water rights holders.

While differences among the water rights laws in the majority of western states and the water rights laws in Texas may seem subtle, the devil is definitely in the details. The following section examines the details of the treatment of water rights by prior appropriation states and shows the similarities and differences among them.

Colorado

In general, the water rights regime of Colorado is the most stringent of all states with regard to perfection, anti-speculation, and change in use. Water rights in Colorado are governed by the prior appropriation doctrine.³⁹ The Colorado Constitution provides that the "water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as provided."⁴⁰ Under Colorado law, a water right is defined as "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same."⁴¹

³⁹ COLO. CONST. art. XVI § 5.

⁴⁰ *Id.*

⁴¹ COLO. REV. STAT. ANN. § 37-92-103(12) (West 2009).

In Colorado, instead of issuing permits as in most states, the state issues “decrees.” Decrees in Colorado differ from permits in other states because a potential water right holder is not granted a judicially awarded final decree until the water is put to a beneficial use.⁴² The priority of the decree is then backdated to the time of the “first step” that was taken toward appropriation.⁴³ This concept is often referred to as the doctrine of relation.⁴⁴

Colorado also issues conditional water rights before granting a decree. A conditional water right is defined as “a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be used.”⁴⁵ A conditional water right comes into play when projects take a long time to complete. An applicant who has taken the initial steps to appropriate water for beneficial use may receive a “conditional” water right to maintain priority until the project is complete.⁴⁶ Once the water is put to a beneficial use, the conditionally decreed priority relates back to the originally decreed appropriation date and becomes an absolute right.⁴⁷ As a conditional water right, the right is not yet vested before being put to a beneficial use, and therefore, does not carry the same value as a vested water right and under the above would not receive the same constitutional protections as a property right.⁴⁸

⁴² See Corbridge, *supra* note 10, at 505.

⁴³ *Id.*

⁴⁴ HUTCHINS, *supra* note 29, at 383.

⁴⁵ COLO. REV. STAT. ANN. § 37-92-103(6) (West 2009).

⁴⁶ *Id.*

⁴⁷ National Science and Technology Center, Bureau of Land Management, Western States Water Laws: Colorado, <http://www.blm.gov/nstc/WaterLaws/pdf/Colorado.pdf> (last visited Aug. 26, 2010) [hereinafter Colorado].

⁴⁸ See Hage, 35 Fed. Cl at 172.

Colorado defines beneficial use as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made...”⁴⁹ While specific beneficial uses are not statutorily listed, state recognized beneficial use categories include: aesthetics and preservation of natural environments, augmentation, commercial use, domestic use, fire protection, fishery use, geothermal use, groundwater recharge, industrial use, irrigation, livestock use, and municipal use.⁵⁰

Beneficial use under Colorado law “also includes the appropriation by the State of Colorado of minimum flows between specific points or levels on natural streams and lakes as are required to preserve the environment to a reasonable degree.”⁵¹ In *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, the Supreme Court of Colorado interpreted the statute codifying this concept.⁵² The court held that the Board does not have authority to relinquish part of a decreed minimum stream flow right.⁵³ If the Board wishes to exercise less than its decreed right, “it must proceed instead through a change of use application to modify its water right.”⁵⁴

Changes in water rights include “a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion and a change in the means of a diversion.”⁵⁵ The change in use of a water right is important because uses that lower the water level may

⁴⁹ COLO. REV. STAT. ANN. § 37-92-103(4) (West 2009).

⁵⁰ Colorado, *supra* note 47.

⁵¹ ROBERT E. BECK, WATERS AND WATER RIGHTS 440-41 (1991 edition) (citing COLO. REV. STAT. ANN. §37-92-102(3) (1991)).

⁵² *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

⁵³ *Id.* at 1261.

⁵⁴ Beck, *supra* note 51, at 441.

⁵⁵ COLO. REV. STAT. ANN. § 37-92-103(5) (West 2009).

negatively affect other water interests downstream, the environment, and instream flows. Therefore, water right holders must apply for a change in use of water to ensure the maintenance of stream conditions as found when holders of other vested water rights first made their appropriations.⁵⁶ When considering a change in use of a water right, the Board looks to the historic consumptive use, including a transfer of water rights.⁵⁷

However, it is important to note that the difference between a “beneficial use” and the “historic consumptive use” in Colorado. A “beneficial use” is a close estimate of the amount of water that will be used for the purposes approved.⁵⁸ The “historic consumptive use” is the amount the Board takes into consideration for a change in use and is a recorded empirical amount based on a set amount of time when the water was in use.⁵⁹ Therefore, the consumptive use will not always match the amount of the projected beneficial use.

