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Water barons for the water barren? A survey of interbasin water transfer laws in western states

Brad Castleberry¹ and Ashleigh Acevedo^{1*}

Abstract: Interbasin transfers of water have become an increasingly popular water management tool—especially among the western states—to address vulnerability to water shortages in those regions susceptible to widely fluctuating drought conditions and population growth. Such transfers offer a practical resolution to the geographic limitations and disparate distribution of water availability. The regulatory frameworks for interbasin transfers adopted across western states, however, vary rather drastically in balancing the practicality of interbasin transfers with equity to the basin of origin. Like its counterparts, Texas has adopted an interbasin transfer statute—Texas Water Code § 11.085—that includes common elements of interbasin transfer regulations aimed at maintaining this balance, including protecting the basin of origin, requiring a distinct demonstration of purpose and need, maintaining existing water rights, and promoting the public interest. However, in comparison to other western states, Texas has a relatively strict framework for interbasin transfers that does not always facilitate the use of such transfers when it is otherwise pragmatic to do so. Policymakers and stakeholders in Texas should thus consider whether and to what extent the balance struck by interbasin transfer laws of other western states is appropriate for Texas and more conducive to using interbasin transfers as a water management strategy across the state.

Keywords: Interbasin transfer, water transfer, transbasin diversion, Texas Water Code § 11.085, water supply, water management

¹Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Ste 1900 Austin, Texas 78701

*Corresponding author: aacevedo@lglawfirm.com

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Terms used in paper

Acronym	Descriptive name
AMA(s)	active management area(s)
IBT(s)	interbasin transfer(s)
NPDES	National Pollutant Discharge Elimination System
TCEQ	Texas Commission on Environmental Quality

INTRODUCTION

The American West conjures images of a scorching, arid desert that is sparsely inhabited and where water is the paramount commodity. In this way, scarcity has been the defining feature of water policy in the west. The scarcity results not only from simple supply issues but also is created by immense population growth, environmental constraints, changing weather patterns, and increased mobility. Governments are chronically engaged in evaluating the ability of water supply systems to keep up with demand, especially as population centers grow, often in locations without reliable, long-term supplies. Consequently, strategic methods are necessary to address water supply concerns.

In recent years, interbasin transfers of water have become a more popular and more practical water management tool to address water shortages. An interbasin transfer, otherwise known as a transbasin diversion or IBT, is a transfer of water from one watershed or river basin to another.¹ Although not specifically defined in Texas, it is implied that an IBT is the transfer from one river basin to another.² Some states also include transfers of groundwater within their IBT programs.³

IBTs are a viable option to address water shortages in states such as Texas that are susceptible to widely fluctuating drought conditions and population growth.⁴ Those in favor of IBTs recognize and promote the flexibility that IBTs can offer in terms of managing dynamic water supply conditions across the state. Opponents of IBTs, however, raise concerns with reallocating such a vital resource into non-native basins.⁵ For

¹ *E.g.* TEX. WATER CODE ANN. § 11.085 (indicating that “[n]o person may take or divert any state water from a river basin . . . and transfer such water to any other river basin without first applying”); COLO. REV. STAT. ANN. § 37-83-101 (indicating that an IBT is from one public stream into another); OR. REV. STAT. §537.801(1)(a).

² Todd Votteler, Kathy Alexander, Joe Moore, *The Evolution of Surface Water Interbasin Transfer Policy in Texas: Viable Options for Future Water, Water Grabs, or Just Pipe Dreams?*, 36 TEX. ENVTL. L.J. 125, 125 (2006).

³ *See, e.g.*, NEV. REV. STAT. § 533.007.

⁴ Water can be shifted from water-rich areas to those areas experiencing or that will imminently experience water supply shortages. Such diversions may increase flow in water bodies and, by increasing assimilative capacity, may ultimately improve the quality of those bodies. Additionally, the interbasin transfers could also be utilized to meet new or changing agricultural and hydropower demands. Although generally not recognized as an affirmatively beneficial tool to water-rich areas, interbasin transfers can also be used as a flood management tool.

