Water and Growing Cities

A Survey of Western State Water Requirements for Urban Development

Prepared by the Board of Advisors

for

***Dividing the Waters* General Conference**

November 1-4, 2017

Baylor University

Waco, Texas

Authors – Board of Advisors

David Aladjem and Rebecca Smith, Downey Brand LLP, Sacramento, CA

Tom Bohl, General Counsel
Guadalupe-Blanco River Authority, Seguin, TX

N**athan Bracken**, Smith Hartvigsen, PLLC, Salt Lake City, UT
with contribution from **Devin L. Bybee**

Dean Couch, GableGotwals, Oklahoma City, OK

John Draper, Draper and Draper, Santa Fe, NM

Eric Garner, Best, Best & Kreiger, Los Angeles, CA

Adam Gravley Van Ness Feldman, LLP, Seattle WA
with contribution from **Tadas Kisielius**

Sarah Klahn, White & Jankowski LLP, Denver, CO

Christopher Meyer, Givens Pursley LLP, Boise, ID

Greg Morrison, Parsons Behle & Latimer, Reno, NV

Janet Neuman, Senior Counsel, Tonkon Torp LLP, Portland, OR

Maria O'Brien, Modrall Sperling Albuquerque, NM
with contribution from **Christina C. Sheehan**

Michael Pearce, Maguire, Pearce & Storey, PLLC, Phoenix, AZ

T.C. Richmond, Van Ness Feldman, LLP, Seattle WA

TABLE OF CONTENTS

INTRODUCTION

> *One of the defining issues of the twenty-first century will be the allocation of fresh water supplies. Population growth, increased per capita consumption in some areas, water pollution, and climate change challenge the water allocation systems of even the wettest states*.[1]

To explore how western states are addressing the allocation of tightening fresh water supplies amidst growth, the Board of Advisors and additional authors of this article consider how each of eleven states has addressed the relationship between land development and water resources, whether local jurisdictions are required to consider water resources when planning for growth and reviewing project approvals, or whether the state water agencies must address land use planning. The authors' goal is to provide the 2017 *Dividing the Waters* General Conference a summary of each state's approach sufficient for the judges to discuss commonalities and differences.

Of the top five fastest-growing states in the nation from 1990 to 2000, all five were western states.[2] With growth came sprawl; and with sprawl came an exponential demand on water resources.[3] Despite the connection between growth, sprawl and water demand, legal measures to link land and water planning is far from universal.[4] This article is intended to facilitate a comparison of the states' approaches to integration of land and water planning, highlighting differences that likely stem from rate of growth and competition for water. However, a common set of challenges may eventually lead to a more common approach. One of the articles reviewed by the authors succinctly characterizes those common challenges as follows: (1) *advancing the public interest while allocating water among competing users;* (2) *retaining sufficient water in natural streams, lakes, and aquifers to maintain vibrant aquatic ecosystems;* (3) *ensuring that adequate water supplies will be available for future needs;* (4) *determining the extent to which managers should "transfer" water from places of relative abundance to places of relative scarcity; and* (5) *determining the role, if any, of the "free" market in allocating water resources within states.*[5]

The authors – water law practitioners in the surveyed states – considered how their state has begun to approach these challenges. The authors agreed to base the survey of their state on a common set of questions that is included as an Appendix to this article. Because of the differences among the states' approaches, not every question was relevant to each state and the authors used their discretion in developing their state summary.

---

[1] Klein, Christine, Mary Jane Angelo and Richard Hamann, *Modernizing Water Law: The Example of Florida,* 61 Florida Law Review 404, 404 (2009).

[2] Davies, Lincoln, East Going West?: The Promise of Assured Water Supply Laws in Modern Real Estate Development, 43 J. Marshall L. Rev. 319, 327 (2010).

[3] Id at 328.

[4] Davies, Lincoln, Just a Big, "Hot Fuss?" Assessing the Value of Connecting Suburban Sprawl, Land Use, and Water Rights through Assured Supply Laws, 23 Ecology Quarterly 1217, 1227 (2008).

[5] Klein at 405.

STATE SUMMARIES

Arizona

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN ARIZONA

A. Arizona water utilities and growth planning

Arizona addresses the interaction between land use planning/development and water resources through a variety of interrelated programs and regulatory authorities. Applicable requirements vary across the state to accommodate the significant diversity in population density and available resources. Many water utilities are operated by cities and towns, but there are also many private (investor-owned) utilities serving domestic and municipal water. These private "public service corporations" are regulated by the Arizona Corporation Commission, Utilities Division.[6]

Arizona cities and towns are required to develop and adopt a five-year general growth plan that must include a water resources element that addresses the known legally and physically available water supplies, the demand for water that will result from future growth, and an analysis of how the demand for water will be served from the existing supplies, or a plan to obtain additional necessary supplies.[7]

Public service corporations in Arizona are not subject to like planning requirements. Some public service corporations operate within the municipal boundaries of cities and towns, and would thus come within the required municipal planning, but many do not. In recent years, however, the Arizona Corporation Commission has taken interest in examining the ability of private water utilities to meet the anticipated water demand of their exclusive franchise area delineated by a Certificate of Convenience and Necessity ("CC&N"). For many new and expanded CC&N applications, the Arizona Corporation Commission has required a showing of adequate water supply approved by the state as a condition of the CC&N grant or expansion. This showing can be challenging, as discussed more below.

B. Consideration of "Duty to Serve" in Arizona

There is no explicit "duty to serve" imposed upon Arizona cities and towns. The issues associated with the cost of infrastructure and, to some extent, the acquisition of new water supplies, are generally handled through pre-annexation or development agreements prepared through the local planning departments in conjunction with the public works departments. Public service corporations are required to provide water service within their CC&N areas, but that is tempered by the fact that if additional facilities are required to provide pressure, storage or water supply, the applicant for service may be required to enter into a main extension agreement with the utility and be required to fund the necessary infrastructure by an advance (refundable over time) or contribution (non-refundable) in aid of

[6] www.azacc.gov/divisions/utilities.

[7] Arizona Revised Statutes ("A.R.S.") § 9-461.05(D)(5).

construction.[8]

There is no comprehensive method for denying service based on lack of available water for service, but, as noted below, the requirements in place for demonstrating assured or adequate supplies prior to development can definitely affect the ability to develop land in certain areas or circumstances.

To better understand Arizona water management, it is necessary to know that Arizona recognizes four distinct legal categories of water (groundwater, surface water, Colorado River water and effluent). Different legal rules apply to each type. Many urban water providers use all four types within their service areas and have developed a portfolio of supplies that can be redundant, flexible and overlapping. In some areas, however, municipal water use is almost entirely dependent upon groundwater, and the ability to access groundwater for municipal growth is regulated in a number of ways. For example, the most urban/developed areas of the state are regulated as groundwater "Active Management Areas" ("AMAs"). Within an AMA, the ability to access groundwater for future growth is limited, requiring more sophisticated planning and development of legally viable alternatives to pure groundwater use. In an AMA, a developer of subdivided land must show an "assured water supply" as that term is defined in state statute.[9]

Outside of the AMAs, access to groundwater is less regulated, but other challenges can be present, such as lack of ready access to groundwater, lack of alternative supplies, and lack of infrastructure. Developers of subdivided land must still show an "adequate" supply of water for 100 years, or they must publish a report, issued by the state, for the sale of lots within the subdivision advising purchasers that the subdivision does not have a 100-year adequate water supply.[10]

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN ARIZONA

The integration of growth management and long-term planning efforts in Arizona are included within the Water System Planning (discussed in "Arizona" section 1 above) and within the water supply requirements (discussed in "Arizona" section 3 below).

3. ASSURED AND ADEQUATE WATER SUPPLY IN ARIZONA

A. Water supply sufficiency – generally

Arizona has both "assured" and "adequate" water supply requirements. In the AMAs, the "assured" water supply requirement applies.[11] Before land can be subdivided (by approval of a subdivision plat by the local platting authority, splitting land into six or more parcels of less than 36 acres each), and before any lots can be sold, the developer must prove that the total projected demand for the

[8] Arizona Administrative Code (A.A.C.) § R14-2-406.

[9] A.R.S. § 45-576.

[10] A.R.S. § 45-108.

[11] A.R.S. § 45-576 *et seq.*; *see also* A.A.C. R12-15-701 *et seq*.

new subdivision will have a supply of water that is physically, continuously and legally available for the next 100 years. These rules apply whether the subdivided land will be served by a city or town, or by a public- or investor-owned private utility.

In addition, the primary water supply cannot be "mined" groundwater.[12] This means that if the groundwater basin is not in "safe yield" (defined as a long-term balance between withdrawals, and natural and artificial recharge), as is the case in the AMAs, virtually all groundwater use must be offset either by active groundwater replenishment, or use of alternative "renewable" resources (surface water, Colorado River water, or effluent).

B. Demonstration of water supply

In the AMAs, there are two ways to demonstrate an assured water supply: an individual developer/subdivider can apply for a Certificate of Assured Supply from the Arizona Department of Water Resources ("ADWR") or a proposed subdivision may be within the service area of a municipal water provider that holds a Designation of Assured Supply.

A Certificate of Assured Supply, if granted, will apply to a specific proposed subdivision plat, and allow that plat to be formally approved by the local land use planning authority. To obtain a Certificate of Assured Supply, the developer must produce hydrologic evidence that water for the subdivision's projected demand is physically and continuously available for the next 100 years, assuming full utilization of all existing uses and water reserved for issued, but not yet used, assured water supplies within the AMA. The developer must also show that the water is legally available to the proposed development (*e.g.* though a duly authorized municipal provider), that the water is of adequate quality (*e.g.* a public water system regulated by the Arizona Department of Environmental Quality) and that the developer has the financial capability to construct the infrastructure necessary to serve the development. Significantly, the developer must also show that the proposed water supply is "consistent with management goal" of the AMA (typically safe yield) and consistent with all mandatory conservation requirement imposed by law in the AMAs.

A Designation of Assured Supply for a municipal water provider's service area will provide a demonstration of assured water supply for proposed subdivision within that service area. In such case, a mere notice of intent to serve from that provider to the developer will suffice to demonstrate the assured supply and allow the final plat to be approved. To become designated, a municipal water provider must show the same 100-year assured water supply elements as the individual developer, but for a water portfolio that covers current, committed (platted but unbuilt lots) and projected demand for at least two years. As lots are platted, the portfolio is "debited" for the new demand and, when the portfolio is diminished to a point where it does not cover two years' of projected growth, the designation must be modified (more water added) or it will be revoked.

A key feature of the Arizona assured water supply program is that the water used for an assured

[12] A.A.C. § R12-15-722.

supply must be consistent with the management goal (*i.e.* cannot be mined groundwater), and so must be comprised of nearly all renewable supplies or, if based on groundwater, that groundwater must be replenished as it is used. To accomplish this replenishment goal, Arizona created the Central Arizona Groundwater Replenishment District, a political subdivision of state whose sole mission is to enroll either "member lands" (individual subdivision developments) or "member service areas" (designated providers), annually account for all mined groundwater used in those lands or service areas, and replenish that groundwater with some renewable supply through purchase, delivery and underground storage of that acquired water within the same AMA.[13]

To become designated, many cities and towns rely on effluent supplies derived from the provision of sewer service and processed through water treatment plants. This effluent is available for direct use (to offset otherwise groundwater demand) or for underground storage and recovery under Arizona's aquifer recharge program.[14] Also, some cities and towns have access to either surface water (*e.g.* from the Salt River) or Colorado River water (including Colorado River water delivered through the Central Arizona Project canal), or both. These supplies must be treated to comply with safe drinking water standards, and thus have been more slowly incorporated into municipal water portfolios, but the percentage of treated direct use is rapidly increasing. As noted, these supplies are deemed "renewable" and thus may be pledged toward an assured water supply without the requirement of replenishment. This greatly facilitates the provider's ability to become designated.

There are few designated private water companies in Arizona, because private water companies typically either have no access to renewable supplies or have access on a small scale. As a result, most private water companies provide service to lands that are enrolled as member lands in the Central Arizona Groundwater Replenishment District.

Outside the AMAs, a developer of subdivided land must still show an "adequate" water supply, using the same 100-year criteria as the assured water supply, but without the requirement of consistency with the management goal.[15] Thus, development outside the AMAs can, and does, occur largely on mined groundwater, save for those few communities that have direct access to surface water, such as those lying along the mainstream Colorado River. Originally, the adequate water supply program was somewhat voluntary, in that a developer could still proceed to plat subdivided lands even if the water supply was deemed inadequate, so long as that fact was revealed in the public subdivision report that must be prepared by the Arizona Department of Real Estate and distributed as part of any promotional program for the subdivision before any lot can be sold.[16] In 2010, however, Arizona adopted laws that would allow individual counties to adopt a mandatory adequate water supply program, which would require showing of adequate supplies before plats could be approved.[17] Although some counties have adopted the

[13] *See generally* A.R.S. § 48-3771 *et seq.*

[14] A.R.S. § 45-831.01 *et seq.*

[15] A.R.S. § 45-108.

[16] A.R.S. § 32-2183.

[17] A.R.S. §§ 45-108 to -108.05.

program, it is not widespread and most development outside the AMAs is still governed by the original adequate water supply rules.

4. MUNICIPAL PREFERENCE IN ARIZONA

For groundwater, Arizona has adopted the modified rule of reasonable use. Under this system, there is no priority with respect to groundwater and all users are on equal footing to the common supply. Thus, in areas where municipal and agricultural users are competing for a limited groundwater resource, municipal use has no preference.

For surface water, Arizona statutes provide a preference for municipalities to appropriate surface water for future uses, and provide preference for municipal uses; however, the available surface water in Arizona has long since been appropriated so these provisions are not particularly helpful for municipalities seeking new water supplies.[18]

Most of the senior surface water rights held in Arizona were developed for agricultural use. Although Arizona law does allow for the severance and transfer of these rights to municipal uses while retaining the original priority, the process is cumbersome and has not been widely used. In the Central Arizona Project, subcontracts for delivery of municipal water have a higher priority than agricultural uses. This is important, because if hydrologic conditions on the mainstream Colorado River dictate curtailments in Arizona's use of its interstate apportionment, much if not all of this shortfall will fall on agriculture, limiting reductions to municipal use.

5. GROUND WATER EXEMPTIONS IN ARIZONA

Arizona recognizes "exempt" wells throughout the state. Exempt wells are defined as wells having a pump capacity of less than 35 gallons per minute, used for a non-irrigation use.[19] Although some restrictions on construction of new exempt wells apply within the service area of a designated assured water supply provider, the vast majority of the state allows the use of exempt wells for domestic use. This has led to a practice of dividing land into five lots or less, or lots of 36 acres or more each (to avoid the definition of subdivided land), and growth of unplatted (so-called "wildcat") subdivisions dependent on exempt wells for their water supply. Although problematic from a land use and water planning point of view, the ability to drill and use a small domestic well in Arizona has deep historical roots and will likely remain unchanged.

6. ENVIRONMENTAL ANALYSIS IN ARIZONA

A. Protection of river or stream flow

Because Arizona has adopted the bifurcated system of water management, regulating use of surface water under the prior appropriation system and regulating groundwater under the modified

[18] A.R.S. § 45-157; 45-152.

[19] A.R.S. § 45-454.

reasonable use system, a perplexing problem has evolved in attempting to distinguish wells that are withdrawing true non-appropriable percolating groundwater from wells (particularly wells in close proximity to a flowing stream) that are withdrawing appropriable surface water. Generally speaking, wells constructed in the saturated floodplain Holocene alluvium of the stream are withdrawing appropriable surface water, but wells outside this narrow geologic unit may also be determined to be withdrawing at least some appropriable water. The difficulties in this analytic process are currently being litigated in the Arizona general stream adjudications (covering most of the state in two separate, but connected proceedings), and the ultimate answers are yet unknown.[20]

B. Environmental Analysis

Arizona does not have an independent requirement of environmental impacts similar to the National Environmental Policy Act ("NEPA"). Arizona does recognize the public trust doctrine in the context of ownership of the streambed of navigable streams, but has not applied similar principles to the allocation of water. A recent interesting case was, however, decided in the adequate water supply context, where ADWR was asked to grant a determination of adequacy for a subdivision in the San Pedro River watershed, an environmentally sensitive stream in southern Arizona. Protests to the determination were posed by the United States (Department of the Interior, Bureau of Land Management) and individuals contending that, in granting the determination of adequacy, ADWR had not considered the long-standing federal reserved rights claims of the United States, nor had it considered the impact of groundwater withdrawals for the new development on the ecologic health of the San Pedro River. The matter was decided by the Arizona Court of Appeals, which remanded to ADWR for further consideration of these claims, although with the express provision that such claims need not be taken at face value, nor would ADWR be required to access the impact of wells on the flowing stream as part of the adequacy determination.[21]

7. WATER MARKETS IN ARIZONA

Arizona allows water transfers, exchanges, and leases in a variety of contexts, but does not have as yet a developed water market. The Arizona laws relating to the underground storage and recovery of water do allow the accrual of "long-term storage credits" that operate somewhat like a warehouse receipt for the water stored. By their nature, these long-term storage credits lend themselves to sale and transfer, and there has been a fairly active market for these credits in Arizona. Other types of transfers are also allowed, for example certain groundwater withdrawal rights in the AMAs (Type 2 rights) are treated as personal property and may be bought, sold and leased. Colorado River entitlements, represented by contracts issued by the Secretary of the Interior under the Boulder Canyon Project Act are also transferrable, although the number of actual transfers has been few.

---

[20] The latest rulings from the Arizona Supreme Court on the issue may be found in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 9 P.3d 1069 (2000) and much additional information may be found on the website of the Special Master overseeing the proceedings: https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication.

[21] *Silver v. Pueblo Del Sol Water Co.*, 241 Ariz. 131, 384 P.3d 814 (App. 2016).

Arizona has an in-stream flow program for attaching water rights to appropriable surface water solely for recreational and aesthetic purposes.[22] The difficulty is that new applications are of low priority and may not protect stream reaches in many instances. It is possible to sever and transfer an appropriative right to an instream flow use, but only the state of Arizona or its political subdivisions may do so and retain the original priority of the former use.[23]

California

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN CALIFORNIA

The California Water Code requires developers to identify water sources and water infrastructure before an agency approves the proposed development. Cal. Water Code §§ 10910 – 10915. Separately, the California Environmental Quality Act ("CEQA") requires the preparation of a water supply assessment to determine whether projected water supplies will be sufficient for the project in addition to existing and planned future uses, in order to properly identify and analyze the potential impacts of the proposed project adequate long-term water supply to carry out a proposed development project without associated significant environmental impacts. The sufficiency of that water supply assessment, however, is highly fact-dependent. Consistent with that premise, the California Supreme Court held that:

> …the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a conceptual plan is much lower than for issuance of building permits. The ultimate question under CEQA, moreover, is not whether an [environmental impact report] establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project.[24]

Accordingly, although an Environmental Impact Report ("EIR") prepared under CEQA to evaluate a land use plan in the early stages of planning does not require the same level of detail that a building permitting decision might require, that analysis cannot be based on mere speculation, and "must include facts to evaluate the pros and cons of supplying the amount of water that the project will need."[25] In many cases, that analysis may incorporate the existing Urban Water Management Plan ("UWMP") prepared by the water supplier. *See* Cal. Water Code § 10910(c) and Cal. Public Resources Code § 21080.1.

---

[22] A.R.S. § 45-152.01.

[23] A.R.S. § 45-172(A).

[24] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 434.

[25] *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654; *see Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal. 4th at 431-432 ("An EIR for a land use project must address the impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability.")

Water shortages (for example, in the case of drought) are addressed on multiple fronts. The California State Water Resources Control Board (SWRCB) may issue curtailment orders for those rights permitted and regulated by that entity. On the local level, public utility districts are also authorized to declare a water shortage emergency. Cal. Water Code §§ 350 – 359. Under such an emergency, the district may adopt rules and regulations limiting the use and delivery of water in the interest of conserving that supply. A "water shortage emergency condition" encompasses both an immediate emergency, where a district cannot meet its customers' water needs, and a threatened water shortage, where a district determines that its water supply would not be able to meet future demand.[26] Finally, right holders within a given basin or waterway may enter into adjudications or legal actions to determine each right holder's entitlement, and to prevent the unlawful use of water when supplies are insufficient to meet demand.

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN CALIFORNIA

The California Government Code requires each city and county to adopt a general plan, which must include a statement of development policies and seven key elements: Land Use, Open Space, Conservation, Housing, Circulation, Noise, and Safety. Cal. Gov. Code § 65302. In connection with the adoption and amendment of a general plan, the municipality is required to coordinate and consult with local water supply agencies "to ensure that proper water supply planning occurs in order to accommodate projects that will result in increased demands on water supplies." Cal. Gov. Code § 65352.5. The California Government Code also sets out specific requirements for information sharing and coordination under such circumstances. *See* Cal. Gov. Code § 65352.5. Local land use decisions should be consistent with the general plan, and the evaluation of any project within the area under CEQA will include an assessment of the project's consistency with any applicable general plans.

3. ASSURED WATER SUPPLY IN CALIFORNIA

See "California" sections 1 and 2, above.

4. MUNICIPAL PREFERENCE

In California, water rights are usufructuary: water right holders enjoy the right to use water, but do not own it. That right to use is bounded by the limitations of the California Constitution, and specifically Article 10, section 2, which prohibits the waste of water, and requires that water be put to a reasonable and beneficial use. The California Water Code declares that the use of water for domestic purposes is the "highest use" of water, followed by the use of water for irrigation. Cal. Water Code § 106. Though municipalities' ability to acquire and hold water rights is protected "to the fullest extent necessary for existing and future uses," those rights are not subject to any special protection, and do not entitle the municipality to quantities of water beyond that which the entity can put to a reasonable and beneficial use. Cal. Water Code § 106.5. Challenges to a municipality's use of water would come in the

[26] See, e.g., *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California*, 117 Cal.App.4th 13 (2004).

form of protests against the entity's petitions to the California SWRCB for a new or amended water right permit, or in the form of a legal action challenging the entity's use as inconsistent with the Constitutional prohibition against waste.