Colorado’s consideration that no change in use of water may interfere with the expectations of other vested water rights is known as the ‘no-injury rule.’⁶⁰ Colorado’s no-injury rule states that a change in use of water, or a plan for augmentation, shall be approved if such change “will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.”⁶¹

A Colorado court interpreted the change-in-use doctrine in conjunction with the no-injury rule in the case of *Orr v. Arapahoe*.⁶² In that case, the court observed that

⁵⁶ Corbridge, *supra* note 10, at 507.

⁵⁷ *Id.* at 506.

⁵⁸ *Id.* at 506-07.

⁵⁹ *Id.* at 507.

⁶⁰ *Id.*

⁶¹ COLO. REV. STAT. ANN. § 37-92-305(3)(a) (West 2009).

⁶² *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1223 (Colo. 1988).

“several limitations are read into every decree by implication.”⁶³ Among those implications are the ideals that diversions are limited to an amount sufficient for the appropriation’s purpose and that a senior water-right holder may not take excess water left over after the irrigation process and lend, rent, or sell it to others against a junior water-right holder.⁶⁴

To illustrate Colorado’s water-right law in more detail, consider again the hypothetical example of the senior water-right holder who was issued a water permit (or under Colorado law, a “decree”) of 1,000 acre-feet of water, but only had vested 500 acre-feet of water. Under Colorado law, if Landowner “A” wanted to start using more than the perfected 500 acre-feet of water due to a change in use, Landowner “A” would have to apply for a change in use. The Board should approve that change in use only if the amount used over the historic consumptive use of 500 acre-feet would not injure those other water-right holders who have vested water rights in a portion of the second set of 500 acre-feet of water. Also, the increase in amount over the historic consumptive use cannot restrict below a certain threshold water flows to sensitive ecosystems. The measurement of the historic consumptive use is a critical element in determining the quantity that can be transferred without injury to other water users.⁶⁵ (It is important to note that a subtle difference in Texas law may result in a completely different outcome in this example.)

Another tool that Colorado has in its water-code arsenal to ensure the most beneficial use of water is the anti-speculation doctrine. Many states have implemented

⁶³ Corbridge, *supra* note 10, at 518 (citing *Orr*, 753 P.2d at 1223).

⁶⁴ *Id.*

⁶⁵ Corbridge, *supra* note 10, at 504.

the anti-speculation doctrine in case law,⁶⁶ but Colorado is the only one to date that has codified it. As noted, the doctrine is now referred to as the ‘can and will’ doctrine. In the Colorado Water code, it states:

No claim for a conditional water right may be recognized or a decree therefore granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.⁶⁷

Colorado case law also supports anti-speculation. In *City of Thorton v. Bijou*, the Supreme Court of Colorado said that to fulfill the ‘can and will’ requirement, an applicant must “establish that there is a substantial probability that within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence and that as a result waters will be applied to a beneficial use.”⁶⁸ More recently, the court in *Pagrosa v. Trout Unlimited*, held that a “governmental water supply agency has the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of unappropriated water: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections, based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply.”⁶⁹ The court also said that the governmental water supply agency must fulfill the can and will test: that it can and will put the conditionally appropriated water to beneficial use within

⁶⁶ *Bacher v. State Eng’r*, 146 P.3d 793, 799 (Nev. 2006); *Central Delta Water Agency et. al. v. State Water Res. Control Bd.*, 124 Cal.App. 4th 245, 267 (2004).

⁶⁷ COLO. REV. STAT. ANN. § 37-92-305(9)(b) (West 2008).

⁶⁸ *City of Thorton v. Bijou Irrigation Co.*, 926 P.2d 1, 42-43 (Colo. 1996).

⁶⁹ *Pagrosa Area Water & Sanitation v. Trout Unlimited*, 170 P.3d 307, 309-10 (Colo. 2007).

a reasonable period of time.⁷⁰ In 2005, Colorado extended the anti-speculation principles to changes in use of the water, which further emphasizes the importance of anti-speculation.⁷¹

Colorado water rights laws are well-formulated in preparation for future needs in a state with a relatively large population but a low supply of water. Colorado's acknowledgement of the full value and protections of a vested water right – including those of junior appropriators – limits the use of water transfers, thereby eliminating any negative impact of water markets on third parties or the environment.