⁵ Among those concerns are the fact that interbasin transfers may affect the natural flow of the river, which may alter or compromise wetlands and riparian habitats downstream. Additionally, there is a concern about water quality in both the basin of origin and the receiving basin, such as the introduction of pollutants and foreign species. The most significant opposition stems from the movement of water resources from rural areas to urban centers – often

decades, Texas has increasingly employed IBTs as a long-term management tool to address water shortages. But, as a state with high agricultural production and significant urban centers that are among some of the fastest growing in the nation, Texas is facing fundamental questions: are its IBT laws equitable and efficient; do they support both high agricultural production and fast-growing urban centers?

Stakeholders and lawmakers have been grappling over appropriate terms and conditions to impose when a water right holder desires to sidestep the geographical limitations of the basin of origin in order to move water elsewhere. Since 1997 when the Texas IBT statute, Texas Water Code § 11.085, was substantively amended by Senate Bill 1 (S.B. 1) to significantly increase the burden on IBT permit applicants, the equilibrium between equity and efficiency has been the subject of much debate at the Texas Legislature. In the 2015 legislative session, IBTs were of significant interest to lawmakers, with the introduction of four bills that sought to make approval for certain IBTs easier, although none succeeded.⁶ The overhaul in 1997 and the record at the 2015 legislative session depict a hostile environment for IBTs in Texas, but Texas’s IBT laws are not the most restrictive among many western states facing similar water constraints. That said, the legal framework in Texas is also not the most flexible. Some stakeholders maintain that the requirements to obtain an IBT in Texas hinder the implementation of effective and readily available water management practices in those areas of the state where diverse management is most desperately needed.

This article establishes a framework within which policymakers and stakeholders can consider a reformation or, at the very least, a reevaluation of the Texas IBT laws. Specifically, this article analyzes and compares commonly recurring elements of the legal framework for IBTs among western states facing similar water constraints as Texas: Arizona, California, Colorado, Idaho, Nevada, New Mexico, and Oregon. This comparative analysis is intended to demonstrate how these western states facilitate or impede IBTs through prioritization

referred to as “buy and dry” – resulting in an economic burden on the rural, and thus primarily agricultural, sector. Votteler et al., *supra note 2*, at 126-27.

⁶ Tex. H.B. 1153, 84th Leg., R.S. (2015) (relating to the repeal of the junior priority of a water right authorizing an interbasin transfer within the state; not referred to committee); Tex. H.B. 2805, 84th Leg., R.S. (2015) (excepting from the requirement that an interbasin transfer subordinates the underlying water right to all other rights established prior to the date of the application for the transfer of any water between certain water control and improvement districts and certain municipalities; not referred to committee); Tex. H.B. 3324, 84th Leg., R.S. (2015) (seeking an interbasin transfer exception for a substitution or exchange of reclaimed or desalinated water and reclaimed water or return flow from the basin of discharge to the basin of origin; not referred to committee); Tex. S.B. 1411, 84th Leg., R.S. (2015) (seeking an IBT exception for a transfer from a basin to an adjoining basin; not referred to committee).

of protecting the basin of origin, requiring a distinct demonstration of purpose and need, maintaining existing water rights, and promoting the public interest, among others. The purpose of this article is not to advocate for any particular revision to Texas Water Code § 11.085 or corresponding regulations, but rather to contextualize elements of Texas's IBT laws and provide a vignette of the spectrum of real-life ways in which potential variations to these elements have been applied elsewhere and may be applied in Texas. Given this context, this article makes recommendations on how Texas could revise its IBT regulations to encourage IBTs as a larger scale water management strategy should policymakers and stakeholders so choose.

A COMPARISON OF STATE REGULATION OF IBTS

The need for “new” water supplies is a constant in western states. In response, new laws, programs, and incentives have emerged to encourage innovative supply solutions, particularly IBTs. Underpinned by the prior appropriation doctrine, western states have modified their water regulations to integrate IBTs. The overall legal framework for IBTs varies among the western states, but certain regulatory elements—although nuanced among each state—recur in regulating IBTs.