5. GROUND WATER EXEMPTIONS IN CALIFORNIA

Although non-riparian, post-1914 appropriations of surface water are subject to permitting requirements imposed by the California SWRCB, groundwater rights in California are administered through the courts and local agency action. There is no statewide permitting system for groundwater extractions. The 2014 enactment of the Sustainable Groundwater Management Act ("SGMA") imposed some measure of statewide accountability, in the form of required groundwater sustainability plans ("GSPs") for certain basins designated as medium or high priority for management under SGMA. Even so, the day-to-day administration of groundwater is predominantly left to local agencies serving in the role of a "groundwater sustainability agency" ("GSA") under SGMA. GSAs, in turn, are directed to prepare GSPs for their respective basins.

When SGMA was enacted, changes to the California Government Code and within the text of SGMA imposed coordination requirements on GSAs and local land use planning agencies. Local agencies must, for example, consider and review existing GSPs before adopting or amending a general plan, and GSPs must include processes to review local land use plans and to coordinate with land use planning agencies to assess activities that potentially create risks to groundwater quality or quantity. *See* Cal. Gov. Code §§ 65350.5, 65352; Cal. Water Code §§ 10726.8, 10727.2, 10727.4. Challenges to a local agency's permitting or ordinance implementation, or to the implementation of a GSP, are highly dependent on the factual circumstances in the basin, but would generally be brought directly to the GSA, or in certain circumstances pursuant to an administrative writ in superior court. Challenges to the validity of a GSP itself could be raised in comment letters to the California Department of Water Resources, the state agency responsible for reviewing and approving those GSPs.

6. ENVIRONMENTAL IMPACTS IN CALIFORNIA

See "California" section 2, above. CEQA, discussed above, is the California analog to NEPA. CEQA directs that agencies consider whether there are "feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects" of the projects they approve. Cal. Pub. Res. Code § 21002. CEQA requires land use agencies considering a potential new development to assess the availability and quality of water available to serve the proposed new development. As to water supply, "[t]he ultimate question under CEQA [] is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 434 (2007). California recognizes a public trust doctrine, pursuant to which the state, as trustee of the "public trust," retains supervisory control over all the state's waters to protect navigation, fishing, recreation, ecology and aesthetics. See *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).

7. WATER MARKETS IN CALIFORNIA

Certain water rights (including those permitted by the SWRCB) can be transferred in the short- or long-term between users. Transfers between users may be made through the course of groundwater substitution, crop idling, or additional releases of water from storage; and may be made between agricultural users, municipal users, or to fish and wildlife uses. Transfers are bounded by the limitation that the changes brought about cannot result in "injury to any legal user of the water involved." *See* Cal. Water Code §§ 1702, 1706. If that rule is violated, the injured parties may seek recourse before the SWRCB or in the courts, depending on the particular water right at issue in the transfer.

Colorado

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN COLORADO

Almost all municipal water planning discussions in Colorado include either directly or as a subtext the geographical reality: 90% of Colorado's population is on the Front Range (the east slope) and 90% of Colorado's water supplies are on the Western Slope.

Overlying Colorado water planning are one principle and three themes:

Principle: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Colo. Const. art. XVI, § 6. All water planning—affirmative or not—is limited by this concept.

Themes:

- Affirmative planning: State statute requires, to a limited extent, a showing that *new* development has adequate water supplies. C.R.S. §§ 29-20-301 to -306. In addition, if a Colorado water court decree is required to develop or put to use water supplies, local governments must satisfy common law and statutory standards for anti-speculation.
- Healthy encouragement: Colorado Water Conservation Board ("CWCB") regulations require local water suppliers to adopt certain regulations and practices (including conservation plans) to qualify for low interest infrastructure loans.
- Inverse planning: Water suppliers engaging in extraterritorial water development are often subject to 1041 permitting under Colorado's Land Use Statute. Local government 1041 permitting is a kind of mini-NEPA review, which can significantly limit or even prevent development of water projects or infrastructure.

For purposes of comparison with the other states, each of these themes is developed in the following sections.

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN COLORADO

Affirmative planning: C.R.S. § 29-20-301 to -306 and the anti-speculation requirement

For established local government water suppliers, the extent of water planning is related to the nature and extent of water supplies sought.

In most areas in Colorado, reliable new water supplies are difficult to acquire or develop. In most areas, surface water supplies are over-appropriated. With some caveats, the unavailability of surface water supplies makes senior irrigation water rights desirable for purchase and change through a water court change application. Plans to acquire and change senior water rights are usually not the subject of planning documents, as this type of public disclosure tends to drive up prices and alert potential objectors to the change case.

In the Front Range, the only reliable (and not inexpensive) option is development of ground water (tributary, Denver Basin or designated basin). However, Denver Basin ground water is supply limited, so not a sustainable choice for new development.

Local governments are obligated to adopt comprehensive plans for "advisory" purposes. Unless expressly adopted into subdivision regulations, these comprehensive plans remain aspirational. Nonetheless, a county or statutory municipal comprehensive plan may include consideration of water supplies and, if these are included, the only requirement is to "coordinate" water supply and facility planning:

> *If the master plan includes a water supply element, the planning commission shall consult with the entities that supply water for use within the municipality to ensure coordination on water supply and facility planning, and the water supply element shall identify water supplies and facilities sufficient to meet the needs of the public and private infrastructure reasonably anticipated or identified in the planning process. Nothing in this paragraph (d) shall be construed to supersede, abrogate, or otherwise impair the allocation of water pursuant to the state constitution or laws, the right to beneficially use water pursuant to decrees, contracts, or other water use agreements, or the operation, maintenance, repair, replacement, or use of any water facility.*

C.R.S. § 31-23-206(1)(d) (emphasis added). Water supply elements of master plans, when adopted into subdivision regulations, are the subject of review by the Colorado State Engineer.

3. ASSURED WATER SUPPLY IN COLORADO

A. New Development

For brand new development that is subject to local government land use approvals, C.R.S. § 29-20-301 to -306 requires a showing of adequate water supply for each phase of a project development.

In 2008, under the auspices of existing local governmental land use statutes, the General Assembly adopted provisions requiring local governments to ensure new developments had an adequate water supply. Under C.R.S. § 29-20-303(1):

> A local government shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate.

The application of this statute was put at issue in Douglas County district court by opponents to Sterling Ranch, a large, rural subdivision. The developers attempted to satisfy the statutory standard in C.R.S. § 29-20-303 not with a demonstration of the adequacy of water supply, but with a "water plan" that purported to determine the adequacy of the water supply at each phase of the subdivision.[27]

The crux of the problem in the Sterling Ranch dispute was the developer's intention to rely, at least initially, on non-renewable Denver Basin ground water supplies. Denver Basin ground water is owned by the overlying landowner (and is not considered "waters of the stream" for purposes of constitutional appropriations). The developer likely intended to initially rely on this locally available, if volumetrically inadequate, source of supply while attempting to develop new, sustainable supplies.

The district court decision resulted in amendment of C.R.S. § 29-20-301(1)(c) to authorize local governments to determine when in a development permit approval process the determination of an adequate water supply may be made. The Sterling Ranch development is still on the books as an approved development.

B. Use of existing water rights, appropriation, or development of tributary ground or surface water sources

To the extent "planning" involves purchase and change of existing water rights, appropriation, or development of tributary ground or surface water sources, any such efforts are subject to Colorado's anti-speculation evaluation in front of the Colorado water courts.

Colorado's anti-speculation standard is strict, unless the party is a municipal provider:

> "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation . . . :

[27] *Chatfield Community Ass'n, Inc. v. Bd. of County Comm'rs of Douglas County*, Case No. 11CV1437 (Douglas County District Court, Aug. 22, 2012) ("Sterling Ranch decision") (opinion attached).

> The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, *unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.*
>
> The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses. [28]

4. MUNICIPAL PREFERENCE IN COLORADO

A. "The Great and Growing Cities Doctrine"

The municipal exception to the anti-speculation doctrine arises in *City and County of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939) (reversing district court decision holding that Front Range appropriators must make full and economical use of existing water rights before appropriating additional water from the West Slope). This is sometimes referred to (particularly in other western states) as "the great and growing cities doctrine."

As a practical matter, then, municipalities must show:

- Reasonably anticipated future demand based on substantiated projections of future growth within the water service area. In practice this means reliance on state demographer numbers and on projections in local comprehensive plans.
- The planning period must also be reasonable: case law suggests that is a 50 year time horizon.[29]
- Query the result when a municipality has held onto its conditional water rights for 50 years but not yet met its original growth projection?

In determining that Pagosa Area Water & Sanitation District had failed to satisfy the legal standard to show demand for its appropriation, the *Pagosa* Court compared the statutory "adequate supply" standards of C.R.S. § 29-20-301 to -306 described *infra* in Part II.B. to the showing required under the municipal anti-speculation exception ("These water supply planning provisions . . . . complement and parallel, in significant respects, the three elements and four considerations we identified in *Pagosa I* as applicable to a governmental water supply entity's non-speculative conditional appropriation . . . ." [30]

---

[28] C.R.S. § 37-92-103(3)(a) (emphasis added).

[29] *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009).

[30] *Pagosa*, 219 P.3d at 786.

In reality, the two standards are more properly considered as wholly different determinations regarding a similar subset of facts. In the context of the "adequate water supply" statutory showing, a local government is merely considering whether there is "enough" water; in reality, "enough" water could be determined to be "too much" water under a water court anti-speculation analysis. However, Colorado municipalities are authorized to maintain (although not to perfect) water supplies above and beyond their existing demands.

B. Municipal Water Planning Through Encouragement

Several agencies—both state and federal—have low interest loans that municipalities may obtain to support raw water acquisition, infrastructure construction, improvement or maintenance, efficiency efforts, and conservation efforts.[31] Agencies typically have pre-conditions for loan approval including demonstrated adoption of water efficiency or conservation plans. As a result, a community's need for low interest government loans may provide a platform for water planning efforts.

C. Inverse water planning: 1041 regulations

In the context of 1041 regulations, geography matters. In 1974, the Colorado General Assembly adopted C.R.S. § 24-65.1-101 to -108 ("H.B. 1041") to authorize local governments to regulate projects of "statewide concern." Water projects, including infrastructure, treatment plants, and wastewater plants, are all defined as projects of statewide concern under H.B. 1041. Regulations (referred to as "1041 regulations") are often adopted by local governments to limit, to significantly condition, or to prevent the development of water projects.

This is a kind of inverse planning requirement—where a municipality seeking to develop new water supplies or infrastructure extraterritorially finds its project subject to local permitting requirements that may significantly hamper or even prevent new or refined developments.

Western Slope counties with water supplies vulnerable to trans-mountain diversions have almost uniformly adopted 1041 regulations. In some instances, these have been used with effect to impose significant restrictions on trans-mountain water projects. [32]

A 1041 process usually requires submissions to local government, in the form called for by adopted 1041 regulations, and often a public hearing to review the application materials. The 1041 process often requires substantial expenditures without certainty of outcome.

5. ENVIRONMENTAL IMPACTS IN COLORADO

Like NEPA, C.R.S. § 24-65.1-101 to -108 ("H.B. 1041") imposes a substantial transactional cost which should encourage planning on the part of the water provider.

---

[31] *See, e.g.*, http://cwcb.state.co.us/LOANSGRANTS/WATER-PROJECT-LOAN-PROGRAM/Pages/main.aspx (last visited May 30, 2017).

[32] *See, e.g., City & County of Denver v. Bd. of County Comm'rs of Grand County*, 782 P.2d 753 (Colo. 1989); City of Colo. Springs v. Bd. of County Comm'rs of Eagle County, 895 P.2d 1105 (Colo. 1994).

6. CHALLENGES IN COLORADO

Challenges to water planning decision-making are almost all pursuant to C.R.C.P. 106(a)(4), which authorizes challenges to local government under *ultra vires* or abuse of discretion theories. Due to the limited jurisdiction of Colorado water courts (e.g., limited to determining "water matters" as that has been defined by the Colorado Supreme Court), Colorado water judges are highly unlikely to review any disputes involving water planning. However, disputes over substantive water rights issues (core "water matters" including anti-speculation) are in the sole jurisdiction of the Colorado water courts. Local government determinations regarding the adequacy of a water supply are appealable to state district court under C.R.C.P. 106. Appeals from an adverse 1041 determination are pursuant to C.R.C.P. 106.

Idaho[33]

1. INTRODUCTION TO IDAHO

In Idaho (and most western states), the law of water rights and land use planning developed along entirely different paths, which did not intersect until recently. Their interaction today is spotty and confused, based on sometimes conflicting and inadequate legislative direction.

The quick (and over-simplified) answer is that the Idaho Department of Water Resources ("IDWR") has control over the acquisition, transfer, and administration of water rights in Idaho, while cities and counties (together, referred to as municipalities) have control over land use. A third entity, the Idaho Department of Environmental Quality ("IDEQ"), has jurisdiction over water quality. This discussion focuses primarily on the authority of IDWR and municipalities.

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). This authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[34]

2. WATER SYSTEM PLANNING AND DUTY TO SERVE IN IDAHO

Land use control and, in particular, the authority to zone, resides in Idaho cities and counties. Idaho is a Dillon's rule state (as opposed to a home rule state), meaning that cities and counties have no

[33] This is an abbreviated version of an article, *Water Rights and Land Use Planning in Idaho*, by Christopher Meyers, available at from Mr. Meyers.

[34] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws, pp. 380-87; 1901 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

inherent authority to legislate. Rather, their law-making power derives from grants of authority found in or necessarily implied by the Idaho Constitution or statute.[35]

Despite being a Dillon's rule state, no statutory authorization is necessary for zoning, because the authority to zone derives directly from a self-executing grant under the State Constitution.[36] Specifically, the police power granted to municipalities (Idaho Const. art. XII, § 2) includes the power to zone.[37] Thus, cities have lawfully engaged in zoning even before the first comprehensive land use planning statute was enacted in 1975 (the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538). Today, local authority over land use is controlled and constrained by the comprehensive regime set out in LLUPA. (*See* Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a comprehensive discussion of LLUPA.)

3. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN IDAHO

A. IDWR's responsibility to consider comprehensive planning in the context of RAFN rights

The courts of Idaho and other Western states have long recognized the unique obligations of municipalities to establish a long-term water supply sufficient to meet all comers. Most water users are required to put water to use promptly in order to obtain and retain a water right. Idaho was the first state to recognize the need for special treatment for municipal providers, allowing them to secure water rights for future needs. [38] Colorado was quick to follow, and the doctrine has been most thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939. [39]

---

[35] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

[36] In sharp contrast, the state constitutional taxing authority, Idaho Const. art. VII, § 6, is non-self-executing. Accordingly, impact fees, capitalization fees, service fees, and other "land use fees" all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho.

[37] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

[38] *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd*, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.).

[39] *City & County of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939).

What is known in Colorado as the "great and growing cities doctrine," is known in Idaho and elsewhere as the "growing communities doctrine"—underscoring that it applies to all municipalities. [40] In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for "reasonably anticipated future needs ("RAFN").[41]

In the 1996 Act, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is applied. By requiring careful planning and full disclosure by municipal providers who seek future needs water rights, the statute establishes a cautious approach that is both sensitive to speculation and consistent with the Idaho's longstanding doctrine mandating the maximum use of this public resource.

The 1996 Act may be boiled down to one sentence (with defined terms underlined): "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" (aka "RAFN") within an expanding "service area" during a specified "planning horizon."

On occasion, growing cities in other western states have engaged in costly races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The primary authors of the 1996 Act were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

In order to avoid these problems, the 1996 Act imposes three anti-speculation requirements. First, the Act requires that the claimed future needs must not be "inconsistent with comprehensive land use plans approved by each municipality." Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

The first two of these speak directly to land use planning, and will be discussed further below. In a nutshell, the 1996 Act draws a clear jurisdictional boundary. It recognizes that municipalities have the duty to engage in comprehensive planning. IDWR is obligated to respect those planning documents, not to second-guess them.

---

[40] See Fereday, Meyer & Creamer, *Idaho Water Law Handbook,* for a detailed treatment of the common law and its codification.

[41] Municipal Water Rights Act of 1996 ("1996 Act"), 1996 Idaho Sess. Laws ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 Act. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act, but came a year later.

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[42] Comprehensive plans do not ordinarily contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections take into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high-density development in the area.

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification.

As a practical matter, however, such conflicts are rare in Idaho. LLUPA does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

The 1996 Act's prohibition against serving "conflicting plans" areas applies equally to municipalities and to private utilities providing municipal water. Thus, a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" areas probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within such "conflicted" areas.

B. Cities and counties are required to consider land use impacts on aquifers

In 1989, as part of larger legislation expanding IDEQ's role in ground water protection, the Idaho Legislature enacted a provision requiring municipalities to address ground water impacts when updating their comprehensive plans. 1989 Idaho Sess. Laws ch. 421 (now codified at Idaho Code § 67-6537(4)).

[42] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. *See* Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a detailed discussion of this subject.

A comprehensive plan, as its name implies, is a comprehensive articulation of the conditions and objectives that will guide future growth within the geographic boundaries of the city or county. Idaho Code § 67-6508. "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." [43]

However, LLUPA mandates that zoning ordinances must be "in accordance with" the comprehensive plan. Idaho Code §§ 67-6511 and 67-6535(1). Consequently, developers and others seeking or opposing rezones must pay particular attention to the comprehensive plan—including the development's impact on the aquifer, if any.

C. LLUPA's mandate for use of surface irrigation water when available

In 2005, the Idaho Legislature enacted legislation requiring land developers to use surface water for lawn irrigation systems if possible. 2005 Idaho Sess. Laws ch. 338) (H.B. 281) (codified at Idaho Code § 67-6537).[44] "All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1). This mandate is driven by the assumption that ground water (which typically does not require treatment to be used as drinking water) is more precious than surface water.

The legislation is not directed to IDWR. Instead, it amended LLUPA, which governs planning and zoning actions by cities and counties.

The 2005 act applies to any applicant "proposing to make land use changes." That is very broad, presumably including zoning changes, special use permits, planned unit developments, annexations, or any other application for a new land use.

Thus, if a developer of agricultural land served by surface water seeks a land use entitlement, he or she is obligated to install a separate lawn irrigation system to utilize that water (rather than relying on municipal water that uses on ground water). The effect of this requirement is the proliferation of separate, unmetered lawn irrigation systems. Without the price signal of metering, effective water conservation is difficult to achieve. The City of Denver learned this the hard way, when it was forced to retrofit the entire city which was originally unmetered.

The requirement applies where surface water is "reasonably available." The act defines this as where surface water is appurtenant to the property, or reasonably could be made appurtenant, or where it could be obtained from an irrigation district or other entity. Idaho Code § 67-6537(1)(a). In other words,

---

[43] *Urrutia v. Blaine County*, 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.).

[44] Idaho Code § 67-6537 was first enacted as a part of the Ground Water Quality Protection Act of 1989, 1989 Idaho Sess. Laws ch. 421. At that time, it merely required local comprehensive plans to consider ground water protection (see discussion in 3.B. above). It was not until 2005 that the provision was amended to add the substantive mandate to developers to use surface water when available.

even if the land does not have surface water available today, the owner might be obligated to acquire surface water rights.

The requirement to use surface water where available raises a number of questions:

a. Does the act prohibit a municipal water provider (relying at least in part on ground water supplies) from serving homes that use the municipal water for lawn irrigation? Answer: No. The act applies to developers appearing before zoning bodies, not to municipal water providers whose water rights are administered by IDWR. Thus, it has no effect on what a municipal provider (or anyone else) does with its water rights. This is reinforced by subsection 3 of the act, which states that nothing in the statute is intended to override or amend the Water Code. Idaho Code § 67-6537(3). Thus, the statute has no impact on IDWR's review of a water right application or any other administration of water rights.

b. Would the act require the developer of a shopping mall to install a separate surface-based irrigation system to irrigate the trees and shrubs in the parking lot? Answer: Arguably yes, if surface water is reasonably available. On the other hand, the mandate, though written in absolute terms, should be read in context, allowing the municipality to exercise some discretion. The first sentence of the act says that its purpose is to "encourage the use of surface water," not to mandate it. Moreover, the requirement is placed in a planning statute, LLUPA, which is built on the exercise of discretion. Thus, in determining whether surface water is reasonably available, one would think that the zoning board should be entitled to consider such things as the economic feasibility and efficiency.

c. Does this provision prohibit a municipal provider or subdivision developer from land applying treated municipal effluent from derived from ground water to parks, open space, golf courses, and common areas? Answer: No. IDWR takes the position that it does not, so long as the ground water was first used for in-house culinary purposes (as opposed to lawn irrigation). This also would seem logical from a physical standpoint: Once the water emerges from the treatment plant, it should be viewed as surface water.

d. If a proposed development is within an irrigation district that has surface water available for irrigation, can the municipality require that the development's irrigation be served instead by reuse water provided by the city?[45] Answer: Probably yes. Assuming that the reuse is seen as surface water, the statute raises no impediment to

[45] For "Class A wastewater," which has been treated essentially to drinking water standards, the IDEQ guidance does not require any buffer zones between use areas and, for example, private dwellings. *Guidance for Reclamation and Reuse of Municipal and Industrial Wastewater*, Idaho Department of Environmental Quality at 6-17 (September 2007).

such a city requirement.[46] However, assuming the subdivision remains within the irrigation district, its landowners would be subject to irrigation district assessments whether they get water from the district or not.

e. Can a new development use ground water to irrigate lawns and landscaping during the "shoulder season" (when surface water is not available in the spring and fall)? Answer: Yes. The statute requires only that surface water serve as the primary source of water, and it must be reasonably available.

f. Can an applicant install an efficient irrigation system that uses a portion of the former surface right, and sell the balance to another user?[47] Answer: Yes. The act does not limit the ability of a landowner to sell off the unused portion of surface rights associated with a developed parcel. In other words, the act says that if there is surface water on the property, it must be used.

g. Rather than directly applying the surface water, can the surface water be put to use indirectly as mitigation for a ground water right that serves the new development? Answer: Arguably yes. The statute requires the developer to "use the surface water . . . as the primary water source for irrigation." Arguably, use of the water in a mitigation plan would satisfy this requirement, but there has been no ruling or Departmental guidance on this point.