California

Similar to Colorado, California has adopted water rights laws that are relatively strict in terms of acquiring a water right, but California has also experimented with transferring water rights and water marketing. California was one of the first Western states to identify and adopt the prior appropriation doctrine of water rights.⁷² Although California has adopted prior appropriation, the State still recognizes riparian water rights.⁷³ Some courts have held that riparian rights have a higher priority than prior-appropriation rights except when the appropriated rights were initiated before the grant of a portion of public lands of the United States.⁷⁴ This note will limit its discussion to California's treatment of prior appropriation.

Like all prior-appropriation states, water appropriated must be put to a beneficial use. California's Constitution states:

⁷⁰ *Id.* at 310.

⁷¹ *High Plains A&M, LLC v. Se. Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005).

⁷² BECK, *supra* note 51, at 409.

⁷³ *Id.* (citing *Irwing v. Phillips*, 5 Cal. 140, 146 (1855)).

⁷⁴ *Id.* at 410 (citing *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 774-775 (1998)).

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 a 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.⁷⁵

Under California law, the water appropriation must be for some useful and beneficial purpose, and when the appropriator fails to put the water to that purpose, the right ceases.⁷⁶ Beneficial uses in California include domestic uses,⁷⁷ uses for a municipality,⁷⁸ irrigation, hydroelectric power,⁷⁹ and transfers of water.⁸⁰ California is unique in that it explicitly states that transfer of water is a beneficial use. As mentioned above, California is a leader in water marketing. The acknowledgment by the California Legislature in 1980 that a transfer of water qualifies as a beneficial use has hefty implications.

California's Water Code states:

The Legislature...finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have right to, or rely on, the water covered by a proposed transfer.⁸¹

The policy rationale for implementing a water code section to allow for water transfers is that many scholars and economists believe transfers allow for a means of achieving greater efficiency through water marketing.⁸² Water marketing makes water a commodity, establishes a framework for trading, and therefore, allows for the emergence of a price signal. Those in favor of water marketing believe that the opportunity to

⁷⁵ CAL. CONST. art. X, § 2.

⁷⁶ CAL. WATER CODE § 1240 (West 2009).

⁷⁷ *Id.* at § 106.

⁷⁸ *Id.* at § 106.5.

⁷⁹ *Id.* at § 106.7.

⁸⁰ *Id.* at § 109.

⁸¹ *Id.* at § 475.

⁸² CAL. WATER CODE § 475 (West 2009).

engage in water transfers increases efficiency, because “users are confronted with the opportunity cost of their existing water management practices.”⁸³ In other words, the opportunity to transfer water puts a price on water that is wasted, causing users such as farmers to view wasted water as lost revenue.

After the California Legislature condoned water transfers in 1980, the Department of Water Resources created a water bank in 1991.⁸⁴ The water bank allowed sellers to sell water to the bank for \$125 per acre-foot and buyers to buy water for \$175 per acre-foot. The difference of \$50 was then allocated to cover the administrative costs of running the bank and carriage water needs.⁸⁵

While the water bank seemed to provide a solution to some of California’s water shortages, it also created other problems in regards to third parties. The water transfers were detrimental to water levels in some areas due to the displacement. This effect resulted in an increase of social service expenditures and damage to certain fisheries.⁸⁶ California’s treatment of water as a commodity instead of an economic benefit for the public had detrimental effects to those that relied on it as a public good.

While the California water bank got off to a controversial start, the Board has implemented environmental safeguards to prevent water shortages and negative effects on third parties. The Board now has the authority to reject applications for public interest reasons.⁸⁷ While a rejection rarely happens, the Board is now stricter with the limitations on the permits that it issues.⁸⁸ The Board is stricter through requiring a greater level of

⁸³ Brian E. Gray, *The Shape of Things to Come: A Model Water Transfer Act for California*, 14 HASTINGS W.-N.W. J. ENVTL. L.& POL’Y 623, 632 (2008).

⁸⁴ BECK, *supra* note 51, at 416.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 417.