Demonstration of need or purpose

In obtaining the requisite approvals to transfer water between basins, some western states require that the transferor demonstrate, or the relevant agency consider, the purpose or the need for the water in the receiving basin. The Texas IBT statute provides that when the Texas Commission on Environmental Quality (TCEQ) is considering an IBT application, it must perform a balancing test that weighs the effects of the proposed transfer in the native basin by considering the need for the water for the duration of the period for which the water is requested (but that consideration should not exceed a fifty-year period even if a longer period is requested)⁷ and the need for water in the receiving basin.⁸ In addition, the amount of water needed and the proposed purpose or purposes must also be considered along with the continued need to use the water for the existing purpose.⁹ Notably, Texas requires the consideration of need in terms of both water supply and a proposed

⁷ TEX. WATER CODE ANN. § 11.085(k)(1); 30 TEX. ADMIN. CODE ANN. § 297.45(b)(4).

⁸ *Id.*

⁹ TEX. WATER CODE ANN. § 11.085(k)(2)(B); 30 TEX. ADMIN. CODE ANN. § 295.13.

use within the receiving basin.¹⁰

Likewise, in Nevada, the state engineer (the governmental entity charged with evaluating IBT applications) must consider whether the applicant for an IBT has demonstrated a justified need for the water in the receiving basin to import water from another basin.¹¹ The remaining states evaluated do not make demonstrable need a prerequisite to authorization of an IBT.

With respect to demonstration of need or purpose, Texas's IBT statute is among the most restrictive of the 8 states analyzed herein. Texas and Nevada explicitly require the permitting authority to find that there is a need for the water in the receiving basin, and Texas's consideration involves a multitude of factors absent in the Nevada requirement to demonstrate the need for the transfer.

Beneficial use requirement

The cornerstone of the appropriation doctrine is that the right to water is obtained through a demonstration of beneficial use, regardless of the place of use.¹² In the western states, beneficial use generally means use that is “reasonable and useful and beneficial to the appropriator, and at the same time is consistent with interests of the public in the best utilization of water supplies,” although some variations further refine beneficial use requirements.¹³

For IBTs in Texas, the TCEQ must consider the proposed method by which the transferred water will be put to a beneficial use.¹⁴ In Texas, beneficial use is defined as “the use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose”¹⁵

Colorado, Oregon, and Idaho likewise require that a change in a water right—such as an amendment seeking an IBT—be for a beneficial use.¹⁶ In Idaho, however, if the water is not applied to a beneficial use within five years, the right to the water is forfeited to the state, but unlike in other states, minimum streamflows and out-of-state water use are both

¹⁰ *See id.*

¹¹ NEV. REV. STAT. ANN. § 533.370(3)(a).

¹² Max Main, *Fundamental Principles Of Water Law In The Western United States*, 34C RMMLF-INST 5 (1994).

¹³ *Id.*

¹⁴ TEX. WATER CODE ANN. § 11.085(k)(2)(D); 30 TEX. ADMIN. CODE ANN. § 295.13.

¹⁵ TEX. WATER CODE ANN. § 11.002(4).

¹⁶ COLO. REV. STAT. § 37-92-103(4); OR. REV. STAT. §§ 540.539, 540.610; IDAHO CODE ANN. § 42-222(1).

considered beneficial uses in Idaho.¹⁷ Colorado's policy has long been that "the true test of appropriation of water is the successful application thereof to the beneficial use."¹⁸ Correspondingly, every 10 years, Colorado requires the division engineer to evaluate and determine whether any water right has been abandoned.¹⁹ Upon judgment and decree, the list of abandoned rights developed during each review period is conclusive as to absolute water rights or portions thereof determined to be abandoned.²⁰ To be considered abandoned in Colorado, the owner of the water right must have failed for a period of 10 years or more to fully apply a beneficial use to the water available under said right.²¹ Colorado's requirement that an appropriation—for IBTs or in general—be for a beneficial use is the underlying driver of Colorado's strict antispeculation policy.²² In short, antispeculation means "no appropriation of water . . . 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 . . ."²³ The Colorado Supreme Court once explained that "[o]ur constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit."²⁴ Thus, the prioritization of beneficial use over speculation has become a staple of Colorado water policy, not just with respect to IBTs.²⁵ Effectively, before a change of use can occur in Colorado, the purchaser must have final contracts in place and be able to identify both the point of