H.B. 281 also raises constitutional questions under the Fifth Amendment (takings).[48]

---

[46] The "irrigate with surface water" statute, Idaho Code § 67-6537, raises no impediment, but it is possible an opponent of the city's plan might assert that Idaho Code § 42-201(7), discussed below, would block the city from requiring that the reuse water be employed for subdivision irrigation. However, that provision addresses agency "authority over the appropriation of the public surface water and ground waters of the state." To the extent supplying reuse water for irrigation is not mandating an appropriation, it would appear this statute would not come into play.

[47] Splitting a water right and selling a portion is relatively easy if the land is served by its own water right(s). It is far more difficult if the land is served by an irrigation district, whose consent (and possibly the consent of the federal water provider) will be required.

[48] The measure probably does not qualify as a physical invasion, and thus is not a *per se* taking under that line of cases. *Loretto v. Teleprompter Manhattan CATV Corp.*, 444 U.S. 164 (1979). On the other hand, if rigidly applied, it may constitute a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and its progeny. Most notably, the provision would appear to falter under the cases dealing with "exactions." In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court held an exaction is a taking if it does not substantially advance the same governmental interest that would justify denial of the zoning application. In other words, there must be an "essential nexus" between the restriction on the use of the surface water and the goals of the planning and zoning act. One could argue that there is no such connection, an argument reinforced by the Legislature's decision to address this question in LLUPA, rather than the Water Code.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court elaborated further on the subject, declaring that there must be "rough proportionality" between the required dedication and the impact of the proposed development. H.B. 281 appears quite vulnerable on this point. Indeed, the problem with H.B. 281 is that it is a blanket prohibition that takes no account of the individual circumstances, and thus no account of the actual impacts of a particular development on the ground and surface water supply.

D. IDWR's "exclusive authority" over water rights (Idaho Code § 42-201(7))

In 2006, the Idaho Legislature enacted a statute intended to shore up IDWR's authority over water rights. 2006 Idaho Sess. Laws ch. 256 (S.B. 1353) (codified at Idaho Code § 42-201(7)). The bill delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water.

The legislation was a direct response to a draft ordinance contemplated by the City of Parma that would have required the City's approval of any new ground water well. The bill's sponsors viewed this as an attempt by the City to usurp IDWR's authority (and potentially limit the ability of well drillers to install new wells). Accordingly, the bill clarifies that local governments may not set up regulatory processes that mimic the responsibilities of IDWR regarding the appropriation of water.

Presumably, the bill does not interfere with other proper governmental regulatory activity dealing with water and sewer systems. Indeed, the Statement of Purpose accompanying the bill says as much: "It will have no impact on the zoning authority or other powers inherent in political subdivisions. There would be no impact on private contracts, covenants, or restrictions."

Thus, it appears that local governments may continue to enact zoning regulations even if they impinge on water rights in some ways, so long as the justification for the restriction relates to some proper police power concern distinct from the management of water resources.[49] For example, it would appear that a city or county would have ample justification as a matter of local municipal concern to require that applicants for developments of a certain size provide water rights or a central water delivery system to serve the new development.[50] Presumably a city could require developers to employ efficient irrigation or other water use systems, if it had distinct local justification for doing so. However, local governments are prohibited from using their local zoning authority to address what are really water appropriation duties assigned to IDWR. Two recent cases illustrate this.

Ralph Naylor Farms v. Latah County ("Naylor Farms")[51] involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited the county from accepting applications for specified new land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). The

[49] Likewise, it appears that IDEQ may continue to administer its wellhead protection program.

[50] Such a requirement for central water and sewer was upheld in *Sanders Orchard v. Gem County*, 137 Idaho 695, 702, 52 P.2d 840, 847 (2002), in which the Court vacated the county's denial of a subdivision plat on the basis of the developer's failure to provide for a central water and sewer system. The Court found that there was no evidence in the record to support the county's factual conclusion that sewer would soon be extended to the area. However, the Court made clear that the county had the authority to consider the feasibility of installing central water and sewer. Indeed, the Court strongly implied that the county could have simply mandated such a requirement without need for individual factual determinations. *Sanders*, 137 Idaho at 702-03, n.6, 52 P.3d at 847-48, n.6.

[51] 144 Idaho 806, 172 P.3d 1081 (2007) (Trout, J. Pro. Tem.).

ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for clay processing.

The district court invalidated the ordinance on the basis that it was preempted by the authority granted to IDWR to regulate water resources. The county did not appeal. Instead, the prevailing applicant appealed the district court's denial of its attorney fee request. While the appeal dealt with attorney fees, the Idaho Supreme Court found it necessary to discuss the merits of the preemption issue, essentially upholding the district court's preemption analysis.[52] Neither the parties nor the Court discussed Idaho Code § 42-201(4), which was enacted in 2006, the year after the county adopted the ordinance in question. Instead, the district court applied a common law implied preemption analysis under *Envirosafe Services of Idaho, Inc. v. County of Owyhee*,[53]. (See Allen, Meyer, Nelson & Lee, *Idaho Land Use Handbook* for a discussion of the attorney fee issue.)

On May 6, 2008, District Court Judge Elgee issued a decision in *Eagle Creek Partners, LLC v. Blaine County*, Case No. CR-2007-670, Idaho, Fifth Judicial Dist. (May 6, 2008), invalidating the county's requirement that the developer not employ a series of ponds as part of its irrigation water delivery system. The district court ruled that the county's authority to require more efficient irrigation is preempted by IDWR's authority to regulate water rights.

The message from *Naylor Farms* and *Eagle Creek* appears to be that counties may not employ zoning laws to engage in what is really water resource management. That is exclusively IDWR's domain. Thus, municipalities may not prohibit golf courses or aesthetic ponds because, in their opinion, they use too much water and may impair the aquifer.[54] This is not to say, of course, that local governments are obligated to grant every zoning request simply because the applicant has obtained a water right for it. But it is to say that the reason for restricting or prohibiting the development had better be something other than "it is good water resource management." Just where the line is between legitimate local regulation and improper intrusions into IDWR's authority remains to be worked out. It bears emphasis that we do not yet have a definitive ruling from the Idaho Supreme Court.

4. MUNICIPAL PREFERENCE IN IDAHO

A. The "preference" for domestic use is really a right to condemn.

[52] Since the county failed to appeal, the Idaho Supreme Court accepted the district court's determination as a given. On the other hand, the Idaho Supreme Court did not appear to be the least bit troubled by the district court's ruling on the merits, saying at one point "we respect the district court's analysis." *Naylor Farms* at 813, 172 P.3d at 1986. Ultimately, however, the Idaho Supreme Court upheld the district court's decision not to award attorney fees against the county.

[53] 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

[54] This seems at odds with Idaho Code § 67-6537(4) (discussed in section B at page 12), which requires municipalities to address aquifer impacts in their comprehensive planning documents. *Naylor Farms* did not mention this statute, which had been on the books 18 years. Apparently municipalities are supposed to think about aquifer impacts, but not do anything about aquifer impacts.

Like the constitutions of several western states, Idaho's constitution ranks certain beneficial uses in terms of "preferences." Idaho's Constitution ranks domestic uses first, agricultural uses second, and manufacturing purposes third, except that in an "organized mining district" (an historical anachronism) mining uses have preference over all but domestic uses.[55]

These preferences mean much less than might appear. They provide neither "super-priority" status in the priority system nor authority for IDWR to "prefer" certain water uses over others in the approval or administration of rights. Rather, this constitutional preference simply confers on the preferred water user the right to condemn the water rights of a less preferred user.[56] Indeed, this is made explicit by the last sentence of section 3: "But 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, as referred to in section 14 of article I of this Constitution."[57]

Thus, for instance, a farmer may condemn the water rights of a manufacturing operation, but would be required to reimburse the manufacturer for the fair market value of the water right taken. That, of course, is not likely to pencil out. Likewise, a municipal provider (whose municipal water needs are deemed "domestic" for this purpose) could, in theory, condemn any other use. The authors are unaware of an instance in Idaho where this constitutional condemnation power has been exercised.

5. ENVIRONMENTAL ANALYSIS IN IDAHO

A. IDWR's scaled back authority to evaluate the local public interest test.

Prior to 1978, applications for water right appropriations and transfers were evaluated by IDWR solely on the basis of the traditional issues, such as injury, enlargement, beneficial use, and speculation. The environmental or land use impacts of water development were not a relevant consideration.[58] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At the time, that was considered the cost of progress.

---

[55] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have 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. And 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. But 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, as referred to in section 14 of article I of this Constitution." Idaho Const. art. XV, § 3.

[56] *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

[57] This language was noted, in support of this proposition, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

[58] *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an "inappropriate consideration" prior to the adoption of the local public interest test).

In Idaho, this changed dramatically in 1978 when the Idaho Legislature added a "local public interest" review requirement to the criteria for approval of appropriations of new water rights.[59] 1978 Idaho Sess. Laws ch. 306, § 1 (codified as amended at Idaho Code §§ 42--202B(3), 42-203A(5)(e)).[60]

As originally enacted, the public interest provision granted IDWR broad authority to consider anything bearing on "the affairs of the people in the area directly affected by the proposed use." 1978 Idaho Sess. Laws ch. 306, § 1. This sweeping language opened the door for IDWR to consider environmental and land use impacts associated with the project or development for which the water was needed.

The statute was hardly noticed for two decades. Then, in the late 1990s, it began to generate a substantial number of contested administrative cases. These contests set off a firestorm of debate over the proper scope of the local public interest test. The resulting hue and cry resulted in an amendment to the local public interest language in 2003, over the objection of environmental groups and IDWR itself.

In 2003, the Legislature redefined "local public interest," limiting its scope to "the effects of such use on the public water resource." 2003 Idaho Sess. Laws ch. 298 (codified at Idaho Code § 42-202B(3)).

Under this new test, a protestant could still complain, for instance, that a water right would dewater a trout stream. Presumably, the new definition also embraces water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to be a proper matter for the IDWR to evaluate.

But evidence about dairy odors, noise, traffic, and other adverse effects of the project (unrelated to the water resource) was off limits in IDWR's consideration of the water right application. These are land use matters that must be taken up with municipal and other regulatory authorities with proper jurisdiction.

The examples above involve impacts caused by the diversion of water. What about adverse impacts resulting from the use of the diverted water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in it. The current language speaks in terms of impacts of "a proposed water use" (and not just the diversion). This suggests that the

[59] There is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the "public interest" in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws ch. 374, § 2. It was repealed two years later. 1969 Idaho Sess. Laws ch. 468, § 1. However, this short-lived provision did not provide a basis for a broad public interest review.

[60] This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

Department is authorized to consider impacts including contaminated return flow, seepage, or waste water.

B. IDWR's basin-of-origin protection

As part of the 2003 amendment to the local public interest statutes, the Legislature added new protections against diversions of water to out-of-basin uses.[61] When water is moved from one basin to another, the Director must determine that the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (*i.e.*, the basin of origin). 2003 Idaho Sess. Laws ch. 298 (H.B. 284). This is codified in multiple places: Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

Though its geographic scope is limited (diversions that take water out of the "watershed or local area" for use in another area), the authority granted IDWR over such out-of-basin transfers is broad. In contrast to the now restricted scope of the local public interest test, the new basin-of-origin protection is rather broad, allowing IDWR to consider effects on "the local economy of the watershed or local area within which the source of water for the proposed use originates."

This protection, it appears, was aimed at protecting local areas from "Owens Valley" type water transfers that deprive a local community of its economic base.[62] Given that the statute's focus is on the basin of origin, not the new place of use, it would appear that the statute does not allow IDWR to consider the economic impact of the new project or development where it is located.

C. IDWR's authority to evaluate out-of-state water transfers

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with out-of-state uses of water (by either appropriation or transfer of existing rights). 1990 Idaho Sess. Laws ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)) ("Water Export Act").

The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the dormant commerce clause for when states may restrict water exports to other states. The Water Export Act included two primary elements.

First, it added a conservation requirement applicable to <u>all</u> water right applications (not just those out-of-state). Second, the Water Export Act repealed earlier measures aimed particularly at water use in

[61] An earlier basin-of-origin provision remains on the books. 1980 Idaho Sess. Laws ch. 186; 1986 Idaho Sess. Laws ch. 347 (codified as amended at Idaho Code § 42-226). It applies only to large new appropriations of ground water for use outside the "immediate ground water basin as defined by the director." It applies only to applications seeking water for irrigation of 5,000 acres or more or for a total volume of 10,000 acre-feet per year. Such a permit application requires special approval by both IDWR and the Idaho Legislature, based on "due consideration to the local economic and ecological impact of the project or development."

[62] Owens Valley was a once thriving agricultural area that was largely dewatered by the Los Angeles Canal completed in 1913.

Oregon, and replaced them with a set of rules applicable to all appropriations and transfers for use of water out-of-state. Such out-of-state uses were required to follow special procedures, and IDWR was required to address six additional "factors" addressing the availability of water in the sending and receiving states. The factors are:

> (1) The supply of water available to the state of Idaho;
>
> (2) The current and reasonably anticipated water demands of the state of Idaho;
>
> (3) Whether there are current or reasonably available anticipated water shortages within the state of Idaho;
>
> (4) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
>
> (5) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
>
> (6) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

Idaho Code § 42-401(3).

It is unclear how these factors would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director very broad discretion. For the applicant, the result is to significantly increase uncertainty and transaction costs. Not surprisingly, out-of-state transfers are a rarity.

Out-of-state water bank rentals were made subject to the same five tests in 1992. 1992 Idaho Sess. Laws ch. 101, § 1 (codified at Idaho Code § 42-1763).

D. IDWR's authority to evaluate water conservation

As noted above, the Water Export Act included a conservation requirement applicable to <u>all</u> water right applications. The applicant for any new water right appropriation or transfer must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers) 42-401(3) (out-of-state water exports).

This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho.[63] Both applications were denied because the

[63] In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); In the Matter of Application for Permit No. 95-09086

proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. IDWR concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1), not the local public interest test. There is no appellate case law interpreting this provision.

It would seem that this provision could be used by IDWR, if it chose, to widen its role in the evaluation of the efficiency of all manners of water uses—from agricultural irrigation to housing developments. To date, however, IDWR has been guarded in its use of this conservation provision.

Nevada

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN NEVADA

Nevada generally employs a top-down approach to water system planning, with multiple layers of input and participation along the way. In 1977, the Nevada Legislature expressly recognized the importance of water planning, noting that "it is the policy of the State of Nevada to continue to recognize the critical nature of the State's limited water resources."[64] Because of the "relationship between the critical nature of the State's limited water resources and the increasing demands placed on these resources as the population of the State continues to grow,"[65] the Legislature created the Water Planning Section of the Division of Water Resources (the "Section").[66]

Among the functions designated by the Section are: (i) suggesting to the Legislature any changes in water policy that it deems necessary; (ii) assisting the State Engineer in dealings with the federal government and neighboring states; (iii) reviewing and ensuring the accuracy of local and federal documents relating to water planning; (iv) compiling and updating data relating to Nevada's hydrographic basins; and (v) promoting water conservation.[67] Central to all of those functions was the creation of the *Nevada State Water Plan* ("State Water Plan") and its intermittent updates since 1977. The State Water Plan is developed by the Section with the assistance of a 15-member Advisory Board for Water Resources Planning and Development and the Department of Conservation and Natural Resources Steering Committee, along with local, state and federal agencies, and the public.

On the local level, every water service provider must develop a comprehensive Water Resource Plan[68] incorporating several growth-oriented analyses, including (i) an estimate of the population served

---

in the Name of Kootenai Generation LLC, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002)

[64] Nevada Revised Statutes ("NRS") 540.011(1).

[65] NRS 540.011(2).

[66] NRS 540.031.

[67] NRS 540.051.

[68] Nevada Administrative Code ("NAC") 445A.5921.

by the system and the number of connections that will be necessary; (ii) a description of the estimated amount of water required for the system for five years after the system begins operation; (iii) a demonstration of the ownership of or right to appropriate an amount of water that is sufficient to satisfy the requirements of the system for five years after the system begins operation, and more.[69] Water Resource Plans must be submitted to and approved by the Division of Water Resources every five years.[70]

Careful preparation of a five-year Water Resource Plan is essential for water suppliers to meet the administrative mandate that any supplier of water "provide a safe and reliable supply of water to all of the customers in its area of service."[71] Further, if the Division of Water Resources refuses to approve a water service provider's Water Resource Plan, there are several informal administrative remedies available to review the rejection, but judicial review is not available.[72]

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN NEVADA

Nevada statute does not include a mandate for local jurisdictions to plan for growth, per se. However, city and county planning commissions[73] are required to develop and adopt comprehensive Master Plans, which in turn must account for projected growth. Among the required elements of any Master Plan are: (i) a land use plan, including an inventory and classification of natural land types, existing land cover and uses, and comprehensive plans for the most desirable utilization of land, and (ii) a public facilities and services element, which must include both a population plan setting forth an estimate of the total population which the natural resources will support on a continuing basis, and provisions concerning public services and facilities showing general plans for water utilities. Interestingly, Master Plans are not required to address water supply sources available to address projected water demand during the planning period; however, virtually every Master Plan does include that element.[74]

In turn, specific local land use decisions must be consistent with the Master Plan. Nevada statute requires that "[a]ny action of a local government relating to development, zoning, the subdivision of land or capital improvements *must* conform to the master plan." In fact, when adopting any ordinance or regulation relating to development or zoning, a local government "shall make a specific finding that the

[69] NAC 445A.5922.

[70] NAC 445A.5923.

[71] NAC 445A.66655.

[72] NAC 445A.5926.

[73] Counties with populations over 40,000 and cities with populations over 25,000 must establish planning commissions. Cities with less than 25,000 residents may, but are not required to, create planning commissions. NRS 268.110.

[74] *See, e.g.*, Washoe County Master Plan, Public Services and Facilities Element (2010), at pp. 3-18 (available at https://washoecounty.us/csd/planning_and_development/master-plan-zoning/files/public_services_facilities_element.pdf).

ordinance conforms to the master plan."[75] Thus, land use planning is driven by counties, as is expected in a largely rural state like Nevada, and fine-tuned by individual cities to their individual circumstances. While statute sets the minimum requirements for Master Plans, there is little to no statewide land use oversight.

The Nevada Legislature recognized the nexus between land use planning and water management in the prefatory language to the Master Planning statute, stating that it "recognizes the need for innovative strategies of planning and development that … address the anticipated needs and demands of continued urbanization and the corresponding need to protect environmentally sensitive areas; and … allow the development of less populous regions … if such regions … have sufficient resources of land and water to accommodate development in a manner that is environmentally sound."[76]

While a Master Plan requires at least one public hearing prior to adoption, there is no per se requirement that affected water service providers have a seat at the table to assist in a Master Plan's development. A party who is aggrieved by a Master Plan or element of a Master Plan must appeal that matter administratively. However, any administrative decision is considered a final determination, and a party may petition the district court of the subject county for review of the administrative determination.[77]

3. ASSURED WATER SUPPLY IN NEVADA

Arguably the most important element in Nevada's water supply planning is at the subdivision map approval stage. Before any development may proceed, an initial subdivision map must be submitted to the Division of Water Resources, Office of the State Engineer ("State Engineer") for review and comment.[78, 79] The State Engineer will coordinate with the local water provider to determine whether there is sufficient water supply available to support the proposed subdivision. The applicable county or city planning commission then has the final say on approval of a subdivision map, but will take comments and concerns of the State Engineer into consideration when making its decision. It is a statutory requirement that a planning commission must consider whether "[t]he availability of water which meets applicable health standards and is sufficient in quantity for the reasonably foreseeable needs of the subdivision."[80] If the above criteria are met, a tentative subdivision map may proceed to the next step in permitting – the approval of a final subdivision map.

[75] NRS 278.0284; *see also* NRS 278.250 (zoning regulations must be "adopted in accordance with the master plan for land use…").

[76] NRS 278.02521.

[77] NRS 278.3195.

[78] NRS 278.330; 278.335.

[79] If the proposed development is within a General Improvement District or Irrigation District, the tentative map must also be submitted to those entities for review and comment. NRS 278.347; 278.348.

[80] NRS 278.349.

A final subdivision map involves the same elements as a tentative map, only in greater specificity.[81] In addition to general water availability assurances, a final map may not be approved by a planning commission "unless the subdivider has submitted plans which provide for the installation of water meters or other devices which will measure water delivered to each water user in the subdivision."[82] This two-tiered subdivision approval approach initiated in 1977 assures that no development can take place without a demonstration that the developer has considered current and future water supplies, and believes that they will be adequate to support the proposed subdivision.

Like Master Plans, decisions of the planning commission involving subdivision maps are administratively appealable to the county commission first, and then to the district court in the county in which the proposed subdivision sits.[83] In such an appeal, the burden is on the appellant developer to demonstrate that a county commission's decision to deny the final subdivision map was arbitrary and capricious or an abuse of discretion. In the context of water, that generally means that the county commission failed to properly consider the adequacy of the water supply, or overestimated the demands that a proposed project would place on that supply.