⁸⁸ *Id.*

scrutiny when approving beneficial use and by denying applications that appear to be speculative.⁸⁹

California now recognizes that water transfer laws, if implemented, should be implemented with caution and awareness of all those parties who could be affected. As discussed above, vested water rights are treated as property rights in all of the prior appropriation states and, in some, are even afforded constitutional protections. Even those junior appropriators have a property interest in the water that they have put to a beneficial use and have priority at least for that portion of water to the senior appropriator's unperfected right. Therefore, it is imperative that any water transfer law specify, as California law does, that the water transfer occur only in a "manner that fully protects the interests of other entities which have a right to the water covered by the proposed transfer."⁹⁰ This clause should prevent harm to the junior appropriator's use of the water and just as importantly, the water essential to preservation of aquatic life downstream.

To prevent water hoarding and to ensure that water appropriated or transferred is appropriated only as needed, California has also adopted the anti-speculation doctrine, although it does not use that term specifically. The California Constitution requires that "a permit to impound water in a reservoir must state, and the Water Board must determine, that an actual, beneficial use, in estimated amounts, will be made of the impounded waters."⁹¹

Case law in California also supports the anti-speculation doctrine. In *Central Delta Water Agency v. State Water Resource Control Board*, the Board issued permits for

⁸⁹ *Id.*

⁹⁰ CAL. WATER CODE § 475 (West 2009).

⁹¹ CAL. CONST. art. X, § 2.

the appropriation of water for a corporate wetlands project.⁹² The Board hoped to divert water from the San Francisco Bay into reservoirs in the wetlands for later redirection and sale to potential buyers in large amounts. The appellate court held that the Board, in violation of the California Water Code, failed to specify the actual intended use of the water to be appropriated for a specific use.⁹³ Indeed, the court believed that “it was not possible for the Board to estimate the reasonable amount of water that could be put to any specific beneficial use.”⁹⁴

California also acknowledges scrutiny is required when an appropriator wishes to modify the allocation of water. Under California law, when water is appropriated for one specific purpose it “shall not be deemed appropriated for any other or different purpose, but the purpose...may be changed”⁹⁵ However, a change in purpose may only occur with the permission of the Board.⁹⁶ The Board may approve a water application only if it “will not operate to the injury of any legal user of the water involved.”⁹⁷

Another environmental safeguard found in California law is the public trust doctrine. According to this doctrine, the State holds certain important natural resources in trust for the public.⁹⁸ For example, Section 5973 of the California Fish & Game Code requires the owner of dams to allow sufficient water to bypass their dams “to keep in good condition any fish that may be planted or exist below them.”⁹⁹ In *National Audubon Society v. Superior Court* (the “Mono Lake” case) the Supreme Court of California held that the State lacked the authority to convey vested rights that resulted in

⁹² *Central Delta Water*, 124 Cal.App. 4th at 267.

⁹³ *Id.* at 264.

⁹⁴ *Id.* at 261.

⁹⁵ CAL. WATER CODE § 1700 (West 2009).

⁹⁶ *Id.* at § 1701.

⁹⁷ *Id.* at § 1702.

⁹⁸ Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 683-84 (1989).

⁹⁹ BECK, *supra* note 51, at 418 (citing CAL. FISH & GAME CODE § 5937).

harm to trust resources.¹⁰⁰ The Mono Lake decision is important because it shows that even though vested rights may be property rights, the State can prevent a transfer of water that would impair trust resources. Mono Lake also reemphasized the fact that private water rights in California are contingent and heavily regulated.¹⁰¹

California is more lenient than Colorado with its water permits, statutory approval of water transfers, and creation of a state water bank. However, over time, California has realized the importance of implementing procedural safeguards when approving water applications. Many competing factors must be considered: the interests of third-parties, those of junior water-right holders, aquatic life in the environment, and the interest in water as a public good.

New Mexico

Much of New Mexico is desert with little rainfall and water. Therefore, New Mexico's water-rights laws are critical to ensuring that New Mexico's residents have access to water. Prior appropriation governs both surface water and groundwater in New Mexico.¹⁰² In accordance with the prior-appropriation doctrine and with how most western states treat water rights, beneficial use "shall be the basis, the measure and the limit of the right to the use of the water."¹⁰³ Distinct from some western states, New Mexico law requires that if the water is used for irrigation, that water shall be appurtenant to the land owned by the appropriator.¹⁰⁴ Otherwise, the water is not required to be

¹⁰⁰ Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 Ariz. L. Rev. 701, 701 (1995) (citing Nat'l Audobon Soc'y v. Superior Court, 65 P.2d 709 (Cal. 1983)).