diversion and the place of use.²⁶

Similarly, Nevada water law provides that, so long as certain conditions are met, the state engineer shall approve an application that contemplates the application of water to beneficial use, including diversion.²⁷ However, Nevada's beneficial use requirements are also refined by the antispeculation doctrine. According to the Nevada Supreme Court, the applicant for an interbasin water transfer need not be the person putting the water to a beneficial use; the applicant need only have a relationship with someone who will put that water to a beneficial use.²⁸

Therefore, among the states with a beneficial use requirement, Texas has a fairly standard requirement, although it is not as liberal in its interpretation as some states, such as Idaho and Nevada.

Source area and basin of origin protection laws

Most of the western states have laws designed to protect the source area or basin of origin. Typically, the scope of protection has one of the following objectives: limiting detrimental economic impacts of the transfer on the local community or limiting specific amounts of water that may be transferred out of the basin of origin. However, each state has unique protections for basins of origin.

In Texas, prior to issuance of a permit for a transfer, the impacts reasonably expected to occur as a result of the water transfer—including economic impacts and need in the basin of origin for up to fifty years—must be considered.²⁹ The impacts to the receiving basin are also considered.³⁰ An IBT can only be granted to the extent that the detriments to the basin of origin during the transfer period are less than the benefits to the receiving basin. Additionally, the Texas no injury rule provides that the change in the water right shall not cause adverse impact to the environment on the stream of greater magnitude than under circumstances in which the existing permit was fully exercised in accordance with its terms

¹⁷ IDAHO CODE ANN. § 42-1501.

¹⁸ *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883).

¹⁹ COLO. REV. STAT. § 37-92-401(1)(c).

²⁰ *Id.* §§ 37-92-401(1)(c), 37-92-402(1)(b).

²¹ *Id.* § 37-92-402(11).

²² *High Plains A&M, LLC v. SE Water Conservancy Dist.*, 120 P.3d 710, 713 (Colo. 2005) (stating that "[t]he anti-speculation doctrine rooted in the requirement that appropriation of Colorado's water resource must be for an actual beneficial use.>").

²³ *Id.* § 37-92-103(3)(a); see also *High Plains A & M, LLC*, 120 P.3d at 714.

²⁴ *Colo. Riv. Water Conserv. Dist. v. Vidler Water Co.*, 594 P.2d 566, 568 (Colo. 1979).

²⁵ COLO. REV. STAT. §§ 37-92-103(3)(a), 37-92-305; *Dallas Creek Water Co. v. Huey*, 933 P.2s 27, 37 (Colo. 1997) (explaining that "[a]ccumulation of conditional water rights is subject to Colorado's anti-speculation doctrine. Speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires. A conditional decree may not be entered if the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation."); see *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.2d 307, 317-18 (Colo. 2007).

²⁶ See *High Plains A & M*, 120 P.3d at 720-21; Lawrence J. MacDonnell, *Public Water—Private Water: Anti-Speculation, Water Reallocations, and High Plains A&M, LLC v. Southeastern Colorado Water Conservancy District*, 10 U. DENV. WATER L. REV. 1, 2 (2006).

²⁷ NEV. REV. STAT. ANN. §§ 533.370(1), 553.055; see also *id.* § 533.030(1).

²⁸ *Bacher v. Office of the State Eng'r of the State of Nev.*, 146 P.3d 793, 798 (2006).

²⁹ TEX. WATER CODE ANN. § 11.085(k). Other factors include the availability of feasible and practicable alternative supplies in the receiving basin; the amount and purposes for which water is needed; proposed conservation efforts in the receiving basin; expected impacts to water quality, aquatic and riparian habitat, and bays and estuaries; proposed mitigation and compensation; and continued need to use the water.