4. MUNICIPAL PREFERENCE IN NEVADA

Nevada water law does not specifically provide a preference for perfection of municipal water rights so that municipal systems may perfect water rights in advance of actual need to provide for future growth. However, certain concessions appear in Nevada's appropriation and forfeiture statutes that allow municipal water systems to avoid harsh results of the non-speculation doctrine.

Generally, the State Engineer must approve or reject an application to appropriate water or change the use of an existing water right within two years of the date of the application.[84] When an application is for municipal purposes, however, the State Engineer may postpone action on the application indefinitely, providing that the application is re-noticed – and protestants are again invited to object to the application – every seven years.[85] The postponement statute allows municipal providers greater flexibility in satisfying Nevada's appropriation standards, such as justification of need for the water right.

Nevada's abandonment laws also make concessions to municipal providers, and take into account the rapid urbanization that is occurring in Nevada's previously agricultural communities. Generally, failure to place water to beneficial use for a five-year period will result in the forfeiture or abandonment of the certificated water right or cancellation of a permitted right.[86] However, when an agricultural

[81] NRS 278.360 et seq.

[82] NRS 278.385.

[83] NRS 278.380.

[84] NRS 533.370(4).

[85] NRS 533.370(4) & (7).

[86] Whether a right was forfeited or abandoned depends on the precise circumstances of the non-use. Generally, the difference between the two is that abandonment requires some intent to abandon, and forfeiture is strictly based on non-use. NRS 534.090.

(irrigation) water right (i) is appurtenant to land that was converted from agricultural to urban use; and (ii) was dedicated to or acquired by a municipal water system, the water right is not subject to a finding of abandonment. This allows municipal water systems to accept dedications of water from former agricultural lands and obtain the necessary permits to change the use without necessarily having to prove beneficial use of the water within the five-year window.

5. GROUND WATER EXEMPTIONS IN NEVADA

Nevada's water law was developed incorporating the presumption that parcels on which residences are to be built include a reasonable domestic water right.[87] As such, NRS Chapter 534, which governs underground water and wells, does not apply to water for domestic uses. "Domestic use" is defined in statute as "culinary and household purposes directly related to a single-family dwelling" as well as "watering of a family garden … and the watering of livestock" so long as the use does not exceed two acre-feet.[88] When a proposed use exceeds two acre-feet, a permit will be required for either domestic or stock watering. Importantly, the regulatory requirements for drilling, operating, and plugging are all applicable to domestic wells, but a state-issued water right is not necessary to obtain a well permit.

Although permits are not required, domestic wells and use must be registered with the State Engineer, and the State Engineer may require that a meter be installed on a domestic well and that pumpage volumes be reported annually.[89] When municipal water service is available to a parcel, or becomes available even when a domestic well exists, the State Engineer may require plugging of the domestic well and connection to the municipal service.[90] As such, the majority of domestic wells in Nevada are located outside of urban centers.

As with any decision of the State Engineer, a property owner who is denied a domestic well permit or who is required to plug an existing well and connect to a municipal supply can petition the district court for review of the State Engineer's determination.[91] Judicial review of the State Engineer's determination is in the manner of an appeal, and the decision of the State Engineer is prima facie correct.[92] Thus, the burden on the petitioner is to show that the State Engineer's decision was arbitrary, capricious, or an abuse of discretion.

---

[87] NRS 533.024(1)(b).

[88] NRS 534.013; NRS 534.180.

[89] NRS 534.180(4).

[90] NRS 534.180(3) (connection may only be required if the connection fee is less than $200).

[91] NRS 533.450 ("any person feeling aggrieved by an order or decision of the State Engineer" may petition for judicial review of the decision).

[92] NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979).

6. ENVIRONMENTAL ANALYSIS IN NEVADA

Nevada recognizes both the "public interest" and the "public trust doctrine" in its water law and jurisprudence, and makes a distinction between the two concepts. The public interest is the far broader of the two concepts, and requires analysis in the event of any water appropriation.

A. Public Interest

When considering whether to approve an application to appropriate water, or to change the point of diversion, place of use, or manner of use of an existing water right, the State Engineer must deny any application that "threatens to prove detrimental to the public interest."[93] The State Engineer has developed several principles that he uses for guidance in this public interest analysis that have been upheld on multiple occasions by the Nevada Supreme Court.[94] The public interest requirement has evolved into a sort of catch-all, becoming a nebulous protest ground cited by protestants to an application whether or not other, more concrete, grounds for denial of an application are readily available.

B. Public Trust Doctrine

The Nevada Supreme Court has also expressly adopted the public trust doctrine, which relates to lands underlying navigable waterways at the time of statehood.[95] Pursuant to the public trust doctrine, as adopted in *Lawrence*, the state holds the banks and beds of navigable waterways in trust for the public and subject to restraints on alienability. Because the beds and banks of the navigable waterways are held in trust for the public uses of navigation, commerce, and fishing and other recreation, the state may not convey those public trust lands to private parties.[96] Nevada contains very few navigable waterways, leading some parties to attempt to convince the Court that the scope of the public trust doctrine should be expanded to include underground water sources. To date, the Court has refused to extend the doctrine beyond the traditional application, which requires navigability.

7. WATER MARKETS IN NEVADA

Nevada has historically recognized water rights as a form of real property distinct and severable from the land to which the water is appurtenant.[97] As such, water rights may be stripped from the land and sold or leased to third parties as a separate commodity.[98] Assuming that a purchaser or lessor of a water right can get an application to change the manner of use of the water approved by the State

---

[93] NRS 533.370(2).

[94] *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996) (the "Honey Lake Case") (identifying 13 policy considerations from Nevada water statutes for public interest analysis).

[95] *Lawrence v. Clark County*, 127 Nev. Adv. Op. 32, 254 P.3d 606 (2011).

[96] *Id.* at 609 (discussing the public trust doctrine as adopted by the U.S. Supreme Court in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)).

[97] *See Carson City v. Estate of Lompa*, 88 Nev. 541, 501 P.2d 662 (1972) ("a water right is regarded and protected as real property").

[98] *Adaven Management, Inc. v. Mountain Falls Acquisition Corp.*, 122 Nev. 1110, 146 P.3d 793 (2006).

Engineer, water previously used for agriculture can be converted to municipal use, or vice-versa, which maintains a vibrant market for water rights as a stand-alone commodity.[99]

New Mexico

1. INTRODUCTION FOR NEW MEXICO

New Mexico is a prior appropriation state with respect to the ownership and use of surface water and groundwater.[100] This fundamental legal principle is founded in the New Mexico Constitution.[101] The New Mexico Legislature has implemented the prior appropriation system through surface water and groundwater codes.[102] The New Mexico Legislature has further established the position of the State Engineer, a centralized water administrator who was charged with and has promulgated rules and regulations by which water is administered.[103]

Under the doctrine of prior appropriation, water rights are both established and exercised by beneficial use, which forms the basis, the measure and the limit of the right to use of the water.[104] In order to put water to a beneficial use, including municipal and subdivision uses, one must have a water right to do so.[105] This requirement applies to cities and other municipalities, as well as to private land developers.[106] Individuals may apply for domestic well permits, which will be automatically granted by the State Engineer except to the extent limited or prohibited by the State Engineer or by court order.[107]

Water rights are adjudicated by the courts, not the State Engineer.[108] A court decree is the best evidence of a water right.[109] Adjudications are comprehensive and are done on a stream-wide basis, joining all water right claimants.[110] Adjudications typically take many years to complete. There are

[99] The criteria for approval of an application under NRS 533.370(1) and (2) apply to all applications, and NRS 533.370(3) applies of the new use will result in an interbasin transfer of water.

[100] *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 21,173 P.3d 749, 756; *State Eng'r v. Diamond K Bar Ranch, LLC*, 2016-NMSC-036, ¶ 13, 385 P.3d 626, 629.

[101] N.M. Const. Art. XVI, §2.

[102] New Mexico Statutes Annotated ("NMSA") § 72-5-1, *et seq* and NMSA §72-12-1, *et seq*, respectively.

[103] *See* NMSA § 72-2-1; NMSA § 72-2-8.

[104] N.M. Const. Art XVI, §3; *Walker v. United States*, 2007-NMSC-038, ¶ 22, 142 N.M. 45, 162 P.3d 882.

[105] *Walker v. United States*, 2007 NMSC 38, ¶ 22,162 P.3d 882; *Hydro Res. Corp.*, 2007 NMSC 61, ¶ 20 n.5, 173 P.3d 749. 755 (internal quotation marks and citation omitted).

[106] NMSA § 72-5-1; NMSA §72-12-1.1.

[107] NMSA § 72-12-1.1 through 72-12-1.3; *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, 306 P.3d 457, 465.

[108] NMSA § 72-4-17.

[109] NMSA § 72-4-19; *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 6, 289 P.3d 1232, 1236.

[110] NMSA § 72-4-17; *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 58, 376, 89 P.3d 47, 65.

currently a number of adjudications pending in state and federal courts in New Mexico.[111]

2. WATER SYSTEM PLANNING IN NEW MEXICO

Water planning is implemented by the Interstate Stream Commission, a sister agency of the Office of the State Engineer.[112] The New Mexico Legislature recognized the need for water planning and created a regional water planning program in 1987, which tasked the Interstate Stream Commission with implementing the state's regional water planning program.[113] The state is divided into 16 water planning districts, all of which submitted water plans to the Interstate Stream Commission between 1999 and 2008.[114] Water plans developed locally in each district are reviewed and integrated into the State Water Plan as appropriate.[115]

3. PRIOR APPROPRIATION AND URBAN GROWTH IN NEW MEXICO

A. General Principles

Article 16, Section 2 of the New Mexico Constitution provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

Consequently, any unappropriated water is required to be available for appropriation by private or public entities, including municipalities.[116] Today, most surface water in New Mexico is appropriated, and streams that are fully appropriated must be protected from any depletion.[117] Groundwater is not fully appropriated, but effects of pumping on other wells must not amount to impairment.[118] In addition, any net depletion of appropriated surface flows is strictly prohibited and must be offset in order to obtain a permit from the State Engineer.[119]

If one wishes to put water to a beneficial use, such as supplying municipal needs, one must have a

---

[111] *See* New Mexico Office of the State Engineer, Interstate Stream Commission, Active Cases available at http://www.ose.state.nm.us/Legal/activeCases.php (July 3, 2017).

[112] NMSA § 72-14-1.

[113] *See* NMSA §72-14-43; NMSA §72-14-44.

[114] *See* Office of the State Engineer, Water Plans by Region, available at http://www.ose.state.nm.us/Planning/regional_planning.php (July 3, 2017).

[115] NMSA § 72-14-3.1.

[116] *See* NMSA § 72-1-1; *see City of Albuquerque v. Reynolds*, 1962-NMSC-173, ¶ 44, 443, 379 P.2d 73, 83

[117] *See* NMSA § 72-5-23; *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, 150 P.3d 971.

[118] NMSA § 72-12-3.

[119] *City of Albuquerque v. Reynolds*, 1962-NMSC-173, 379 P2d 73.

water right.[120] There are no formal preferences given for municipal uses, but municipalities are allowed a 40-year planning period.[121] This allows municipalities to obtain permits from the State Engineer to meet their reasonably expected needs 40 years into the future.[122] The 40-year period allowance is also a limit.[123] Municipalities are forbidden from seeking new permits that go beyond their reasonably expected needs in 40 years.[124]

The New Mexico Subdivision Act requires new subdivisions to obtain sufficient water rights.[125] The Office of the State Engineer reviews new subdivisions with regard to whether they have sufficient water rights.[126] Counties and municipalities may have additional requirements over and above the statewide requirements. These may include a requirement to obtain and transfer water rights to the municipality to match the expected demand on the municipal system of a new development.[127] In some areas, hydrologic reports are required to prove that water is physically available, as well as legally available.[128]

B. Groundwater for Urban Growth

Groundwater is often involved in supplying water for urban growth in New Mexico. In fact, almost all of New Mexico's municipalities have historically depended partially or totally on well water. Groundwater regulation by the State Engineer came later than surface water regulation. State Engineer approval of new surface water rights and transfers of prior rights became mandatory in 1907.[129] Groundwater regulation was extended area-by-area starting in the 1930s, until the whole state came under the State Engineer's authority in recent years.[130]

State Engineer approval is therefore required to initiate a new groundwater right or to change the well location, purpose of use, or place of use of an existing right.[131] In considering an application for a new groundwater permit, the State Engineer considers whether unappropriated water is available and

---

[120] *Hanson v. Turney*, 2004-NMCA-069, ¶ 10, 94 P.3d 1, 4.

[121] NMSA § 72-1-9 (1978); 19.26.2.7.L NMAC.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] NMSA § 47-6-11.

[126] *Id.*

[127] *See* Village of Los Lunas Municipal Code 8.42 and 40 year plan.

[128] *See* Curry County Subdivision Regulations, Section 7.14 (2014); McKinley County Subdivision Regulations, Section V.B (1997).

[129] 1907 N.M. Laws, ch. 49, § 4; *Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth.*, 2014-NMCA-032, ¶ 17, 320 P.3d 492, 499.

[130] *See* 1931 N.M. Laws ch. 97, § 1; *State ex rel. Office of the State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 8, 150 P.3d 375, 378.

[131] NMSA § 72-12-3; NMSA § 72-12-7.

whether the permit can be granted without impairing other water rights.[132] Similarly, in considering an application to change an existing right, the State Engineer considers whether the right sought to be changed exists and whether it can be changed without impairment to other water rights.[133] In both types of proceedings, there is a public notice requirement and an opportunity for interested parties to object to the application.[134] Additionally, for both a new right or to change an existing right, the State Engineer is required to determine whether granting the permit will be contrary to the conservation of water within the state or detrimental to the public welfare of the state.[135] New Mexico does not otherwise recognize a public interest or public trust doctrine.

In making a determination, particularly if an application is challenged, extensive discovery, hydrologic analysis and hearings can take place before the State Engineer or an appointed hearing examiner. The resulting order of the State Engineer is appealable *de novo* to the local state district court.[136] Further appeals may take a case to the New Mexico Court of Appeals and the New Mexico Supreme Court.[137]

4. WATER MARKETS IN NEW MEXICO

New Mexico has an active market in the purchase and sale of water rights. Sometimes the transactions are very simple, where ownership of a water right is transferred as part of a land transaction where the water right's use on the land will not be changed. Other transfers are considerably more complicated. A water right is considered a real property right.[138] Thus, water rights are transferred by deed and normal recording requirements apply.[139] In addition, transfers of ownership must be recorded with the Office of the State Engineer.[140]

If any important aspect of a water right is to be changed, the point of diversion, the type of use or the place of use, an application must be filed with the State Engineer, as indicated above.[141] In any change of a water right, the proposed change must draw water from the same source as the existing right, and it must do so in a way that does not impair other water rights, either surface water or groundwater.[142]

---

[132] NMSA § 72-12-3(E).

[133] NMSA § 72-12-7(A).

[134] NMSA § 72-12-3(E); NMSA §72-12-7(A).

[135] *Id.*

[136] N.M. Const. Art. XVI, §5; NMSA §72-7-1 (1978)

[137] *See* NMRA 12-201; *State Eng'r v. Diamond K Bar Ranch, LLC*, 2016-NMSC-036, ¶ 12, 385 P.3d 626, 629.

[138] *Posey v. Dove*, 57 N.M. 200, 210, 257 P.2d 541, 547 (1953); *New Mexico Prods. Co. v. New Mexico Power Co.*, 42 N.M. 311, 77 P.2d 634; *Elephant Butte Irr. Distr. v. Regents of N.M.*, 115 N.M. 229, 849 P.2d 372 (App. 1993).

[139] NMSA § 72-1-2.1 (1978); 19.26.2.17 NMAC

[140] *Id.*

[141] NMSA § 72-12-7; NMSA § 72-5-23; NMSA § 72-5-24.

[142] *Id.*

Water rights may be leased, but, again, State Engineer approval is needed if the lease use requires a temporary change in the water right.[143] Transfers from agricultural to urban uses are common, although often controversial. The amount of water that can be transferred from agricultural uses to municipal uses, as with any right, is the historical consumptive use amount.[144] If the new use is less consumptive than the previous use, the applicant can ask for an increase in the amount diverted by filing a return flow plan with the State Engineer.[145]

Oklahoma

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN OKLAHOMA

The state of Oklahoma indirectly requires water utilities to plan for growth within their service areas. A state agency, the Oklahoma Department of Environmental Quality ("ODEQ"), adopts rules that impose requirements on "public water supply systems" (defined as a system that provides water for human consumption through pipes if the system has at least 15 service connections or serves at least 25 individuals for at least 60 days per year.) A source development rule requirement imposed by ODEQ specifies that an engineering report to support a permit for new public water supply project construction must show that there is an "adequate quantity of water available" to "meet the projected water demand including anticipated growth of the service area as shown by calculations based on the extreme recorded drought." The Oklahoma Water Resources Board ("Board"), a separate state agency, considers applications for permits to appropriate surface water, and water utilities, typically municipalities and rural water districts, must demonstrate a "present or future need" for the water before a permit can be issued. Rules of the Oklahoma Water Resources Board provide that the Board may consider population projections to support an application for public water supply water. Typically, population projections for a 50-year period are considered reasonable.

In Oklahoma, there is no express duty to serve imposed on municipal or rural water district water supply systems, but as noted above, a public water supply construction permit requires presentation of information about adequacy of supply for the anticipated growth of the service area.

Decisions by the Oklahoma Department of Environmental Quality are governed by Oklahoma's Administrative Procedures Act, where appeals of decisions may be taken to District Courts of the state.

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN OKLAHOMA

Oklahoma does not have a growth management statute that requires growth planning by local jurisdictions. The Oklahoma Municipal Code in the Oklahoma statutes authorizes but does not require

[143] NMSA § 72-6-3.

[144] 19.26.2.11.B NMAC

[145] 19.26.2.11.E NMAC

municipalities to adopt general plans for long-range plans. Besides creating municipal planning commissions, that state statute authorize municipalities to create regional planning commissions that include county officials input on matters within three miles of the municipal boundaries. Cities with a population greater than 200,000 may create a city planning commission that has a broad range of listed authorities, including creation of master plans for physical development of the city.

Decisions by planning commissions are addressed by the municipal governing body, such as city council. Decisions by a municipal governing body can be presented to a state District Court.

3. ASSURED WATER SUPPLY IN OKLAHOMA

In Oklahoma, there is no separate express requirement on developers to prove they have sufficient water available before the development may proceed. However, to obtain an appropriation permit for any proposed use in Oklahoma, the Oklahoma Water Resources Board must determine that there is unappropriated water available as requested. As noted in "Oklahoma" section 1 above, Oklahoma through its agency Department of Environmental Quality has adopted a rule requiring an adequate quantity of water be identified before public water supply system construction can be approved. A public water supplier must show that water is likely to exist in the future based on dependable yield of the water source.

Municipalities that own and operate their own public water supply system will typically require a developer to specify that water for the development will be supplied by the municipal system and will require that water supply lines and easements be dedicated to the municipality as a condition for subdivision plat approval. Municipal planning and plat requirements may require information about several items including roads, parks, etc. along with water supply information as a condition to plat approval for a development.

Rural water districts as public water suppliers do not require developers of rural property to provide proof of sufficient supply, but the state law authorizing rural water districts to be formed by land owners does require the petitioners to allege and the board of county commissioners to determine that the district will have an adequate water supply for purchase or by appropriation from the Oklahoma Water Resources Board.

4. MUNICIPAL PREFERENCE IN OKLAHOMA

Oklahoma appropriation law provides that an applicant for a permit to appropriate must show a "present or future" use for the water. The appropriation law also provides that if the amount of water requested cannot be put to use with the default seven years after permit issuance, the applicant may ask that a schedule of use be added as a condition on the appropriation permit. Such long-term schedules for gradual increase in water use typically include 10-year incremental time periods and percentages of the total that must be used (or lost by forfeiture). The longest such schedules of use are typically approved for municipal use is 50 years based on population projections for the same period. Projections to support longer schedules of use periods are deemed to be insufficiently accurate.

Decisions of the Oklahoma Water Resources Board regarding permit issuance or conditions in an appropriation permit are reviewable by the state District Courts.

5. GROUND WATER EXEMPTIONS IN OKLAHOMA

Under Oklahoma law, "domestic use," narratively defined as use by an individual for household purposes, irrigating up to three acres of gardens and orchards, and for the normal grazing capacity of the land (stock watering) is exempt for permit requirements for use of groundwater as well as for use of surface water (water in a "definite stream").

Exempt wells are not accounted for under Oklahoma's Comprehensive Water Plan law. Municipalities can impose restrictions on domestic wells (for water pollution control purposes) but municipalities cannot prohibit use of domestic wells.

A challenge to the statute that provides the exemption for domestic wells would be raised in a state District Court.

6. ENVIRONMENTAL ANALYSIS IN OKLAHOMA

Use of water in a definite stream and use of groundwater in Oklahoma are regulated separately, so there are few opportunities for conjunctive or integrated management to address surface flow protection from impacts caused by groundwater well pumping. In 2003, the Oklahoma Legislature amended the Oklahoma Groundwater Law to impose restrictions on one sensitive groundwater basin so that pumping of groundwater cannot impact the natural flow of area springs and streams. A test of that law as implemented by the Oklahoma Water Resources Board is pending appeal in the Oklahoma Supreme Court. Currently, two new surface basin studies by the U.S. Bureau of Reclamation ("USBOR") are including specific information about impacts on stream flow from pumping water from wells in the alluvium and how such flow impacts might impact yield of reservoirs constructed by the USBOR.

Oklahoma law does not require environmental analysis for actions with the potential to impact the environment similar to NEPA, except for public water and sewer treatment projects which are funded through loan programs subsidized by U.S. Environmental Protection Agency, i.e. Safe Drinking Water and Clean Water State Revolving Fund money. In those cases, analysis is required of aquatic endangered or threatened species protection in use of surface water sources for water supply or discharge of municipal wastewater in streams.