¹⁰¹ *Id.* at 710-11.

¹⁰² N. Colorado River Municipal Water District M. STAT. ANN. § 72-1-2 (West 2009).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

appurtenant to the land owned by the appropriator. Neither New Mexico's statutes nor its Constitution list different types of uses considered beneficial. However, many have been so considered in case law. Domestic uses, stock watering, and irrigation have been approved as beneficial uses.¹⁰⁵ Fishing and recreational boating have also been approved.¹⁰⁶ New Mexico has recognized, however, that excessive diversion of water is wasteful and does not constitute a beneficial use.¹⁰⁷

New Mexico distinguishes between a water permit and a perfected water right. A permit itself is not a perfected water right. A water right is perfected once it is put to a beneficial use.¹⁰⁸ If the water right is not put to a beneficial use for a continuous four-year period, it is forfeited.¹⁰⁹ The portion of the water permit that is not perfected and not vested is not afforded the same rights and protections as that portion that is perfected and vested. However, it is important to note that New Mexico has an exception to its forfeiture rule. New Mexico law allows municipalities and other specified public entities to hold unused water rights in an amount greater than their reasonable needs for up to forty years as long as the entity has an approved water development plan.¹¹⁰ This exception allows cities to accumulate water without putting it to a beneficial use for forty years in order to plan for future needs.¹¹¹

Similar to other prior appropriation states, New Mexico also issues permits for those "intending to acquire the right to the beneficial use of any waters."¹¹² New Mexico is unique in that the applicant must publish notice in a newspaper that is distributed in

¹⁰⁵ BECK, *supra* note 51, at 831 (citing *First State Bank of Alamogordo v. McNew*, 269 P. 56 (1928)).

¹⁰⁶ *Id.* at 832 (citing *State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (1947)).

¹⁰⁷ *Id.* (citing *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981)).

¹⁰⁸ *Id.* at 838 (citing *Hanson v. Turney*, 94 P.3d 1 (N.M. Ct. App. 2004)).

¹⁰⁹ N.M. STAT. ANN. § 72-5-28 (West 2009).

¹¹⁰ *Id.* at § 72-1-9.

¹¹¹ BECK, *supra* note 51, at 833 (citing N.M. STAT. ANN. § 72-1-9 (West 2009)).

¹¹² N.M. STAT. ANN. § 72-5-1 (West 2009).

each county affected by the diversion and in each county where the water will be put to a beneficial use.¹¹³

While New Mexico created an exception for municipalities to bank water for forty years in anticipation of future needs, New Mexico law prohibits this sort of speculation by other entities.¹¹⁴ New Mexico law provides that “construction of works shall be diligently prosecuted in order that the project may be completed within the time set by the water permit.”¹¹⁵

New Mexico has also codified a no injury rule, which allows the transfer of water for other purposes than those stated in the original application, “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.”¹¹⁶ Also, just like the application for a water permit, the application for a change in use or a transfer requires publication of notice.¹¹⁷ Therefore, while New Mexico does allow for transfers of water permits, New Mexico law also provides an important safeguard to protect existing junior appropriators and the public welfare through the notice period and opportunity to object to the change in use.

New Mexico water-rights law seems to fall somewhere between Colorado and California. While it does provide for the opportunity to transfer water rights, New Mexico has a secure safety net in the notice period to protect third parties and the public welfare. This type of safeguard does not exist in Texas.

¹¹³ *Id.* at § 72-5-4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at § 72-5-8.

¹¹⁶ *Id.* at § 72-5-23.

¹¹⁷ *Id.*

Texas

Similar to the pattern of the rainfall in the United States as a whole, the amount of rainfall in Texas is distinct from one side of the state to the other. In East Texas, rainfall is more abundant, whereas in West Texas rainfall and water supplies are scarce. The side of the state that lies to the east of the I-35 Interstate Highway corridor receives as much as fifty-five inches of rain each year, while the western half receive as little as seven.¹¹⁸ The population of Texas will have increased from 9.5 million in 1960¹¹⁹ to an expected 24.6 million in 2009,¹²⁰ and the population in the western part of the state is growing at a higher rate than in the eastern part.¹²¹ As the population in Texas grows, effective water planning must ensure both that sufficient water exists for everyone and that sufficient water is left undisturbed in the environment to preserve habitats for wildlife such as the Concho Water Snake.