³⁰ *Id.*

and conditions prior to the proposed amendment.³¹

Idaho and Colorado go beyond this blanket requirement to protect the economy of the source area; both states contain a special agricultural protection. In Idaho, the IBT shall not be approved if the nature of the use will change from agricultural use and such change would significantly affect the agricultural base of the source area.³² Only the local economy of the source area is considered in Idaho; the proposed transfer cannot adversely affect the local economy from which the water originates.³³ In Colorado, if a change of use of water right is from agricultural or irrigation purposes, the transfer is conditioned on reasonable revegetation and noxious weed management of lands from which the irrigated water is transferred to another basin.³⁴

The source area protection law in Nevada is unique. It goes beyond evaluating the economic affects and requires consideration of the amount of water that may be transferred to protect the water supply and environment in the basin of origin. First, before an IBT may even be considered, the state water engineer must inventory the basin of origin and determine the amount of water (both surface and ground) that is available for appropriation from the basin.³⁵ Ultimately, the application must be rejected if there is insufficient water in the basin of origin to maintain the perennial yield or safe yield of that particular source.³⁶ Then, in considering the IBT application, the state engineer is required to conduct an evaluation of the economic impacts of the transfer on the basin of origin.³⁷ Specifically, the engineer must consider whether the proposed transfer will inhibit future growth and development in the basin of origin.³⁸ However, the Nevada statute additionally requires the state engineer to evaluate whether the proposed transfer is an environmentally sound practice for the basin of origin.³⁹ Environmental soundness relates to “whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related

natural resources that are dependent on those water resources.”⁴⁰ In this way, Nevada’s legal framework for IBTs is one of the most protective of the basin of origin.

California’s protections for the basin of origin are also unique, but this difference arises from California’s dual transfer system: temporary changes involving transfers and long-term transfers. For temporary transfers (*i.e.*, less than one year), the source area is protected by limiting the amount of water that may be transferred to that which would have been consumptively used or stored by the permittee without the temporary change.⁴¹ However, there is no similar protection for long-term transfers.⁴²

For IBTs in Oregon, there are numerous protections for the basin of origin. The application must include information on, among other things, the types of benefits that the basin of origin presently enjoys that would be eliminated if the transfer were approved; the hydrologic correlation between the surface water and groundwater within the basin of origin and whether the proposed transfer would harm either source; and alternative sources of water that would allow the basin of origin to maintain its supply.⁴³ Oregon also requires an analysis of whether the IBT will interfere with planned use and development within the basin of origin. The Legislature must provide consent if a transfer is for 50 cubic feet per second or more, with very limited exceptions.⁴⁴ Moreover, the Oregon Water Resources Commission can only approve or recommend approval of an IBT if it reserves an amount of water adequate for future needs in the basin of origin and subordinates the use out of basin to that reservation.⁴⁵

In Arizona, IBTs are allowed in limited circumstances for groundwater, which is the only state evaluated herein with such an authorization. However, Arizona’s unique and complex groundwater regulation structure makes interbasin water transfers very difficult. In short, groundwater may be transferred within the same subbasin if the subbasins fall within active management areas (AMAs), which strictly regulate groundwater use in Arizona.⁴⁶ IBTs, on the other hand, are mostly prohibited unless they are covered by certain grandfathered exceptions.⁴⁷ When such an exception is allowed, damages may be awarded for any injury or impairment was caused to the

³¹ *Id.* § 11.122(b).

³² IDAHO CODE ANN. § 42-222(1).

³³ *Id.*

³⁴ COLO. REV. STAT. § 37-92-305(4.5). This requirement does not apply to dry land agriculture. *Id.*

³⁵ NEV. REV. STAT. ANN. § 533.364(1).

³⁶ *Id.* § 533.371(4) (requiring rejection of the application if the application is incomplete; the application fees have not been paid; the proposed use is not temporary; the proposed use conflicts with existing rights; or the proposed use threatens to prove detrimental to the public interest).

³⁷ *Id.* § 533.570(3)(d).

³⁸ *Id.*

³⁹ NEV. REV. STAT. § 533.570(3)(c).

⁴⁰ Nevada State Engineer Ruling No. 6127, at 26 (July 15, 2011).

⁴¹ CAL. WATER CODE ANN. § 1725.

⁴² *See id.* §§ 1735, 1736.