Decisions to approve or deny state funding for public water or sewer projects are not expressly appealable, but challenges may be brought in the state District Courts.

A "public interest" requirement was in Oklahoma's early appropriation law for surface water but was dropped in the 1950s. Regarding the public trust for water, the dissent in a seminal case which declared that Oklahoma is a dual doctrine state, noted that the majority seemed to confuse the public and preeminent right in the streams of the state, protected through the public trust doctrine, as being the private property of landowners along a stream.

7. WATER MARKETS IN OKLAHOMA

In Oklahoma, there are rare situations whereby an irrigator may sell the irrigation right to a rural water district or municipality, but such markets appear to be active only where a stream is fully appropriated. There are few streams in Oklahoma that are fully appropriated.

There have been no reported private use transfers for environmental uses only. Besides the 2003 legislative restriction on groundwater use from one sensitive groundwater basin in Oklahoma to protect the natural flow of area springs and streams, other instances of in-stream flow protection have been approved by Congress through approval of design plans for federally constructed reservoirs (U.S. Army Corps of Engineers and USBOR) which specify a minimum flow release operation to protect fisheries downstream from the dam. The Federal Energy Regulatory Commission ("FERC") has imposed conditions on some licensed hydropower facilities in Oklahoma that specify a minimum flow release. Such flow release requirements may impact the dependable yield of the reservoirs, but typically are designated to be released from storage that is not subject to repayment to the federal government. The state of Oklahoma does not issue appropriation permits for such releases.

Oregon

1. GROWTH MANAGEMENT AND LONG-TERM PLANNING IN OREGON

Oregon has a comprehensive, well-developed land use planning program that governs growth management and urban development statewide. Since 1973, cities and counties have been required to adopt comprehensive land use plans and ordinances that are consistent with 19 statewide planning goals.[146] The plans are reviewed and approved ("acknowledged") by the State Department of Land Conservation and Development and its policy oversight body, the Land Conservation and Development Commission (together "DLCD"), for compliance with the goals and other requirements of state law and DLCD's administrative rules. The plans are supposed to go through periodic review every 4-10 years, but this does not always happen due to staff and budget limitations, and DLCD does not strictly enforce this requirement. Specific local land use decisions—and also state agency decisions—are required to be consistent with the acknowledged comprehensive plans and implementing ordinances.

Protection and preservation of valuable farm and forest lands by managing the pace and location of urban development are the foundations of Oregon's land use program. Cities and metropolitan planning districts must adopt "urban growth boundaries" ("UGBs") to contain urban development within the UGB and to protect rural land outside the UGB that is best suited for farm and forest use from

[146] ORS 197.005 *et. seq.* The 19 goals cover: (1) citizen involvement; (2) land use planning; (3) agricultural lands; (4) forest lands; (5) natural resources, scenic and historic areas, and open spaces; (6) air, water, and land resources quality; (7) areas subject to natural disasters and hazards; (8) recreational needs; (9) economy of the state; (10) housing; (11) public facilities and services; (12) transportation; (13) energy conservation; and (14) urbanization; (15) Willamette Greenway; (16) estuarine resources; (17) coastal shorelands; (18) beaches and dunes; and (19) ocean resources. The goals and guidelines are available at http://www.oregon.gov/LCD/Pages/goals.aspx.

unregulated sprawl.[147] In drawing its UGB, a city must plan for sufficient lands to accommodate a 20-year population projection while addressing all of the purposes and needs identified in the goals. UGBs can be expanded over time, when certain population growth rates or other benchmarks are reached, by following specified procedures.[148]

Consideration of water resources is mandated by several of the statewide planning goals. The most pertinent to the subject of this report is Goal 11, which requires planning for timely and efficient provision of public facilities and services, including water supply and sewage treatment. (Goal 11 is discussed in further detail below.) A number of other goals also contain water-related components: Goal 5 requires inventorying and protecting water and riparian areas, fish habitat, wetlands, federal and state wild and scenic rivers, and groundwater resources; Goal 6 requires maintaining and improving water quality; Goal 7 directs planning for natural hazards, including flooding, coastal erosion, and tsunamis; Goal 14 requires coordination of urban development with the provision of public services; Goal 15 protects the Willamette River Greenway; and Goals 16-19 protect a variety of coastal resources in the counties fronting the Pacific Ocean. Non-mandatory "guidelines" accompanying most of the goals, including Goals 5, 6, 11, and 15, urge consideration of the "carrying capacity" of the land, air, and water resources within the planning area in plan development.[149]

2. WATER PROVIDERS' PLANNING REQUIREMENTS AND DUTY TO SERVE IN OREGON

A. Planning Requirements for Water Providers

Oregon has a wide variety of water providers, including municipalities, special districts, regulated utilities, private companies, membership associations, and other entities—totaling 3,500 different providers—1,100 of which are municipal or public entities, including people's utility districts, cooperatives, and special districts.[150] Nearly all providers are subject to some type of planning requirements. Some of the requirements overlap, and in several instances, the applicable statutes or rules

[147] Currently, there is only one such metropolitan planning district, in the Portland metropolitan area.

[148] See Statewide Planning Goal 14, supra note 1, ORS 197A.305 *et. seq*., and ORS 268.390. In fact, the UGB for the Portland Metropolitan Area has been expanded about three dozen times since it was first drawn when the 1973 law went into effect. *See* http://www.oregonmetro.gov/urban-growth-boundary.

[149] "Carrying capacity" is defined as the "level of use which can be accommodated and continued without irreversible impairment of natural resources productivity, the ecosystem, and the quality of air, land, and water resources." DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES (March 12, 2010) (Definitions, p. 9). However, at least as to Goal 11, this direction to consider carrying capacity is largely aspirational and discretionary, as it is not further refined or required in the administrative rules implementing the goal.

[150] OREGON PUBLIC UTILITIES COMMISSION, OVERVIEW OF WATER REGULATION, *available at* http://www.puc.state.or.us/Pages/water/index.aspx. The majority of the state's population is served by public water providers. *See also* JANET C. NEUMAN. OREGON WATER LAW: A COMPREHENSIVE TREATISE ON THE LAW OF WATER AND WATER RIGHTS IN OREGON 43-49 (2011) (discussing the range of municipal and other entities involved in water management).

cross-reference other planning provisions and allow plans developed under one authority to be used to satisfy other requirements as well.[151]

As part of the statewide land use planning requirements described in Part 1 above, all local governments must comply with Goal 11 pertaining to planning for public facilities, including water systems. Goal 11's implementing regulations require a city or a county to adopt a public facilities plan for any area within an adopted UGB with a population exceeding 2,500.[152] The public facilities planning requirement essentially fills the role that "concurrency" or "assured water supply" requirements play elsewhere.[153] Like comprehensive plans, public facilities plans are reviewed and approved by DLCD for compliance with agency rules. If the local government preparing the facilities plan is not itself the water provider, the planning entity is directed by the agency's rules to work with other appropriate entities — including private providers—to prepare the plan.[154]

The Oregon Court of Appeals stated the purpose of Goal 11 in *Gisler v. Deschutes County* in 1992:[155]

> the overall objectives of the goal are to regulate development as well as services and facilities, *to coordinate development levels with service and facility levels* and, together with Goal 14, to channel intensive uses and development to existing urban and urbanizable land first before allowing the conversion of or intense non-resource uses on

[151] *See, e.g.*, OAR 660-011-0010(3) pertaining to Goal 11 public facilities plans: "It is not the purpose of this division to cause duplication of or to supplant existing applicable facility plans and programs. Where all or part of an acknowledged comprehensive plan, facility master plan either of the local jurisdiction or appropriate special district, capital improvement program, regional functional plan, similar plan or any combination of such plans meets all or some of the requirements of this division, those plans or programs may be incorporated by reference into the public facility plan required by this division."

[152] OAR 660-011-0000 *et. seq.*

[153] In discussing the transportation planning requirements of Oregon law (similar but not identical to water system planning requirements), DLCD said that the transportation planning rule does not create the kind of "concurrency" requirement that has been adopted in other states, where transportation facilities must be built before new development is approved, but rather it requires local governments to assess whether planned facilities that are expected to be constructed over the planning period will be adequate to meet needs at the end of the planning period, which allows for development to occur in advance of the necessary improvements being constructed. DLCD, *Frequently Asked Questions about Section 0060 of the Transportation Planning Rule, available at* http://www.oregon.gov/LCD/Pages/about_tpr_section_0060.aspx. *Compare* City of Tallahassee, Florida, at http://www.talgov.com/growth/growth-confaq.aspx. ("'Concurrency' is a shorthand expression for a set of land use regulations that local governments are required (by the Florida Legislature) to adopt to ensure that new development does not outstrip local government's ability to handle it. For a development to … 'meet concurrency' the local government must have enough infrastructure capacity to serve each proposed development.") However, DLCD also noted that some local jurisdictions in Oregon have adopted their own version of concurrency requirements. *See also* note 48, *infra*, discussing one Oregon County's requirement that dispersed rural developments provide information about their intended water supply in applications for county development permits.

[154] OAR 660-011-0015.

[155] 149 Or App 528, 945 P2d 1051 (1997).

the rural land that comprises areas outside UGBs.[156] (Emphasis added.)

The language of Goal 11 that was in effect in 1997 is somewhat different than it is now, but the purpose is still the same. Thus, no matter who is actually the water provider, cities and counties are responsible for planning for the rational development of water service in coordination with managing and channeling urban growth.

The applicable statutes and rules state a preference for limiting the provision of urban water and sewer services to areas within UGBs. In *Foland v. Jackson County*,[157] the Court of Appeals considered and applied the current version of Goal 11 and its implementing rules to a decision by a county that would have allowed extension of water service outside a city's UGB to a proposed state highway department welcome center, which all parties recognized as an urban use. The Court found that although Goal 11 and the rules do not "expressly and categorically" prohibit extension of water service outside the UGB, as they do for sewer service, reading together the goal's language, purpose, and history produces the same result. The Court thus held that Jackson County's approval of extending water service outside the City of Ashland's UGB to serve the welcome center did "not comport with Goal 11 and, consequently, the county was required to take a goal exception to extend the water services in this case."[158] The process of taking an exception requires the local government to make a number of specific findings to justify its action to assure that the essential purpose of preventing premature development of rural areas is not undermined.[159]

In addition to the planning requirements of the land use laws, other statutory requirements also apply to various categories and types of water providers. For instance, drinking water providers serving 300 or more connections are required by the Oregon Health Authority ("OHA") to develop master plans which address projected development of their systems and alternative water sources. OAR 333-061-0060(5). Providers serving fewer than 300 connections are required to prepare a similar document if they apply for certain public funding.

Water utilities are also regulated by the Oregon Public Utilities Commission ("PUC") if they meet certain threshold requirements.[160] "Any corporation, company, individual, association of individuals, or

---

[156] *Id.* at 535, 1054.

[157] 239 Or. App 60, 243 P3d 830 (2010).

[158] *But see Brown v. City of Eugene*, 250 Or App 132, 279 P3d 298 (2012), where the Court interpreted "extension of water service" *not* to include wholesale sales of water to another municipality. The Court found that, although the Eugene City Charter required City Council approval for "extension of water service," by otherwise granting complete control to the Eugene Water and Electric Board ("EWEB") to maintain and operate the city's water utility, Eugene could not require Council approval for a wholesale water sales agreement whereby EWEB agreed to sell surplus water to the City of Veneta.

[159] *See* ORS 197.732 and 197.734; OAR 660-004-0000 *et.seq.*

[160] Municipalities and other public water providers are not regulated by the PUC. An association providing water to its members is not subject to PUC jurisdiction either unless: 1) 20 percent of the association members petition the Commission for rate regulation, and 2) The association provides water service to customers that are not association members, but an association providing water service to non-member customers is only subject to PUC service regulation if it charges more than $33 for its average annual monthly residential water service rate, or if it has become regulated due to inadequate or discriminatory service.

its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city" is a "public utility" for purposes of PUC regulation.

Public utilities that serve 500 or more customers are subject to regulation by the PUC for both service and rates. Entities serving fewer than 500 customers are generally subject to service regulation and may also be subject to rate regulation if they meet certain threshold requirements.[161] Service regulation is to insure that the utilities provide safe, adequate, and non-discriminatory water service. Rate regulation is to ensure that hookup fees, system impact fees, facilities charges, mainline extension charges, or other similar charges are reasonable and cost based. The PUC does not impose specific long range planning requirements of its own, but it occasionally reviews and considers a water utility's OHA master plan as part of a rate case, to be sure that rates are appropriately supported by costs and investments.

Administrative rules of the Oregon Water Resources Department ("OWRD") "encourage," but do not require, public and private municipal water suppliers to prepare Water Management and Conservation Plans ("WMCPs").[162] Although planning is technically optional under the rules, preparation of a WMCP is often imposed as a condition on municipal water rights permits. Since 2005, WMCPs have also been required by statute when a municipality requests a permit extension to develop its full water right.[163] WMCPs must address ten and twenty-year demand projections and proposed sources to meet the projected needs. When a WMCP is required, it must be updated on a schedule specified by OWRD (at least every ten years).[164] OWRD will accept plans prepared to comply with the land use planning laws or the OHA requirements as WMCPS, as long as they include all of the elements required by OWRD's rules.

B. Water Providers' Duty to Serve

Water providers that are regulated by the PUC as public utilities have a statutory duty to serve all within their service territory.[165] In fact, the PUC can order a regulated utility to extend service to an unserved area under certain circumstances.[166]

Historically, Oregon courts held that water utilities have a common law duty to serve. *Haugen v.*

---

[161] Water providers are regulated for *service* if they serve fewer than 500 customers, and charge an average annual monthly residential water service rate between $24 and $33, or if they become subject to regulation because of providing inadequate or discriminatory service. Rate regulation will apply to smaller entities if they provide both water and wastewater services within the boundaries of a city, if they charge a rate in excess of the regulatory thresholds specified in administrative rules, or if they request rate regulation. OAR 860-036-0030.

[162] OAR 690-086-0100 *et seq.*

[163] ORS 537.230(2)(b).

[164] OAR 690-086-0100 *et seq.*

[165] ORS 757.020.

[166] ORS 757.050.

Albina Light and Water Co., an 1891 case, and *Kampstra v. Salem Heights Water District*, a 1964 case, both found such a duty.[167] However, since 1973, decisions about the location and pace of urban development—including water and sewer service expansion—have been controlled by the land use program, thus largely replacing the function of the common law duty-to-serve doctrine. Within the land use framework, courts have upheld restrictions imposed by municipalities on where and when they will allow development based on their comprehensive plans, facilities plans, and UGBs, in conformance with the adopted statewide goals and administrative rules. In the *Gisler* case cited earlier, the Court upheld Deschutes County's denial of a subdivision application outside a UGB due to the lack of sewer service on the property. The Court also found that the county was not required to allow the applicant to use septic systems as an alternative and that the denial did not constitute an illegal de facto moratorium. Given the reasoning of the *Foland* case discussed previously, the result would likely be the same for a decision pertaining to extension of water service.

Oregon municipalities have imposed moratoria based on insufficient water or sewer capacity, though no reported Oregon case seems to have tested the legality or limits of such moratoria.[168] In a 1999 property tax dispute in Clackamas County, the Oregon Tax Court found that the value of an undeveloped lot in the City of Wilsonville was diminished by $1.00 per square foot during a given tax year because of the city's building moratorium limiting issuance of building permits due to a lack of water system capacity. No question was raised in that case about the validity of the moratorium and the moratorium was apparently only in effect for a two-year period. A 1992 Court of Appeals case also referred to a city moratorium on new construction in areas served by city water facilities, but the moratorium's validity was not directly at issue in that case either.[169]

Oregon's land use laws now provide a specific planning device for municipalities to use when faced with a deficiency in public facilities, such as water supply or wastewater treatment facilities. Local governments can adopt a short term "public facilities strategy" to respond to the deficiency.[170] In order to adopt a strategy, the governing body must find that: (i) there is a rapid increase in the rate or intensity of land development in a specific geographic area that was unanticipated at the time the original plan for that area was adopted or there has been a natural disaster or other catastrophic event in a specific geographic area; (2) the total land development expected within the specific geographic area will exceed the planned or existing capacity of public facilities; and (3) the necessary supply of housing and commercial and industrial facilities will not be unreasonably restricted by the adoption of the public facilities strategy.

A public facilities strategy must include a detailed description of the actions and practices a local

---

[167] *Haugen*, 21 Or 411, 28 P 244, and *Kampstra*, 237 Or 336, 391 P2d 641 (1964). *Haugen* and *Kampstra* were not particularly hard cases. Both involved requests for service within the immediate area already being served with water, and the disputes had more to do with what payment the providers could impose for connection to the system.

[168] Cf. Ore-Cal Coca Cola Bottling Co. v. Clackamas County Assessor, 1999 SL 33117381 (Or. Tax Magistrate Div.).

[169] *Schatz v. City of Jacksonville*, 113 Or App 675, 835 P2d 923 (1992) (case turned on procedural issues).

[170] ORS 197.768.

government or special district will pursue to control the time and sequence of development approvals in response to the identified deficiencies in public facilities. Moratoria could certainly be a part of such a strategy. However, a strategy can only be in effect for two years, with a maximum of three one-year extensions, and extensions must follow a public process to demonstrate that reasonable progress is being made but the facilities problem still exists.

C. Raising a Challenge to Restrictions on Water Service

Challenges to restrictions on water service in Oregon could be raised in different forums depending on the particular action being challenged. A challenge to a specific final land use decision by a local government (such as denial of a subdivision application based on lack of water service) would be brought in the first instance to the Land Use Board of Appeals ("LUBA").[171] LUBA is a specialized three-member administrative body created as part of Oregon's comprehensive statewide land use program.[172] Final LUBA decisions can be appealed to the state Court of Appeals.[173] A challenge to the provisions of a local government's comprehensive plan, including provisions pertaining to public facilities, can be raised administratively during DLCD's review of the plan, and the agency's final decision can be challenged in court.[174]

Challenges to agency action in areas outside the land use planning process would normally follow a similar path, with issues raised first before an agency and then before the Circuit Court or the Court of Appeals, depending on what type of decision the agency has made.[175] Under the Oregon Administrative Procedures Act, agency orders in contested cases are appealed to the Court of Appeals, while orders in "other than contested cases" are subject to challenge in Circuit Court.[176]

---

[171] Although this sounds simple enough, the question of when the local government has made a "land use decision" as it is defined by statute for purposes of review by LUBA (ORS 197.015(1)) is not all that straightforward. *See* http://www.oregon.gov/LUBA/Pages/FAQ.aspx ("The tests for determining what is a land use decision or limited land use decision are not always easy to apply. A petitioner in a LUBA appeal must explain why the appealed decision is a land use decision.")

[172] *See* LAND USE BOARD OF APPEALS, *About Us*, at http://www.oregon.gov/LUBA/Pages/about_us.aspx.

[173] *See, e.g., Gisler v. Deschutes County*, *supra* (applicant for subdivision appealed county's denial first to LUBA and then appealed LUBA's affirmance of the denial to the Court of Appeals).

[174] *See, e.g., 1000 Friends of Oregon v. Land Conservation and Development Commission*, 301 Or 447, 724 P2d 268 (1986) (conservation group initially raised objections to county's plan during the agency review process and then appealed agency's final decision to the Court of Appeals and the Supreme Court).

[175] *See, e.g., WaterWatch of Oregon, Inc. v. Water Resources Department*, 259 Or App 717, 316 P3d 330 (2013) (nonprofit organization protested OWRD's grant of a permit extension to the City of Cottage Grove without requiring preparation of a WMCP, among other objections; after an administrative contested case, the agency issued a final order and WaterWatch filed a petition for review with the Court of Appeals).

[176] ORS 183.482 and 183.484 (Oregon APA); *see also* ORS 536.075 (specific judicial review provisions applying to OWRD). These citations to the Oregon APA are relevant throughout the rest of the Oregon discussion as well in terms of challenging agency decisions in other areas, so this section is not repeated throughout the outline.

D. Municipal Preference

Oregon law contains several special provisions applicable to municipal water suppliers. First of all, several municipalities were granted water rights by the state legislature, including Portland, Bend, Medford, and Pendleton.[177] These statutory grants effectively preserve the designated water sources for those cities' future needs and protect them from appropriation by competing users. Municipalities and other governmental agencies may also request that OWRD reserve water administratively for future economic development, including for municipal use.[178] The reservation operates as a placeholder priority date, so that when the use is eventually developed, it will have earlier priority than subsequent appropriations.

OWRD may approve a municipal application "to the exclusion of all subsequent appropriations, if the exigencies of the case demand."[179] OWRD can also issue permits to municipalities and some other water providers prior to their submission of an easement or other written authorization to use land not owned by the municipality, and prior to submission of engineering plans and specifications for any reservoir that is contemplated by the application.[180] Municipalities are given powers of eminent domain that can be used to acquire water rights and property necessary to support the water system.[181]

Municipalities are given initial terms of 20 years in which to develop their water use under water permits, in contrast to five-year terms for non-municipal permit holders.[182] The longer term for municipalities was added by the Oregon Legislature in 2005, in response to a 2004 decision of the Oregon Court of Appeals holding that municipalities were covered by the five-year construction period, even though OWRD had never applied the provision strictly to municipalities.[183] Municipalities can also request extensions of the 20-year term with a showing of good cause; however, extensions may be conditioned on preparation of a WMCP, and in some cases may also be conditioned to "maintain…the

---

[177] *See* ORS 538.110420-538.450.

[178] *See* ORS 537.356; OAR 690-079-0010 *et. seq.*

[179] ORS 537.190(2). *See also* ORS 540.140 (providing a hierarchy, with domestic use at the top, that could also help break ties, or determine which use will be given preference among uses with same priority).

[180] ORS 537.211(6), 537.248(1).