Water rights laws in Texas have been described as originating from a “hodge-podge of historical and contradictory water rights systems.”¹²² Water rights law in Texas was “influenced by Spanish and Mexican civil law water rights systems, the English doctrine of riparian water rights, and the western American doctrine of appropriative rights.”¹²³ In the interest of creating a consistent set of water-rights laws in Texas, the Texas Legislature passed the Water Rights Adjudication Act in 1967.¹²⁴ The act

¹¹⁸ Bath, *supra* note 2, at 121.

¹¹⁹ *Id.*

¹²⁰ Texas Department of State Health Services, Projected Texas Population by Area, 2009, <http://www.dshs.state.tx.us/chs/popdat/ST2009.shtm> (last visited Nov. 4, 2009).

¹²¹ Bath, *supra* note 2, at 121.

¹²² City of Marshall v. City of Uncertain, 206 S.W.3d 97, 101 (quoting Robin A. Melvin, *Transferring Water Rights in Texas*, in 14.1, THE CHANGING FACE OF TEXAS WATER RIGHTS IN TEXAS 2003 (State Bar of Texas)).

¹²³ BECK, *supra* note 51, at 1051.

¹²⁴ *Id.*

converted all water claims from that date forward to prior appropriation.¹²⁵ All unappropriated water now requires a permit for use granted by the State.

For the Texas Commission on Environmental Quality to grant a new permit, unappropriated water must exist. Controversy over the definition of “unappropriated” water was resolved in the *Lower Colorado River Authority v. Texas Department of Water Resources* (“Stacy Reservoir”) case.¹²⁶ In the Stacy Reservoir case, the Lower Colorado River Authority protested the application permit of a dam on the basis that insufficient levels of water existed to create a lake.¹²⁷ The issue was whether the Commission could issue a permit if all the water in the river basin had already been appropriated.¹²⁸ The applicant, Colorado River Municipal Water District, argued that unappropriated water included all the water that had not yet been put to a beneficial use, regardless of whether it was permitted.¹²⁹ Therefore, water under the Water District’s definition would have included some water already permitted to appropriators.¹³⁰ The Texas Supreme Court rejected that argument and found that the term “unappropriated water” means “the amount of water remaining after taking into account all existing uncanceled permits and filings valued at their recorded levels.”¹³¹ The Stacy Reservoir case is significant because it limits the Commission to issuing permits only for water that is not permitted, regardless of whether or not that water has yet been put to a beneficial use. The court also held that the Commission “may not grant permits when its own records show that the supply must come from an existing downstream permittee’s water that the Commission

¹²⁵ *Id.*

¹²⁶ *See* *Lower Colo. River Auth. v. Texas Dep’t of Water Res.*, 689 S.W.2d 873 (Tex. 1984).

¹²⁷ *Id.* at 875.

¹²⁸ *Id.* at 876.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 874.

speculates he will not actually need.”¹³² Prior to this case, the Commission could appropriate water on which the Commission believed the downstream users were not relying.

Like all prior appropriation states, Texas requires that water be used only if it is to be put to a beneficial use.¹³³ Under Texas law, beneficial use is defined as the amount of water that is economically necessary for a purpose authorized by law “when intelligence and reasonable diligence are used in applying that water to that purpose.”¹³⁴ Beneficial uses under Texas law include: domestic and municipal uses, agricultural and industrial uses, mining and recovery of minerals, hydroelectric power, navigation, recreation and pleasure, public parks, and game preserves.¹³⁵ Unlike the other prior appropriation states, Texas includes a catch-all clause that states “water also may be appropriated, stored, or diverted for any other beneficial use.”¹³⁶ The clause gives the state agency the discretion to allow other beneficial uses, but raises the issue of agency abuse of discretion.

Unlike California, Colorado, and New Mexico, Texas has not implemented an anti-speculation or ‘can and will’ doctrine. Texas does not have any safeguard to prevent speculation when acquiring or maintaining a water right. The prevention of speculation leads to water hoarding, which can negatively affect both instream uses and those who have rights to that same water. The lack of an anti-speculation law in Texas sets it apart from other prior appropriation states and allows more leniency when granting water permits. While Texas has few safeguards to prevent the negative effects of water banking, in Texas an application to amend a water right to change its authorized use

¹³² *Lower Colo. River Auth.*, 689 S.W.2d at 882.