[181] ORS 225.050. Some other water providers have eminent domain authority as well. *See, e.g.*, ORS 261.305 re powers of people's utility districts.

[182] ORS 537.230(1) and (2).

[183] *WaterWatch of Oregon, Inc. v. Water Resources Commission*, 193 Or App 87, 88 P3d 327 (2004). Prior to 2005, the statute provided a five-year term for all permits. OWRD issued a permit to a municipality—the Coos Bay North Bend Water Board ("Coos Bay")—even though the applicant made it clear that construction would not even begin for many years. OWRD explained that it interpreted the five-year provision in the statute as only a "guideline" for municipal water rights, and said that Coos Bay's plan to do only stream measurements in the first several years was sufficient due diligence to develop its water right. WaterWatch challenged the permit issuance as non-compliant with the statutory requirements. The Court of Appeals held that the statute applied equally to municipalities and all other permit holders, and stated that, if municipalities were to be treated differently, the legislature needed to amend the statute. The legislature then did so, amending ORS 537.230 to give municipalities a longer permit development term.

persistence of fish species listed as sensitive, threatened[,] or endangered under state or federal law."[184]

Municipalities are also allowed to proceed in stages to prove up their permits and receive final water rights certificates for a portion of their water use, rather than applying for a certificate only when they have completed development of the full amount of water authorized in the permit. Under ORS 537.260(4), "a municipality may partially perfect not less than 25 percent of the water authorized by its permit without loss of priority or cancellation of the municipality's permit . . . ." This provision essentially insulates municipalities against permit cancellation as long as they are proceeding with staged development. OWRD will issue a certificate covering the perfected amount and then will issue additional certificates as the deferred amount is perfected.[185]

Finally, and importantly, municipalities have special defenses available to allegations that their water rights have been forfeited by a period of five consecutive years of non-use. ORS 540.610 provides:

> (2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:
>
> > (a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.
> >
> > (b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.
> >
> > * * *
>
> (4) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

In the *WaterWatch* case discussed earlier, the Court of Appeals said that these provisions" indicate that the legislature does not favor the forfeiture of a water right implicating municipal purposes."[186]

---

[184] ORS 537.230(2)(a)-(c).

[185] *But see WaterWatch v. Water Resources Commission, supra* footnote 37, at 339-340 (discussing this special provision for municipalities; noting that it does not mean that the separate statute containing the construction deadline can be ignored).

[186] *Id.* at 111-112 (but further noting that these sections "do not affect the construction requirements . . . that apply to municipalities in *obtaining* a permit.") 193 Or App 111-112 (emphasis in original). Interest groups representing municipalities filed an amicus brief in the Oregon Supreme Court's review of the Court of Appeals decision in this case, arguing that the various municipal preferences provided in statute codified the "Growing Communities

Finally, during a declared drought, OWRD can adopt emergency administrative rules giving preference to domestic and livestock uses of water in spite of the normal priority rules.[187] OWRD can also require state agencies and political subdivisions (including municipalities) to prepare a water conservation or curtailment plan to respond to the drought.[188]

3. GROUND WATER EXEMPTIONS IN OREGON

Oregon law exempts the use of groundwater for "single or group domestic purposes not exceeding 15,000 gallons per day" from permit requirements.[189] Use of groundwater for stock watering is also exempt from permit requirements.[190] The exemption for domestic use is significant, since average per capita consumption is only about 100-200 gallons per day and since "group domestic water use" is defined simply as "the use of water for domestic water use by more than one residence or dwelling unit."[191] Quite a few households can thus be provided water from a single well as long as the total withdrawal does not exceed 15,000 gallons per day. There is no stated limit on stock water use, so such use need only be "reasonable." Other exempt uses of groundwater include watering a lawn or noncommercial garden of no more than one-half acre and "single industrial or commercial purposes not exceeding 5,000 gallons per day.[192]

Legislative proposals to begin regulating exempt wells have not gained any traction in recent legislative sessions, though the 2009 legislature did adopt a prospective "registration" requirement for new exempt wells in order to gather information to better evaluate groundwater supplies and generate fees to support groundwater studies and monitoring.[193] Prior to the adoption of the registration requirement, the only information required to be provided to OWRD for an exempt well was a cursory well log filed by the well driller at the time of construction, but the logs often do not contain complete and accurate information about the well's location, and the impact of exempt wells is not well coordinated with uses requiring water rights. OWRD believes that the registration requirement for exempt wells will help it make better water availability determinations for other groundwater uses. However, since exempt wells

---

Doctrine" and urging the Court to explicitly adopt the doctrine. *Amici Curiae Brief on the Merits*, League of Oregon Cities, Special Districts Association of Oregon, and Oregon Association of Water Utilities, 2004 WL 5859645 (Or.) (Appellate Brief). However, the Supreme Court vacated and remanded the Court of Appeals decision as potentially moot because of the intervening legislative adoption of a longer permit term for municipalities, so they did not reach or address the doctrine. *WaterWatch of Oregon, Inc. v. Water Resources Commission*, 339 Or 275, 119 P3d 221 (2005).

[187] ORS 536.750. OWRD can also issue temporary emergency permits and can allow other temporary changes to water rights during a drought. The applicable procedures are found in OAR 690-019-0010 *et. seq*.

[188] ORS 536.780; OAR 690-019-0090.

[189] ORS 537.545; *see also* OAR 690-340-0010.

[190] *Id.*

[191] OAR 690-300-0010(23).

[192] *See supra* note 190.

[193] ORS 537.545(5)-(7); OAR 690-190-0005 *et. seq*.

are not required to report water withdrawals, and since the registration requirement only applies to wells drilled after July 22, 2009, the information that will be gleaned is likely to be of only incremental value.

Exempt wells are not well integrated into the comprehensive land use planning system. Although the restriction of urban development outside of established UGBs controls the proliferation of exempt wells to some degree, it is up to the individual local governmental planning entities whether to impose any additional land use reviews or requirements on exempt wells drilled to support dispersed rural development. Some counties, such as Benton County, have adopted a requirement for such development to demonstrate an available water supply.[194]

4. ENVIRONMENTAL IMPACTS IN OREGON

Oregon law does not require comprehensive analysis of the environmental impacts of projects similar to what is required at the federal level by NEPA. To some degree, Statewide Planning Goal 5 serves this purpose, in that it requires local planning entities to inventory natural resources and perform an analysis of the economic, social, environmental, and energy impacts ("ESEE" analysis) of the planning decisions on those resources.[195] Some environmental impacts of water use proposals are also reflected in the list of factors that OWRD is to consider in conducting a public interest review of all new water permit applications.[196] However, the public interest review does not involve a comprehensive analysis of environmental impacts by any means.

Oregon law does attempt to protect stream flows from the impacts of new groundwater withdrawals to some degree. When OWRD reviews new groundwater permit applications, OWRD's administrative rules require it to determine whether an aquifer is hydraulically connected to surface water in order to assess the potential for substantial interference with the surface water.[197] The same rules apply presumptions of connection and interference for certain wells based on their location relative to a surface water source and on whether they will draw from an unconfined aquifer.

State law also provides additional protection to surface flows in designated scenic waterways. Applications for both groundwater and surface water must be reviewed to assure that the proposed uses of water will not "measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife."[198] If such impact will occur, the permits are to be denied unless appropriate mitigation is provided.

Oregon law also contains a special mitigation program for the arid Deschutes Basin, where

---

[194] *See, e.g.*, BENTON COUNTY DEVELOPMENT CODE, CH. 99.800 *et seq*. (requirements for dispersed rural development to demonstrate water supply in support of applications for building permits or other county approvals).

[195] See OAR 660-023-0000 et seq.

[196] ORS 537.153(2) and 537.170(8); *see also* OAR 690-310-0120 & 0140 (e.g. fish and wildlife, water quality, T & E species).

[197] OAR 690-009-0040.

[198] OAR 690-310-0260.

population has been growing rapidly. The Deschutes Basin has been studied extensively by the United States Geological Survey and the hydraulic connections between surface water and groundwater are well understood in that basin, as compared to a relative lack of knowledge in the rest of the state. The legislature thus adopted mitigation requirements for all new groundwater uses proposed in the Deschutes Basin.[199] Each new groundwater permit applicant must submit a plan demonstrating that the impacts of the proposed groundwater withdrawal on the surface streams will be fully mitigated in an amount specified by OWRD. These requirements have fostered development of mitigation banks in the basin to provide credits available for purchase by parties looking for mitigation opportunities.[200] None of the special rules discussed in this section apply to exempt wells, however.

As noted above, water rights applications are reviewed for compliance with the public interest. Oregon also has a public trust doctrine that protects trust purposes of navigation, commerce, fishing, and recreation in title navigable waters. And the state recognizes a public "use" doctrine that allows recreation in water bodies that are "floatable."[201]

5. WATER MARKETS IN OREGON

The water market in Oregon is not nearly as robust as in the southwest or inter-mountain west states, but there is some leasing and selling of water rights in the state. Many streams are fully or over-appropriated, at least at certain times of the year, so transfers provide the only source of "new water" in many areas. As in the rest of the West, agriculture is the largest user of water, at about 80%, and considerable efficiency improvements are possible, so that's where the water is. Agricultural users also hold the most senior rights in much of the state, which makes them the most valuable. All the same, Oregon has not yet seen significant agricultural-to-urban water transfers, largely because most of the state's population is located in the Willamette Valley, along the Interstate 5 corridor, which is in the wet western third of the state where sufficient water sources have been available for municipal use. More recently, however, communities in the arid regions of the state have been experiencing population growth as well—such as Bend, Redmond, The Dalles, Pendleton, and Medford—so pressure is growing to find additional municipal supplies in those drier places. At this point, the state does not have statewide "plumbing" to enable transfers from the wet areas to the dry areas, as do Colorado, California, and Arizona.

Oregon does have a fairly active market in transfers from agricultural use to environmental use to enhance stream flows for fish and wildlife, water quality, and recreation. These transfers are aided by the state's conserved water right statute and the state's instream water rights law, and also by federal programs

---

[199] ORS 537.746; OAR 690-505-0000 *et. seq.*

[200] *See, e.g.*, the programs of the Deschutes River Conservancy, at http://www.deschutesriver.org/what-we-do/streamflow-restoration-programs/groundwater-mitigation-bank/ and the Deschutes Water Alliance Water Bank, at http://www.deschutesriver.org/what-we-do/water-banking/deschutes-water-alliance-bank/.

[201] *See* Michael B. Huston and Beverly Jane Ard, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623 (1988); Michael C. Blumm and Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375 (2012).

requiring mitigation for the impacts to threatened and endangered anadromous fish from the many federal dams in the Columbia River Basin.

The state conserved water program, adopted in 1987, allows water users to keep a portion of the water that they save through conservation projects approved by OWRD.[202] A minimum of 25% of the conserved water is kept and protected instream—more if public moneys fund the conservation project—while the water user can market or use the remainder. Since 1987, Oregon law has also recognized instream water rights, and the statute authorizes lease, sale, or donation of consumptive rights for conversion to instream rights.[203]

Federal programs and funding also stimulate ag-to-environmental water transactions in Oregon. The Bonneville Power Administration ("BPA") is responsible for protecting, enhancing, and mitigating for the impacts to fish and wildlife of the construction and operation of the Federal Columbia River Power System. Guidance for BPA's mitigation activities come from the Northwest Power and Conservation Council's Fish and Wildlife Program as well as from several Biological Opinions governing the operation of the federal dams to comply with the Endangered Species Act.[204] One important part of BPA's mitigation program is the funding it provides to the Columbia Basin Water Transactions Program,[205] which in turn provides grants to qualified local entities for transactions and projects that put water back instream for the benefit of fish and wildlife.

Texas

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN TEXAS

A. Overview

As noted below, Texas does not mandate specific limitations on development based on water supplies at the state level. The water supply aspect of growth management is addressed on two levels: first, indirectly at the level where the source of water is regulated and financed; second, directly at the level where development is managed.

1) At the Water Source – Regulation, Planning and Finance in Texas

Surface water and groundwater are managed differently in Texas. Surface water state-wide is

[202] ORS 537.455- 537.500; OAR 690-600-0000 *et. seq.*

[203] Several non-profit entities use the provisions of the conserved water rights statute and the instream water rights law to restore stream flows by financing conservation projects or leasing or purchasing water rights from consumptive users—primarily farmers and ranchers—and converting the rights to protected instream rights. *See, e.g.*, The Freshwater Trust (formerly The Oregon Water Trust), https://www.thefreshwatertrust.org/about-us/ and the Deschutes River Conservancy, http://www.deschutesriver.org/what-we-do/streamflow-restoration-projects/.

[204] *See* https://www.bpa.gov/efw/FishWildlife/Pages/default.aspx.

[205] *See* http://www.cbwtp.org/program.htm.

under the jurisdiction of the Texas Commission on Environmental Quality ("TCEQ"), pursuant to Chapter 11 of the Texas Water Code, and, as with all such regulatory programs, water availability is an important factor in the permitting decision.[206] Groundwater is under the jurisdiction of groundwater conservation districts, pursuant to Chapter 36 of the Texas Water Code, in those areas that have districts. A substantial portion of the state, but not all of it, lies within groundwater conservation districts, as the attached November 2015 map shows (*See* Appendix A). As with surface water, water availability is an important factor with groundwater permitting, although the process of evaluation is not exactly the same.[207] Notwithstanding the regulatory differences, state-based financing for water projects of all types is under the supervision of the Texas Water Development Board ("TWDB").[208]

The planning process described below is tied to the permitting process and the state financing process. One of the criteria for TCEQ approval of a surface water permit for a project is consistency with the applicable approved regional water plan.[209] A groundwater permit issued by a groundwater conservation district must be consistent with its own, TWDB-approved management plan.[210] Finally, the approval of state financing applications is tied to approved regional plans.[211]

2) Development

The relationship between water and development is regulated more directly at the local level in Texas through zoning and subdivision ordinances and planning that goes into those ordinances.[212] As is

---

[206] Tex. Water Code § 11.134(b)(2). TCEQ may only grant a surface water permit application if there is unappropriated water available in the source of supply.
The Texas statutes may be found online at: http://www.statutes.legis.state.tx.us/
The Texas Administrative Code, including TWDB rules in Title 30 and TCEQ rules in Title 31 may be found online at:
http://texreg.sos.state.tx.us/public/readtac$ext.viewtac TWDB rules on planning are found in Title 31, Chapters 357 (regional planning guidelines) and 358 (state water plan guidelines). Groundwater-related rules are found in Title 31, Chapter 356. Most TCEQ rules on water rights permitting are contained in Title 30, Chapters 295 (procedural), 297 (substantive) and 298 (environmental flows).

[207] *See, e.g.*, Tex. Water Code § 36.108 (desired future conditions), .1084 (modeled available groundwater), .1085 (management plan goals and objectives), .1132 (permits to be based on modeled available groundwater to the extent possible).

Rules relating to groundwater production are promulgated by the groundwater conservation districts themselves and are typically found on their individual websites, *e.g.*, for the Gonzales County Underground Water Conservation District, the rules are online at: http://www.gcuwcd.org/documentsandforms.html

[208] *See, e.g.* Tex. Water Code, Chapters 15, 16.

[209] Tex. Water Code § 11.134(b)(3)(e) and .134(c).

[210] Tex. Water Code §§ 36.1071 (management plan), .1072 (TWDB approval), and § 36.113(d)(4) (permit considerations).

[211] Tex. Water Code § 16.053(j).

[212] *See* Tex. Local Govt Code, Chapter 212 (municipal subdivision plat regulation), Chapter 211 (municipal zoning), and Chapter 232 (county subdivision plat regulation). Except for limited circumstances (*e.g.*, zoning on Padre Island and around Amistad Reservoir under Local Govt. Code Chapter 231), Texas counties have little or no zoning authority.

illustrated below, it is at the local level that water supplies for development are examined.

B. Water Planning in Texas – A Quick, But Closer Look

1) Background

Texas has a comprehensive, state-wide water resource planning process. Individual water providers are involved in the planning process, but they do not have to go it alone. The water planning process focuses on regional resources and regional needs.

The state-wide Texas Water Plan is compiled and issued by the TWDB,[213] but the planning process is a "ground-up" process that starts with regional planning groups who develop Regional Plans based on scientific and local stakeholder input.[214] These regional plans are then incorporated into the State Water Plan.

There are 15 major river basins and 8 coastal basins designated in Texas (*See* Appendix B).[215] These are used both for regulatory and planning purposes. However, for planning purposes, the Texas Legislature provided that TWDB divide the state into planning regions.[216] Texas is divided into 16 planning regions (*See* Appendix C). These regions are required to reflect "such factors as river basin and aquifer delineations, water utility development patterns, socioeconomic characteristics, existing regional water planning areas, political subdivision boundaries, public comment, and other factors the [TWDB] deems relevant."[217]

The regional planning process is set out in detail in Chapter 16 of the Texas Water Code and in TWDB rules in Chapter 357.[218] The process involves consideration of public comment, along with scientific and technical factors in significant detail and requires that the regional planning groups produce a plan at least once every 5 years. The planning groups must identify projected needs and strategies to meet those needs, while taking factors such as environmental considerations into account.[219] While the water plans and the groundwater management plans do not specifically prescribe development requirements on a local level, clearly they have a direct impact on the projects that provide water or infrastructure to local development.

Current and past plans are posted on the TWDB website.[220]

---

[213] Tex. Water Code § 16.051.

[214] Tex. Water Code § 16.053.

[215] Tex. Water Code § 16.051(c); An interactive map of the Texas river basins can be found at the following url: http://www.twdb.texas.gov/mapping/doc/maps/Major_River_Basins_36x36.pdf?d=1504174888125

[216] Tex. Water Code § 16.053(b).

[217] Id.

[218] Tex. Water Code § 16.053; 31 Tex. Admin. Code § 357.1, *et seq.*

[219] Id.

[220] *See* http://www.twdb.texas.gov/waterplanning/swp/2017/index.asp

C. Duty to Serve; Growth Controls in Texas

A private (non-profit or for-profit) entity wishing to provide water or sewer service in Texas must obtain a certificate of convenience and necessity ("CCN") from the Public Utility Commission of Texas.[221] Governmental entities such as municipalities, water districts and river authorities are not required to obtain a CCN,[222] but if they obtain a CCN, access to their territory by other service providers is limited,[223] and so there is incentive to obtain a CCN. Any person or entity required to have a CCN or who has a CCN for water or sewer service in an area has an affirmative duty to provide adequate and continuous service.[224]

Failure to comply with the statutory requirements for adequate and continuous service is subject to enforcement by the Public Utility Commission through the Texas Attorney General in court[225] or subject to administrative penalties assessed by the Public Utility Commission.[226] In addition, public health problems that may arise from inadequate supply or service are subject to enforcement by the TCEQ[227] and are subject to enforcement by TCEQ through the Texas Attorney General[228] in courts or subject to administrative penalties assessed by the TCEQ.[229]

Texas does not have a state-wide assured water supply statute, nor any mandatory state-imposed growth moratoria, growth caps, or prescribed service denials. Texas state law does involve state agencies in supervision of standards for water or sewer service in certain economically distressed areas. These laws were originally designed to address water- and sewer-related public health issues in colonias.[230] Water utilities in those areas must, for instance, provide proof of contracts for the needed water supply.[231]

---

[221] Tex. Water Code § 13.242.

[222] Water Code § 13.242, in prescribing who must obtain a CCN, draws a distinction between a "retail public utility" (includes governmental entities) and "utility." These terms are defined in § 13.002(19) and (23) respectively. The term, "retail public utility" does not include governmental entities; the term, "water or sewer utility" or "utility" does. Retail public utilities must have CCNs.

[223] Tex. Water Code § 13.242(b).

[224] Tex. Water Code § 13.250(a).

[225] Tex. Water Code § 13.411.

[226] Tex. Water Code § 13.4151.

[227] Texas statutes relating to the regulation of public drinking water are found at Tex. Health & Safety Code § 341.031, et seq. TCEQ drinking water rules are found at 30 Tex. Admin. Code § 290.038, et seq., and elsewhere in Chapter 290 of the TCEQ rules.

[228] Tex. Health & Safety Code §§ 341.048, .050; General TCEQ enforcement authority is found in Tex. Water Code § 7.001, et seq.

[229] Tex. Health & Safety Code §§ 341.049, .050.

[230] Tex. Water Code § 16.341-.356. *See also*, TWDB rules at 31 Tex. Admin. Code § 364.1, *et seq.*

[231] *See, e.g.*, TWDB rules at 31 Tex. Admin. Code § 364.32.

D. Local Regulation – The Key Role of Growth Management in Texas

Control of growth and issues linking development to water supply are primarily a function of local regulation in Texas, through municipal and county platting authority.

Development is regulated at the local level through the approval of plats by municipalities within their corporate limits[232] and extraterritorial jurisdiction ("ETJ")[233] and by counties outside the corporate limits of municipalities.[234] Cities and counties may make agreements as to the division of jurisdiction in the ETJ.[235]

Any person who subdivides a tract into two or more parts to develop must secure plat approval.[236] Part of the consideration for plat approval by municipalities is the question of whether the proposed plat conforms to the municipality's general plan for extension of water and sewer infrastructure.[237] More to the point of linking development and water availability, a municipality may require would-be developers who plan to supply their developments with groundwater to provide a certification by an engineer or hydrogeologist certifying that adequate groundwater is available for the subdivision.[238] Similar requirements apply to county approval of a plat.[239] These local regulations typically do not require a hydrogeologist certification for water supplies require documentation (contracts, permits, or meeting conditions for municipal service) to prove that the developer has acquired water rights. They may also require estimates of needs through time, and other relevant information. Two examples are Travis County[240] and City of Austin regulations.[241]

---

[232] Tex. Local Govt. Code § 212.001, *et seq* .Note that the rulemaking authority for plats approval is found in §§ 212.002.

[233] *Id.*, and § 212.003 (authority to apply rules in the municipality's extraterritorial jurisdiction or "ETJ"). The limits of the ETJ vary with city size, Tex. Local Govt. Code § 42.001, *et seq.*).

[234] Tex. Local Govt. Code § 232.001(a).

[235] Tex. Local Govt. Code § 232.0013.

[236] Tex. Local Govt. Code § 212.004 (municipalities); § 232.002 (counties).

[237] Tex. Local Govt. Code § 212.010(a)(2).

[238] Tex. Local Govt. Code § 212.0101. This statute requires that TCEQ prescribe the form and content of the certification, which TCEQ has done. *See* 30 Tex. Admin. Code § 230.1, *et seq.*

[239] Tex. Local Govt. Code § 232.0032; 30 Tex. Admin. Code § 230.1(a) states that the form and content of the certification set by TCEQ applies both to municipalities and counties.

[240] Travis County (Austin) development regulations relating to water supplies for subdivisions are found in Section 82.213, located at the following url: https://www.traviscountytx.gov/images/commissioners_court/Doc/county-code/chapter-82.pdf

[241] City of Austin development regulations relating to water supplies for subdivision are found in Chapter 25-4 of the Austin City Code, in Sections 25-4-195 through 25-4-197, located at the following url: ftp://ftp.austintexas.gov/Subdivision_Regulations/Resources/Austin_Subdivision_Article%20III_and_Outline.pdf

Municipalities may also issue a moratorium on residential and commercial development for certain express reasons,[242] among them, inadequate "essential public facilities," which include water, sewer, or storm draining facilities.[243]

Texas law prescribes penalties for platting that is not in accordance with the requirements imposed by or under the authority of the Local Government Code.[244]

2. ENVIRONMENTAL IMPACTS; PUBLIC TRUST; USE PREFERENCES; GROUNDWATER PERMIT EXEMPTIONS; WATER MARKETING IN TEXAS

Texas law requires TCEQ to take into account the impact that an application for a surface water permit may have on groundwater.[245] In the groundwater realm, there is no express surface water impact criterion for permits. However, the groundwater conservation district, in developing its groundwater management plan, must estimate "for each aquifer, the annual volume of water that discharges from the aquifer to springs and any surface water bodies, including lakes, streams, and rivers."[246] As noted above, the district, in permitting, is to follow the management plant to the extent possible.

In surface water permitting, Texas has significant environmental requirements to protect instream uses and habitat, mainly in recent years, through the imposition of instream flow requirements required by statute[247] which the TCEQ is continuing to implement through rule making and apply to its permit process.[248]

Texas has not adopted the public trust doctrine for surface or groundwater.

Texas surface water statutes do rank types of use preferred for competing permit applications, with domestic and municipal use at the top of the list.[249] This provision is rarely invoked or applied.[250] There are no similar use ranking provisions in Texas groundwater statutes. Texas surface water statutes provide for a variety of permit exemptions, typically for impoundment and use on one's own property (as opposed to impoundment on a navigable stream).[251] They also exempt limited use of Gulf of Mexico and

---

[242] Tex. Local Govt. Code § 232.131-.139.

[243] Tex. Local Govt. Code § 212.131(1).

[244] Tex. Local Govt. Code § 212.018 (municipalities), § 232.005 (counties).

[245] Tex. Water Code § 11.151.

[246] Tex. Water Code § 36.1071(e)(3)(E).

[247] Tex. Water Code § 11.1471.

[248] 30 Tex. Admin. Code § 298.1, *et seq.*

[249] Tex. Water Code § 11.024.

[250] The City of San Antonio argued for the application of a predecessor statute in a case involving competing permit applications, but the argument was rejected by the Texas Supreme Court because of other statutory permitting considerations. *City of San Antonio v. Texas Water Com'n.*, 407 S.W. 2d 752, 762-63 (Tex. 1966).

[251] Tex. Water Code §§ 11.142 (impoundment and use of up to 200 acre-feet on one's own property for domestic and livestock use or commercial or non-commercial wildlife management, dust and fire suppression relating to coal mining.)

bay waters for oil and gas exploration[252] and use of water for mariculture.[253] Groundwater districts may adopt permit exemptions by rule if they choose.[254] Subject to some limitations prescribed in the statute, groundwater districts are required to exempt wells equipped to produce 25,000 gallons per day or less located on tracts of at least 10 acres that are used for domestic and livestock purposes.[255]

Texas has some limited water marketing. The first area to develop a market was in the Lower Rio Grande Valley, where surface water has been marketed for many years. This is reflected in TCEQ's rather involved rules relating to changes in authorized use and movement of diversion points in its Rio Grande Rules.[256] More recently, among other areas where marketing of water has increased is the area of the state supplied primarily from the Edwards Aquifer, including San Antonio and areas to the west and northeast of the city, along U.S. 90 and Interstate 35. Use of Edwards water (including transfer of permits and changes in diversion points) is governed by the rules of the Edwards Aquifer Authority ("EAA").[257]

Utah

1. WATER PLANNING IN UTAH

As one of the driest states in the nation, Utah has a strong incentive to engage in comprehensive water planning.[258] By law, Utah requires a statewide water plan, and has designated the Utah Division of Water Resources to oversee and administer the program.[259] Accordingly, the Division of Water Resources created a statewide water plan in 2001 and has divided the state into 11 separate basins with each basin having its own water plan. These plans provide estimates on future water need in the state and largely focus on conservation and development of Utah's water resources.

In addition to administering and updating the water plans, the Division of Water Resources has engaged in other efforts to help develop Utah's water supply. Such efforts include cloud seeding programs, which are designed to increase winter precipitation in the state. Other planning efforts include the development of large water infrastructure projects, such as the Lake Powell Pipeline, which the Utah Board of Water Resources has been charged with constructing pursuant to the Lake Powell Pipeline

[252] *Id.*

[253] Tex. Water Code § 11.1421.

[254] Tex. Water Code § 36.117(a).

[255] Tex. Water Code § 36.117(b).

[256] 30 Tex. Admin. Code § 301.1, *et seq.*

[257] EAA's enabling act and rules can be found at the following url: http://www.edwardsaquifer.org/legislation-and-policy/rules-and-regulations.

[258] *E.g.*, Liz Osborn, *Driest States in America*, Current Results (Last Visited June 9, 2017 at 10:00 am), https://www.currentresults.com/Weather-Extremes/US/driest-states.php, and the nation's fastest growing state between 2015 and 2016, Daphne Chen, *Census: Utah is Nation's Fastest-Growing State*, Deseret News, (Dec. 20, 2016, 6:30 pm), http://www.deseretnews.com/article/865669636/Census-Utah-is-nations-fastest-growing-state.html.

[259] UTAH CODE ANN. § 73-10-15; § 73-10-18.

Development Act.[260] When constructed, the pipeline will transport water from the Colorado River system to Washington County, which is home to St. George – one of the fastest growing cities in the nation with a population that is expected to quadruple in the next 50 years.[261]

Utah has also created its Water Infrastructure Restricted Account, which provides funding for "the development of the state's undeveloped share of the Bear and Colorado rivers" as well as other efforts in developing and protecting Utah's water resources.[262]

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN UTAH

Beyond the general plans and other programs to increase Utah's water conservation and development efforts, Utah mostly relies on counties, cities, and local districts to manage water supplies and engage in long-term planning.

For instance, Utah law allows flexibility to "public water suppliers" to plan and prepare for future population growth.[263] Specifically, while water rights are generally susceptible to forfeiture after seven years of nonuse, Utah makes an exception for "public water suppliers" that own a water right and conserve or hold it "for the reasonable future water requirement of the public."[264] A "public water supplier" is defined as an entity that (1) "supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use;" and (2) is a public entity, a water corporation, a community water system, or a water users association.[265]

The Utah Code defines the phrase "reasonable future water requirement for the public" broadly. Specifically, the Utah Code states that "[t]he reasonable future water requirement for the public is the amount of water needed in the next 40 years" by those persons within the "public water suppliers anticipated service area based on reasonably anticipated population growth" or any "*other water use demand*."[266] Consequently, this broad standard allows public water suppliers to acquire a significant amount of water in anticipation of future growth without an obligation to put the water to beneficial use.

---

[260] *Id.* § 73-28, *et seq.*

[261] Judy Fahys, *Lake Powell Pipeline Fact Sheet*, KUER (May 3, 2015) (Last visited June 9, 2017 at 11:30 am), http://kuer.org/post/lake-powell-pipeline-fact-sheet#stream/0.

[262] UTAH CODE ANN. § 73-10g-104.

[263] *Id.* §73-1-4(1)(e)(vii).

[264] *Id.*

[265] *Id.* § 73-1-4(b).

[266] *Id.* § 73-1-4(2)(f) (emphasis added).

3. ASSURED WATER SUPPLY IN UTAH

Utah does not have a statewide assured water supply requirement. Instead, local land use planning authorities (cities, counties, etc.) bear the primary responsibility of determining whether a proposed development will have a sufficient water supply, which was explained in more detail above.[267]

The methods these authorities use varies considerably. For instance, some require developers to dedicate a sufficient number of water rights to cover the development's projected water demands, while others charge an impact fee to cover the costs of acquiring or supplying water for the development. In some cases, the land use planning authority may hold enough water rights to cover anticipated development without the need to impose impact fees or require developers to dedicate rights.

Moreover, in areas where connection to a public water system is not feasible, some land use planning authorities may require the developer to prove that the project will not be supported by sufficient rights.

4. MUNICIPAL PREFERENCE IN UTAH

Since 1880, and for more than a century, Utah law provided a domestic use preference in times of scarcity.[268] In 2009, however, the Utah Legislature unexpectedly changed course and repealed this preference, although very few were aware of the last time the preference was actually used.[269]

The old statute has now been replaced with Section 73-3-21.1, which provides a priority scheme if and when there is a "temporary water shortage emergency."[270] Namely, "if there is a temporary water shortage emergency, the use of water for drinking, sanitation, and fire suppression has a preferential right over any other water right for the duration of the temporary water shortage emergency," so long as the water is used by one of the following: "an individual water user; . . . a county or municipality; . . . a public water supplier; or . . . a military facility that was in operation on March 10, 2011," and is "used without unnecessary waste."[271] Water for "agricultural purposes, including irrigation and livestock water" has the second highest preference.[272]

---

[267] Sarah Bates, Bridging the Governance Gap: Emerging Strategies to Integrate Water and Land Use Planning, 52 Nat. Resources J. 61, 78 (Spring 2012).

[268] UTAH CODE ANN. § 73-3-21 (2008), repealed by 2009 Laws of Utah c. 283 § 1, effective May 11, 2010 ("[I]n times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes.").

[269] J. Craig Smith & Scott M. Ellsworth, *A Preference for Domestic Water Use in Utah: A Relic of the Past*, 12 AMERICAN BAR ASS'N, WATER RESOURCES COMM. NEWSLETTER 1, 9 (Nov. 2009).

[270] UTAH CODE ANN. § 73-3-21.1.

[271] *Id.* §§ 73-3-21.1(2)(b)(i)–(ii).

[272] *Id.*

Note, however, that any such user of water during a temporary water shortage is required to "pay annually to the appropriator whose water use is interrupted the reasonable value of the water use interrupted, crop losses, and other consequential damages incurred as a result of the interruption."[273]

5. GROUND WATER EXEMPTIONS IN UTAH

Unlike its sister states in the West, Utah does not include an exemption or exception for the diversion of groundwater for domestic purposes or for small amounts. Instead, if a person wants to drill a domestic well to divert groundwater, regardless of the amount of water at issue, that person must file an application to appropriate or a change application just like any other appropriator in Utah.[274] The rationale underlying the non-exemption is simple: the Utah Supreme Court has held against allowing de minimus exemptions because if such a "reduction of the waters available to the lower water users were allowed . . . over and over again, the damage to the lower users would be unbearable."[275] In other words, such a de minimus exemption creates a significant incentive for individual residents, developers, and others to drill many small domestic wells to circumvent the somewhat laborious appropriation or change application processes, thereby causing planning and allocation problems of the precious water resources in the state of Utah.[276]

Note, however, that although Utah does require a person drilling a domestic well to file an application to appropriate or a change application, the State Engineer is not required to publish notice for applications to appropriate or permanently change a "small amount of water."[277] Nevertheless, the State Engineer must still follow the other aspects of its appropriation process and find that such applications will not impair existing rights.[278]

This relaxed requirement for "small amounts of water" is inapplicable if the State Engineer finds that the application to appropriate or change the place or use of the water may impair existing rights.[279] In this situation, the State Engineer must provide public notice just as he or she would in a typical scenario, providing any interested party the right to file a protest within 20 days.[280]

---

[273] *Id*. § 73-3-21.1(3).

[274] *Id.*

[275] Nathan Bracken, *Exempt Well Issues in the West*, 40 ENVTL. L. 141, 148 (quoting *Piute Reservoir & Irrigation Co. v. W. Panguitch Irrigation & Reservoir Co*., 367 P.2d 855, 858 (Utah 1962); *see also Wayment v. Howard*, 2006 UT 56, ¶ 13, n.11, 144 P.3d 1147, 1151 ("We have not adopted the de minimus standard, but rather have stated that no impairment is acceptable.").

[276] *See id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.* at 184–85.

6. ENVIRONMENTAL ANALYSIS IN UTAH

Utah law has several safety valves in place to help protect the environment from the potential deleterious effects of water appropriation and use, although some have argued that these safety valves inadequately protect the environment and public recreation in Utah's waters. For instance, each time a person applies to appropriate water, the State Engineer must consider, among other things, whether the potential appropriation "will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare."[281] If the State Engineer "has reason to believe" that such a negative consequence to the environment or to the public generally would occur, the State Engineer must "withhold approval or rejection of the application until the State Engineer has investigated the matter."[282]

In a seminal 1989 decision, Utah's Supreme Court held that the State Engineer must also consider these same impacts when reviewing a change application.[283] If this were not the case, the Court noted that an individual or entity could easily circumvent the public interest test by filing for an appropriation in one location where there is no harm to the public interest and then changing the place of use to a location where there is harm to the public interest.[284] In the same opinion, the Utah Supreme Court also held that a change application could be protested by any party, regardless of whether that party had a water right in the area, providing further opportunity for parties interested in protecting the environment to engage in efforts to protect the environment.[285]

In addition to the public interest scrutiny given to appropriation and change applications, Utah allows some limited instream flow rights.[286] Although instream flow rights can be an integral aspect of environmental conservation, Utah has limited the ability to obtain instream flow rights to the Division of Wildlife Resources, the Division of Parks and Recreation, which must obtain perfected rights and then transfer them instream for the propagation of fish, public recreation, or the "reasonable preservation or enhancement of the natural stream environment.[287] Thus, most environmental conservation efforts through instream flow rights are mostly at the discretion of these agencies.

Nevertheless, the Utah Code does authorize certain fishing groups to transfer water instream for three specific trout species. Such applications must be for a fixed-time not to exceed 10 years and must be based on a perfected, consumptive water right, among other specified conditions.[288] To date, relatively

---

[281] UTAH CODE ANN. § 73-3-8(1)(b).

[282] *Id.*

[283] *Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989) ("We hold that the State Engineer is required to undertake the same investigation in permanent change applications that the statute mandates in applications for water appropriations . . . .").

[284] *Id.*

[285] *Id.*

[286] *See* UTAH CODE ANN. § 73-3-30.

[287] *Id.* § 73-3-30(2).

[288] *Id.* § 73-3-30(3).

few fishing groups have transferred rights instream due to the high transaction costs associated with the statutory process.

Some environmental and recreation groups have also advocated for the incorporation of the public trust doctrine, which would impose a trust duty upon the state to hold all waters in the state in trust for the public's benefit. Supporters of the public trust doctrine have cited it as an important means of protecting the public's interest in Utah's scarce water resources. Others, however, have argued that the public trust doctrine has the potential to eliminate or decrease a person or entity's water rights based on whether the state, at the time, perceives the water use as being in the public's interest.[289]

The Utah Supreme Court is currently weighing in on whether Utah has a public trust duty over the rivers and streams in the state, which could have a major impact on property and water rights owners in the state. A decision is expected within the next year. [290]

7. WATER MARKETS IN UTAH

Utah does not have an official water banking program like other western states, but it does allow for leasing, temporary transfers, and instream transfers, which, in effect, operate as an unofficial water banking program in the state.

Washington

1. WATER SYSTEM PLANNING AND DUTY TO SERVE IN WASHINGTON

In Washington State, public water systems are generally required to prepare a "water system plan" that is designed to ensure the system can provide a safe and sustainable supply of water.[291] The planning process is governed by regulations adopted by the Department of Health. Water system plans must address a variety of topics including technical information related to system design and water quality as well as financial information to demonstrate the utility's financial viability.[292] In addition, water utilities must include a plan for growth as an element of their water system plan. The growth planning element includes a "water rights assessment" that inventories a utility's water rights, current usage and inchoate quantities, and forecasted usage and inchoate quantities at least 20 years in the future.

---

[289] *See National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983) (adopting the public trust doctrine into the state's water allocation system and holding that the state of California had an ongoing trust obligation over its waters, meaning that the state of California could eliminate or reduce an individual or entity's water rights if such water rights were not being used in the public's interest). *See e.g., National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983).

[290] Amy Joi O'Donoghue, *Utah Supreme Court Wades Into Stream Access Case*, DESERET NEWS (Jan. 9, 2017) (last visited June 30, 2017), http://www.deseretnews.com/article/865670748/Utah-Supreme-Court-weighs-stream-access-cases.html.

[291] WASH. ADMIN. CODE ("WAC") Ch. 246-290.

[292] WAC 246-290-100.

Washington enacted a "duty to serve" statute in 2003 that codified the common law concept and added detail. A "municipal water supplier" has a duty to serve to all new customers within its retail service area if (1) service can be available in a timely and reasonable manner; (2) the supplier has sufficient water rights; (3) the supplier has sufficient system capacity to provide the service; and (4) service is consistent with local land use plans and regulations and applicable utility extension ordinances.[293] The term "municipal water supplier" can include private and non-government entities in addition to cities, districts, and local government entities.[294]

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING IN WASHINGTON

Washington cities and counties are responsible for long-range land use planning, including adoption of comprehensive plans, zoning regulations and other controls on development. State courts have recognized these planning activities as a legitimate exercise of the police power. Long-range planning in Washington is primarily governed by the Growth Management Act ("GMA").[295] The GMA is a landmark statute that fundamentally changed planning requirements when it was enacted in 1990. Prior planning laws provided cities and counties with general authority to engage in planning and specifically permitted cities and counties to adopt comprehensive plans and development regulations.[296] The GMA added for the first time substantive requirements for those planning activities. While the statute establishes these substantive requirements, cities and counties are given discretion in how they are implemented.

In general, the GMA requires cities and counties to plan for population growth anticipated in the ensuing 20-year horizon based on projections forecast by a state agency. Those planning efforts must address several key policy concepts that are expressed in the GMA's 14 goals and mandatory requirements. One of the GMA's cornerstones is the prevention of sprawl through the designation of urban growth areas ("UGAs") within which urban development may occur.[297] Each city is included in a UGA as are areas outside of cities that are necessary to serve urban growth that is projected to occur in the county or city for the succeeding 20-year period. Outside these UGAs only rural development can occur (with several limited exceptions).

The elected officials of each city or county are responsible for adoption of comprehensive plans and development regulations pursuant to the GMA, though the process includes significant opportunity for public input through hearings and opportunities for comment. A local jurisdiction's adoption of comprehensive plans and development regulations can be appealed to a state adjudicative tribunal called

---

[293] REV. CODE WASH. § ("RCW") 43.20.260; WAC 246-290-106.

[294] RCW 90.03.015(3)-(4).

[295] Chapter 36.70A RCW.

[296] *See, e.g.*, Ch. 35.63 RCW (the Planning Commission Act): Ch. 35A.63 (the Optional Municipal Code); Ch. 36.70 RCW (the Planning Enabling Act).

[297] RCW 36.70A.110.

the Growth Management Hearing Board ("Growth Board") which resolves appeals based on the legislative record prepared by the city or county. State courts hear any appeals of decisions of the Growth Board pursuant to Washington's Administrative Procedures Act.[298] By contrast, appeals of specific project approvals issued pursuant to those development regulations (including appeals that challenge whether conditions should have been imposed or are adequate to protect water availability) are brought to the trial court pursuant to the Land Use Petition Act.[299]

3. ASSURED WATER SUPPLY IN WASHINGTON

Land use laws governing long range planning and project review require consideration of water resources to ensure development does not occur where water is not available. First, the GMA requires local jurisdictions to consider availability of water resources in long-range land use planning.[300] For areas planning under the GMA, jurisdictions must consider availability of services, including water service, when determining areas where urban growth is allowed. The GMA includes general standards that prioritize zoning for urban growth based on availability of services. Specifically, that statute specifies that urban growth shall be located "first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas."[301] This specific principle is reinforced in the general planning goals, according to which cities and counties are to "[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."

Outside of urban areas, counties are specifically required to adopt measures that ensure protection of surface water and groundwater resources.[302] While these provisions related to protection of water availability in rural areas are very generally worded, the state Supreme Court recently concluded that these provisions impose extensive obligations on counties to manage and restrict growth in areas subject to "instream flow rules" adopted by the Washington State Department of Ecology ("Ecology") where minimum flows established by regulation are not met.[303]

---

[298] Ch. 34.05 RCW.

[299] Ch. 36.70C RCW.

[300] *See, generally*, RCW 36.70A.020 ("Protect and enhance the state's high quality of life, including… availability of water"); RCW 36.70A.070 (comprehensive plans "shall provide for protection of the quality and quantity of groundwater used for public water supplies").

[301] RCW 36.70A.110(3).

[302] RCW 36.70A.070(5)(c) (jurisdictions must adopt development regulations in the rural areas that protect "rural character," including protecting "surface and groundwater resources"); RCW 36.70A.030 ("rural character" is defined as development that is consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas).