¹³³ TEX. WATER CODE ANN. § 11.134(b)(3)(A) (West 2009).

¹³⁴ *Id.* at § 11.002(4).

¹³⁵ *Id.* at § 11.023(a)(1)-(8).

¹³⁶ *Id.* at § 11.023(b).

must pass the no-injury test. Texas' application of the no-injury rule to amendments is different than that of the states analyzed above.

Section 11.134 (b)(3)(B) of the Texas Water Code provides that the Commission shall grant a water permit application only if "it does not impair existing water rights or vested riparian rights."¹³⁷ The no injury rule was implemented to protect existing water rights from impairment. Those water rights to be protected also include those rights that are junior to the water rights being amended.¹³⁸ The no injury rule is also important when a water-right holder wishes to change his water right. Under Texas law, a junior appropriator's water right will be protected against proposed changes to a senior appropriator's water right that would impair the junior water right.¹³⁹ However, with the implementation of Section 11.122(b) in the Texas Water Code, the limitations on an amendment to a water right under the Commission's consideration is different than that in other prior appropriation states and may even contradict Section 11.134(b)(3)(B).¹⁴⁰

To fully understand Section 11.122(b) and its implications, it is important to read it in its entirety:

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 holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.¹⁴¹

¹³⁷ *Id.* at § 11.134(b)(3)(B).

¹³⁸ TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, A REGULATORY GUIDANCE DOCUMENT FOR APPLICATIONS TO DIVERT, STORE OR USE STATE WATER, RG-141, 27 (1995).

¹³⁹ *Id.* at 28.

¹⁴⁰ TEX. WATER CODE ANN. § 11.122(b) (West 2009).

¹⁴¹ *Id.*

As stated above, an amendment shall be granted unless the amendment is seeking to increase the total amount of the permit or the rate of diversion. The language in Section 11.122(b) indicates an assumption that the appropriator who is seeking an amendment to his existing water permit is already using the entire water permit. Therefore, unlike in other states, the Commission considers it impairment on other junior appropriators or on the environment to occur in an amendment only if the appropriator is seeking to increase the water permit as a whole or increases the rate of diversion. This standard is different from all other prior appropriation states because in those states, the commission or board examines the historic use of the water to which it was actually put as a consumptive use and not the amount of authorized use in the water permit in its entirety. This difference can severely impact third parties, including the public welfare.

Returning to our hypothetical example will clarify. Under Texas law, in the amendment scenario discussed above, if senior appropriator “A” is seeking an amendment, the Commission will use its discretion only to decide to deny an amendment if “A” is applying to use more water than the 1,000 acre-feet in the water permit. By contrast, under Colorado law, the Commission will use its discretion to deny an amendment if “A” is seeking to amend his permit to use more than the *historic consumptive* use of 500 acre-feet.

The implications of this distinction are far reaching for our original example. If junior appropriator “B” is relying on and has vested the 500 acre-feet of the water left over from “A”’s unused 1,000 acre-feet, that fact is irrelevant under Section 11.122(b) of the Texas Water Code. On the other hand, under Colorado law, any change in use which

is above the 500 acre-feet of “A”’s historic consumptive use could be denied if it is found to impair “B”’s right or injure the public welfare.

Under the vested rights analysis, the law in the other prior-appropriation states is the only way to completely protect “B”’s vested rights—which are treated as property rights in all states including Texas. This fact has even greater implications. If vested rights are determined to have constitutional protections (as the *Hage* court believed they do), then the State could commit an unconstitutional taking, through the automatic granting of “A”’s amendment to increase from 500 acre-feet to anywhere within 1,000 acre-feet of water. It would be a violation of the Takings Clause of the Fifth Amendment to approve a water permit application that harms a junior appropriator’s vested rights.

The meaning and implications of Section 11.122(b) were at issue in *City of Marshall v. City of Uncertain*.¹⁴² In that case, the City of Marshall held a water permit recognizing a right to use up to 16,000 acre-feet of water from Cypress Creek.¹⁴³ In 2001, the City applied to change the use from municipal to industrial, triggering the amendment to the water permit provisions in Section 11.122(b).¹⁴⁴ An issue in the case was that the City of Marshall was seeking to amend the water permit for another use and increase the amount used from its *historic consumptive use*, which would affect a third party, but the amendment was not seeking to increase the amount of water or rate of diversion from the original water *permit* amount.¹⁴⁵ Therefore, the City of Marshall argued that under Section 11.122(b), the Commission was required to grant the permit

¹⁴² *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006).