[303] *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). The case addressed the county's obligation to regulate the use of "permit-exempt withdrawals" for limited domestic use (see "Washington" section 5, below) in

In addition to these general planning obligations, the GMA also expressly authorizes counties and cities to adopt moratoria on development as a temporary measure for a variety of reasons.[304] Though the authority is general in nature, several jurisdictions recently used this authority to stop processing development applications on the basis of legal availability of water.

In addition to the GMA's long-range planning requirements, other land use statutes ensure sufficient water supply for specific projects and suggest that some level of proof of water supply is necessary at various stages in a development project. *See, e.g.*, RCW 58.17.110, .150 (subdivision statute provides that "appropriate provisions" be made for potable water supplies); RCW 19.27.097 (prior to issuance of building permit applicant must provide "evidence of adequate water supply").

The applicant for a building permit must show adequate water is available for the development under a documented water right, a utility connection or "will serve" letter, or a permit-exempt well.[305] This requirement is compulsory, but issues and possible challenges remain as to the nature and extent of the requirement and the governmental entity that decides.[306]

Finally, in addition to these land use statutes, the state's Water Code also generally recognizes the impact of land use development on water resources. *See* RCW 90.54.010 ("growth and prosperity have significantly increased the competition for this limited resource"). Other provisions in the Water Code attempt to coordinate with land use regulatory efforts. *See* RCW 90.54.130 (water resources agency "may recommend land use management policy modifications it finds appropriate for the further protection of ground and surface water resources in this state"); RCW 90.54.090 (local jurisdictions "shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter" of the water code). *See also* Chapter 90.82 RCW, (Watershed Planning); Chapter 70.116 RCW (Coordinated Water System Planning statute directs to coordinate water system planning with planning under the Growth Management Act). In addition, a water utility's water system plan must be consistent with land use plans and authorities. RCW 43.20.260 (proposed new water services are consistent with local comprehensive plans and development regulations).

4. MUNICIPAL PREFERENCE IN WASHINGTON

Washington does not provide a preference for municipal water such as allows cities to perfect a water right to the amount of water that they will need in advance of demand. Since 2003, the Water Code has required actual beneficial use of water to perfect all water rights, including municipal purpose water

---

areas subject to instream flow rules where water from public water systems are not typically available. Those permit-exempt withdrawals are expressly exempt by statute from the water rights permitting process conducted by Ecology, including review for potential impairment of other senior rights and instream flows. While acknowledging the exemption from the Ecology process, the Court concluded that the GMA provisions impose that duty on counties.

[304] *See* RCW 36.70A.390.

[305] RCW 19.27.097.

[306] *See Hirst v. Whatcom County*, 168 Wn.2d 648, 381 P. 3d 1 (2016).

rights.[307] Before 2003, the standard for perfection of municipal water rights was not clear, as state water agencies had for decades (prematurely) issued perfected water rights documents (certificates) based on system capacity.[308] By statute, such system capacity certificates are "rights in good standing."[309]

Depending on the particulars, a challenge could be brought as an original action in the trial court or as an appeal to the Pollution Control Hearings Board ("PCHB"). Decisions of the PCHB are appealed to the trial court, or a party may petition for direct appellate court review.

5. GROUND WATER EXEMPTIONS IN WASHINGTON

Washington State exempts certain domestic and stock water uses of groundwater from water permitting requirements. Single or group domestic uses not exceeding 5,000 gallons per day are entitled to withdraw groundwater without need of applying or obtaining a water right permit.[310] Stock water uses are similarly exempt from groundwater permitting without limitation as to quantity, subject to reasonable beneficial use.[311]

6. ENVIRONMENTAL ANALYSIS IN WASHINGTON

Washington law provides protection for instream flows from the impacts of new wells. In *Postema v. Pollution Control Hearings Board*, [312] the Washington Supreme Court upheld the denial of applications for new groundwater uses that would deplete flows in streams protected by regulation. *Postema* affirmed the state's administrative policy of "hydraulic continuity" that applies all surface water regulations and legal authorities to hydrologically connected groundwater bodies. In so holding, the State Supreme Court followed a Court of Appeals decision finding that "any" depletion of minimum instream flows constitutes impairment.[313]

Washington's State Environmental Policy Act ("SEPA")[314] requires environmental review of actions by state and local agencies. The statute broadly defines actions to include a variety of activities including issuance of a development permit and adoption of planning documents and regulations. The level of analysis depends on the nature and extent of the action, but new development must evaluate water-related impacts on the built environment (*e.g.*, water utility infrastructure) and the natural environments (*e.g.*, stream flows). The impact evaluation need not, however, duplicate existing analysis

---

[307] RCW 90.03.330(4).

[308] *See Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P. 3d 1220 (2010).

[309] RCW 90.03.380(3).

[310] RCW 90.44.050.

[311] *Id.*; *Five Corners Family Farmers v. Dep't of Ecology*, 173 Wn.2d 296, 268 P. 3d 892 (2011).

[312] 142 Wn.2d 68, 11 P. 3d 726 (2000).

[313] See *Hubbard v. Dep't. of Ecology*, 86 Wn. App. 119, 125 (Div. III 1997) ("Any effect on the river during the period it is below the minimum instream flow level conflicts with existing senior rights (such as the minimum flow level itself) may reasonably be considered detrimental to the public interest").

[314] Ch. 43.21C RCW.

and may rely on prior environmental review. In addition, the SEPA regulations provide a categorical exclusion for some water rights actions and related diversion works.[315] A SEPA challenge may be brought in the same forum as a challenge to the underlying or connected project or program action.

Washington recognizes a public trust doctrine grounded in the public's right of access to navigable waters and shorelands.[316] The doctrine prohibits the state from substantially impairing the public's right to use or access navigable waters or waters of the state.[317] The doctrine has not been applied to water rights or resources disputes, and decisions have noted two reasons. First, the doctrine has never been interpreted to apply to non-navigable water or to groundwater. Second, the doctrine imposes a duty on the state and not any particular agency, and the legislature has not authorized the water resources agency to enforce or administer the public trust doctrine.[318]

7. WATER MARKETS IN WASHINGTON

Washington has an active water market that supports the transfer of water between uses through sales and leases, both permanent and temporary. Market activity varies regionally, and is generally most active in areas with established water banks such as the Yakima River basin, the mainstem Columbia River, and the *Walla* Walla and Dungeness watersheds. Some private water banks also exist, and at least one local government (Kittitas County in the upper Yakima basin) operates its own bank.

Ecology has authority to conduct water banking.[319] In adopting a rule setting minimum instream flows in one basin, Ecology created a water bank and requires all new exempt groundwater uses to secure mitigation from the water bank.[320] A property-owner challenge to the rule's groundwater restrictions and mitigation requirements failed at the trial court and sought direct review by the Washington Supreme Court, which recently transferred the appeal to the Court of Appeals.[321]

---

[315] *See* WAC 197-11-800(4).

[316] *Caminiti v. Boyle*, 107 Wash.2d 662, 732 P. 3d 989 (1987).

[317] *Rettkowski v. Dep't. of Ecology*, 122 Wash. 2d 219, 858 P.2d 232 (1993); *Chelan Basin Conservancy v. GBI Holding Co.*, __ Wash. 3d __, __ P.3d __ (2017) (2017 WL 2876140).

[318] *Rettkowski*, 122 Wash. 2d at 232; *R.D. Merrill Co. v. Pollution Control Hr'gs Bd.*, 137 Wash.2d 118, 969 P.2d 458 (1999).

[319] Ch. 90.42 RCW.

[320] Ch. 173-518 WAC (Dungeness River).

[321] *Bassett v. Dep't. of Ecology*, (Supreme Court No. 94004-5), Order dated September 6, 2017.

COMPARISON OF STATES

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
ARIZONA	-- Cities & towns: 5-year general growth plan w/ water resources element; -- Public service corporations outside muni boundaries not required to plan required to show adequate water supply for new & expanded CC&N applications. -- No explicit "duty to serve" imposed on AZ cities & towns. Public service corporations generally required to provide water service w/in CC&N areas.	-- Integrated into Water System Planning & Assured Water Supply requirements.	-- W/in AMAs, developer must be w/in muni service area w/ either "assured water supply" or show: water physically, continuously & legally available for 100 years w/o "mined" GW. -- Outside of the AMAs, developer must show 100-year "adequate" supply or publish a report of no adequate water supply.	-- For GW, no muni preference; -- For SW, reference for municipalities to appropriate surface water for future uses, & provide preference for municipal uses.	-- Exempt well with capacity of 35 gal/min for non-irrigation use. Typically used for 5 lots or less, or lots of 36 acres or more each.	-- Wells w/in saturated floodplain Holocene alluvium deemed to be withdrawing appropriable SW & other wells as determined (subject to current litigation.) -- No NEPA-like -- Public trust doctrine recognized regarding streambed of navigable streams, but not to allocation of water.	-- Water transfers, exchanges, & leases allowed, but not yet well developed water market.
CALIFORNIA	-- Developer must identify water sources & water infrastructure; -- CEQA requires water supply assessment of adequate long-term water supply, identifying and mitigating for significant impacts.	-- Cities & counties must adopt plan & coordinate with water supply agencies.	-- As required in plans (see 1 & 2).	-- No muni preference, but domestic use is considered highest use of water.	-- Left to GW sustainability agencies under Sustainable GW Management Act of 2014.	-- CEQA (NEPA-like): whether assessment adequately addresses treasonably foreseeable impacts of supplying water to the project; -- Public trust of waters.	-- Water transfers allowed, subject to the no injury rule.

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
COLORADO	--Limited statutory requirement to show adequate water supply; -- Local supplies adopt regs to qualification for infrastructure loans; --Water supplies with extraterritorial water development subject to NEPA-like requirements.	--For local gov't, extent of water planning is related to the nature & extent of water supplies sought; -- Comp plans with water supply element are advisory only unless adopted into subdivision regs.	-- New dev: requirement to show adequate water supply w/ local government determining when met. --With water rights purchase, change, appropriation of tributary GW or SW, an anti-spec evaluation required.	-- "The great & growing cities doctrine" for substantiated projected growth w/in service area for approx. 50 years.		-- Yes, NEPA-like statute encourages planning to avoid or mitigate impacts.	
IDAHO	--State has exclusive control over the acquisition, transfer, & administration of water rights; cities & counties have control over land use. -- Local gov't may enact zoning restrictions impinging on water rights as long as not related to water management.	--Munis required to address ground water impacts when updating their comprehensive plans; --Legislation requiring land developers to use surface water for lawn irrigation systems if possible.		--"Growing communities doctrine": special treatment for muni providers, allowing them to secure water rights reasonably anticipated future needs; -- Preference for domestic use is right to condemn.		--"Local public interest" review for approval of appropriations of new water rights is limited to "the effects of such use on the public water resource." --Basin of origin protection to avoid adverse effects of the local economy. --Evaluation of out of state transfers. -- Water conservation evaluation for all water appropriations.	

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
NEVADA	-- The State Water Plan: developed by Division of Water Resources, 15-member Advisory Board, Dept. of Conservation & Natural Resources, local, state, federal agencies, & the public. -- Every water service provider must develop a comprehensive Water Resource Plan w/ growth analyses for five years after the system begins operation. Water Resource Plans must be submitted to & approved by the Division of Water Resources every 5 years.	-- City & county planning commissions required to adopt comprehensive Master Plans, which must account for projected growth w/ provisions concerning public services & facilities showing general plans for water utilities. -- Specific local land use decisions must be consistent with the applicable Master Plan.	--Initial subdivision map reviewed by the Division of Water Resources & the applicable General Improvement or Irrigation District. --County or city planning commission w/ final approval of subdivision; must consider ability to meet applicable health standards & is sufficient in quantity for reasonably foreseeable needs of the subdivision.	-- Preference for perfection of municipal water rights; -- State engineer my postpone action on muni applications indefinitely & exception to finding of abandonment for water rights converted to urban use.	-- Presumes that parcels on which residences are to be built include a reasonable domestic water right. -- "Domestic use" is "culinary and household purposes directly related to a single-family dwelling" &"watering of a family garden & watering of livestock" so long as the use does not exceed 2 acre-feet.	-- Recognizes both the "public interest" & the "public trust doctrine" in its water.	-- Water rights may be stripped from the land & sold or leased to third parties as a separate commodity.
NEW MEXICO	-- Water plans developed locally in each of 16 water district & integrated into the State Water Plan.		-- State subdivision act requires new subdivisions to obtain sufficient water rights. State Engineer reviews new subdivisions for sufficient water rights. Counties & munis may have additional requirements.	-- No formal preferences given for muni uses, but municipalities are allowed a 40-year planning period.			-- Active market in the purchase & sale of water rights. --Water rights may be leased.

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
OKLAHOMA	-- State source development rule requires new public water supply project construction to show "adequate quantity of water available" to "meet the projected water demand including anticipated growth of the service area as shown by calculations based on the extreme recorded drought." -- No express duty to serve.	-- State statutes authorize but do not require municipalities to adopt general plans for long-range plans.	-- Typical for subdivision plat approval developer required to specify that water will be supplied by the muni system & will require that water supply lines & easements be dedicated to the municipality. -- Rural water district formation requirement of adequate water supply.	-- No; the longest such schedule of use are typically approved for muni use for 50 years.	-- For "domestic use": individual household purposes, irrigating up to 3 acres of gardens & orchards, & stock watering.	-- No NEPA-like analysis required except with SRF funding. -- Restrictions on one GW basin: pumping cannot impact the natural flow of area springs & streams - Public interest requirement for appropriation dropped in 1950s.	-- Allowed but rare.
OREGON	-- Cities & counties required to adopt comprehensive land use plans & ordinances that are consistent with 19 statewide planning goals. -- Consideration of water resources and public facilities is mandated by several of the statewide planning goals. -- Public utilities have a statutory duty to serve all w/i territory.	-- State has well-developed and comprehensive growth management and planning program. --Cities & counties required to adopt comprehensive land use plans & ordinances that are consistent with 19 statewide planning goals.	-- No requirement by that name, but same result is achieved through land use planning program, which requires comprehensive public facilities planning.	-- Statutory grant preserves specific cities designated water sources. -- Governmental agencies may also request reservation of water for future economic development. -- Munis w/ 20 years to develop & w/ special defenses against forfeiture.	-- For single or group domestic purposes not exceeding 15,000 gallons per day, for commercial and industrial use not more than 5,000 GPD, and also for reasonable stock water use.	-- No NEPA-like analysis. -- Environmental impacts considered in land use planning process and in list of factors for public interest review of water rights. -- Stream flow protections from the impacts of new groundwater use. -- Mitigation program for the arid Deschutes Basin.	-- Not robust but some leasing and selling of water rights.

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
TEXAS	-- Planning process tied to the permitting & state financing processes. -- SW permit criteria must be consistent with the applicable approved regional water plan. -- GW permit issued by GW conservation district must be consistent with approved management plan. -- Approval of State financing applications tied to approved regional plans.	-- Entities with CC&Ns must comply with the statutory requirements for adequate and continuous service. -- Control of growth and issues linking development to water supply are primarily a function of local regulation in Texas, through muni & county platting authority.	-- No assured water supply statute, nor mandatory growth moratoria, growth caps, or prescribed service denials, but water supply issues are considered as part of the local muni/county platting processes. -- Also, proposed plat must conform to the muni's general plan for extension of water & sewer infrastructure.	-- Surface water permitting statutes rank types of use of appropriations with domestic and municipal at the top, but rarely, if ever has there even been a conflict. -- There is no type of use ranking of groundwater permits.	-- Surface water: various exemptions for domestic and livestock, mariculture and other purposes -- Groundwater: Limited domestic and livestock exemption mandated by state law; Districts may provide for other exemptions.	-- SW permit application must consider impact on groundwater. -- SW permitting requirements to protect instream uses & habitat. -- Not adopted the public trust doctrine.	-- Increase the area of the State supplied primarily from the Edwards Aquifer.
UTAH	-- Required statewide water plan divides the state into 11 separate basins with each basin having its own water plan. -- These plans provide estimates on future water need in the state and largely focus on conservation and development of Utah's water resources	-- Relies on counties, cities, and local districts to manage water supplies and engage in long-term planning	-- No requirement except through local land use planning requirements for sufficient water supply.	-- Exception for forfeiture for nonuse of "public water suppliers" that own a water right & conserve or hold it for the reasonable future (40 years) for public. -- Preference for drinking, sanitation and fire suppression with temporary water shortage emergency.	-- No exception.	-- For new appropriation or change application: consideration of unreasonable effect on public recreation or the natural stream environment, or will prove detrimental to the public welfare. -- Limited instream flow rights.	-- No official water banking program – But allow for leasing, temporary transfers, and instream transfers.

	1. WATER SYSTEM PLANNING & DUTY TO SERVE	2. GROWTH MANAGEMENT & LONGTERM PLANNING	3. ASSURED WATER SUPPLY	4. MUNICIPAL PREFERENCE	5. GROUND WATER EXEMPTIONS	6. ENVIRONMENTAL ANALYSIS	7. WATER MARKETS
WASHINGTON	-- Public water systems generally required to prepare a "water system plan" to provide a safe and sustainable supply of water. -- The plan must address 20-year forecast of growth. -- Under specific conditions, "municipal water supplier" has a duty to serve to all new customers within its retail service area.	-- Under Growth Management Act (GMA), cities and counties are responsible for long-range (20 year horizon) land use planning to prevent sprawl outside urban growth areas (UGAs).	-- For areas planning under the GMA, jurisdictions must consider availability of services when determining areas where urban growth is allowed. --GMA authorizes counties and cities to adopt moratoria and some level of proof of water supply is necessary at various stages in a development project. -- Building permit applicant must show adequate water.	-- None. Since 2003, the Water Code requires actual beneficial use of water to perfect all water rights, including municipal purpose water rights.	-- Exemptions for certain domestic & stock water uses of GW. -- Single or group domestic uses at or under 5,000 gal/day exempt. -- Stock water uses are exempt.	-- Protection for instream flows from the impacts of new wells. -- SEPA (NEPA-like): new development must evaluate water-related impacts on the built environment. -- Public trust doctrine recognized grounded in the public's right of access to navigable waters and shorelands.	-- Active water market w/ transfer of water between uses through sales and leases. -- State w/ authority to conduct water banking.

CONCLUSION

As a collection, the state summaries demonstrate that all the surveyed states are actively grappling with growth, sprawl, and the resulting demand on water resources. Although there are commonalities among the states, the linkages between land and water planning is far from universal.

We hope that this article has highlighted differences - that likely stem from rate of growth and level of competition for water – and commonalities in a way that the *Dividing the Waters* members can engage is a meaningful discussion of challenges and potential common approaches.

Appendix A

1. WATER SYSTEM PLANNING AND DUTY TO SERVE

A. Does your state require water utilities to plan for growth within their service areas?

B. Does your state impose a duty to serve, under which water utilities must serve all customers within their service area and to acquire necessary supplies to meet projected demands? If yes, discuss whether any of the following management mechanisms are recognized:

1) Growth Moratoria (to defer growth until water and sewer capacity is adequate to serve the new residents)

2) Growth Caps (discretion to decide where and under what conditions they will accommodate the growth)

3) Service Denials (to tie the rate of growth to reliable, available "wet" water)

C. In what judicial forum would a challenge be raised?

2. THE ROLE OF GROWTH MANAGEMENT AND LONG-TERM PLANNING

A. Does your state have a growth management statute requiring local jurisdictions to plan for growth? If yes, does it require consideration of water resources when planning?

B. Does your state require localities to adopt comprehensive general plans governing long-term planning? If yes, discuss the following:

1) Must the comprehensive plans address water supply sources necessary to meet and achieve the existing and projected water use demand for the established planning period?

2) Are specific local land use decisions required to be consistent with the applicable comprehensive plan?

3) To what extent is land use planning governed by the state versus local (i.e. “top down”)?

4) Is there a "concurrency" requirement for linking land use planning and water management?

5) Is there an opportunity for the water providers to participate in local government comprehensive planning and plan amendment?

C. In what judicial forum would a challenge be raised?

3. ASSURED WATER SUPPLY

A. Does your state or local government require developers to prove they have sufficient water

available before they may proceed with new subdivision, commercial, or other residential construction?

B. If yes, discuss the following:

1) Is the requirement compulsory or voluntary?

2) How stringent is the requirement, that is, does the law demand substantiated proof that real water will actually be present for the development, or instead, does the law require only paper rights, or a showing that water might exist in the future to supply the development?

3) Is the requirement universally applied, that is, does the law apply on a statewide basis, or is it instead applicable only in limited parts of the state or as determined by the locality?

4) Is the requirement interconnected with other planning schemes?

C. In what judicial forum would a challenge be raised?

4. MUNICIPAL PREFERENCE

A. Does your state provide a preference for municipal water, such as allowing cities to perfect a water right to the amount of water that they will need in advance of demand?

B. In what judicial forum would a challenge be raised?

5. GROUND WATER EXEMPTIONS

A. Does your state exempt certain domestic and stock water uses of groundwater from water permitting requirements?

B. If so, how is the well use treated under comprehensive planning, and to assure water supply regimes?

C. In what judicial forum would a challenge be raised?

6. ENVIRONMENTAL IMPACTS

A. Does your state protect river or stream flow from new well impacts?

B. Does your state require environmental analysis for actions with the potential to impact the environment similar to the National Environmental Policy Act? If yes, what water-related analysis is required for development utilizing water?

C. In what judicial forum would a challenge be raised?

D. Has your state recognized a public interest or public trust doctrine?

7. WATER MARKETS

A. Does your state have an active water market that supports the transfer of water between uses through sales and leases, both permanent and temporary?

B. If yes, are transfers from agriculture to urban uses? From agricultural and urban uses to environmental uses for restoration, fish and wildlife habitat preservation, and enhancing in-stream flows?