¹⁴³ *Id.* at 98.

¹⁴⁴ *Id.* at 99.

¹⁴⁵ *Id.* at 100.

despite the consequences to downstream entities and the environment.¹⁴⁶ The Commission had approved the permit amendment without a notice and hearing period because “[S]ection 11.122(b)’s full-use assumption mandated authorization of the change.”¹⁴⁷ The Supreme Court of Texas clarified that the full-use assumption or four-corners doctrine requires “the Commission to assess a requested amendment’s impact on other water rights and the on-stream environment based upon the full amount of water authorized by the existing permit irrespective of the amount that the permit holder has actually used.”¹⁴⁸

The City of Uncertain argued that the introductory sentence of Section 11.122(b) “subject to meeting all other applicable requirements of this chapter for the approval of an application” precluded the Commission from granting a water permit amendment without verifying that the effects of the amendment would not violate other sections of Chapter 11 of the Texas Water Code, which include the no injury rule.¹⁴⁹ In the end, the court held that Section 11.122(b) did not necessarily mandate issuance of the City of Marshall’s water rights amendment.¹⁵⁰ However, the Stacy Reservoir case shows that the Supreme Court of Texas interprets Section 11.122(b) as a presumption of full use of a water permit.¹⁵¹

The *City of Marshall* case exemplifies the effects of Section 11.122(b). If Section 11.122(b) mirrored the other prior appropriation states’ change-in-use laws, issuance of a

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *City of Marshall*, 206 S.W.3d at 112.

¹⁴⁹ *Id.* at 106.

¹⁵⁰ *Id.* at 105.

¹⁵¹ *Lower Colo. River Auth.*, 683 S.W.2d at 874.

change-in-use of a water permit would require an assessment of historic consumptive use instead of presuming an appropriator used the full amount of his paper right.

The legislative history of Section 11.122(b) indicates the Legislature's intent to make the amendment process "less cumbersome by imposing the full use restriction on the assessment of adverse impacts on other water rights and the on-stream environment."¹⁵² However, the Legislature's intent on enacting Section 11.122(b) was also to protect the public welfare by ensuring protection of water rights.¹⁵³ In effect Section 11.122(b) does the opposite. As the court noted in the *City of Marshall* case, the executive director said that Section 11.122(b) limited the Commission's discretion to deny or condition approval of an amendment.¹⁵⁴ If the Commission continues to only deny water rights if they are above the original water permit amount or increase the authorized rate of diversion, very few amendments to water rights will be rejected. Junior appropriators, the environment, and the economic benefit of water as a public good will suffer.

V. Conclusion

If Texas law remains as it is, species such as the Concho Water Snake will not survive. Sufficient water will not exist in their habitats. The Commission will continue to approve water permits based on the assumption of full use. Senior appropriators will continue to transfer water to other entities and for other uses without regard to junior appropriators who have vested rights in that same water, and without regard to the environment in general. In other words, senior appropriators will be able to transfer

¹⁵² *City of Marshall*, 206 S.W.3d at 107.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

unperfected water rights (the amount above their historic consumptive use but within their permitted amount) to the highest bidder.

In addition to detrimental ecological effects, Texas' full use assumption provision may be unconstitutional. The government may well commit an unconstitutional taking when it allows senior appropriators to transfer unappropriated water rights to third parties without regard to vested rights to the same water downstream. Texas courts have yet to address this constitutional issue. In the meantime, water marketing is increasing as water becomes scarcer and therefore more valuable. Without well thought-out safeguards and limitations, Texas will run into the same problem California did in the early 1990s. Third party entities will purchase water rights from appropriators at the cost of downstream users, the environment, and the economic benefit to those relying on water as a public good. Texas' problem could be even worse, given the full use assumption of Section 11.122(b). Therefore, if Texas wishes to continue to allow the transfer of water and water rights, it needs to implement safeguards similar to the ones other states have put in place.

VI. Recommendations

In an effort to amend Texas water law, Texas should consider doing two things in particular: 1) amend Section 11.122(b) to consider the historic consumptive use of water, instead of the four corners of the water permit, when deciding on an application for an amendment to a water right, and 2) implement the 'can and will' doctrine to encourage efficient use of water and to prevent speculation and water hoarding.