⁴³ OR. REV. STAT. ANN. § 537.803(1).

⁴⁴ *Id.* § 537.809.

⁴⁵ *Id.* §§ 537.356, 540.531.

⁴⁶ ARIZ. REV. STAT. ANN. §§ 45-541-45-547.

⁴⁷ *Id.* § 45-544.

water supply from the basin of origin.⁴⁸ Moreover, with certain exceptions, a person may not use a well for withdrawing water for transport to an AMA without approval from the relevant state agency.⁴⁹

The protections in Texas for the basin of origin appear to be on par when compared to other western states. Although Texas does not limit its consideration to economic impacts in the basin of origin, the general nature of Texas's basin of origin protections do not evaluate environmental impacts, hydrology of the basin, or the volume of water to be transferred. This general nature allows equal emphasis on all considerations, which seems to facilitate IBTs.

Future need and demand in the basin of origin

Aside from demonstrating that the transferred water can be put to a beneficial use in the receiving basin, some states also require consideration of the need for the water to remain in the basin of origin and the potential adverse effects of removing water from the basin of origin. Texas is one such state. Its IBT statute mandates evaluation of the need for the water in both the receiving and native basins.⁵⁰ However, "need" is not defined.⁵¹ Nevada also requires the consideration of whether an IBT is "an appropriate long-term use which will not unduly limit the future growth and development" in the basin of origin.⁵²

The most stringent laws for protecting the water supply in the basin of origin for future needs are in Oregon. Its law requires that prior to approving an IBT, the Water Resources Commission reserve an amount of water adequate for future needs in the basin of origin, including an amount sufficient to protect public uses, and, as in Texas, subordinates the out-of-basin use to that reservation.⁵³ Oregon requires an applicant for an IBT to disclose the projected future needs for water in the basin of origin.⁵⁴ Similarly, California reserves water for the county of origin that may be needed future development.⁵⁵ However, unlike in Nevada, the applicant in California—not the relevant state agency—is responsible for the determining the amount of water available in the basin of origin available for future appro-

priation.⁵⁶

Although Texas is among the few states that require consideration of the future water demand in the basin of origin, Texas does not require the applicant or TCEQ to ensure that a specific volume of water will remain in the basin of origin or to earmark water for future needs in the basin of origin. In other words, future availability is only a consideration in Texas, and it does not require a detailed accounting and set-asides for future use. Texas relies more on its state and regional water planning process in this regard.

Transfer fees

To ensure economic viability and mitigate the negative impacts on tax revenue on the basin of origin, some western states allow (or even require) compensation be paid to the local governments within the basin of origin. Thus, in conjunction with protecting the basin by reserving water for anticipated future needs, the detriment of the transfer is offset monetarily. Generally, such compensation takes the form of a transfer fee per acre-foot of water transferred.

Texas considers compensation to the basin of origin but does not obligate the payment of transfer fees.⁵⁷ With input from each county judge of a county located entirely or even partially within the basin of origin, the parties to an IBT may contract for transfer fees and other mitigation.⁵⁸ Any such compensation agreed to by the parties must also be considered by the TCEQ in determining whether to grant the transfer.⁵⁹ However, neither the statute nor the accompanying regulations indicate to whom such compensation should be delivered; nor do they specify an amount or method for determining an amount.⁶⁰

Nevada also allows the county of origin to impose a \$10 per acre-foot transfer fee on all groundwater transfers with permission from the state engineer,⁶¹ or an applicant and the county may reach an agreement through which the adverse economic effects of the transfer will be mitigated by compensation, reservation of water rights, or other appropriate methods.⁶² Unlike

⁴⁸ *Id.*

⁴⁹ TEX. WATER CODE ANN. § 11.085(o).

⁵⁰ *Id.*

⁵¹ TEX. WATER CODE ANN. § 11.085(k)(3).

⁵² *See id.*; 30 TEX. ADMIN. CODE ANN. § 295.13; Suzanne Schwartz, *Whiskey is for Drinking, Water is for Fighting: A Texas Perspective on the Issues and Pressures Relating to Conflicts over Water*, 20 TEX. TECH L. REV. 1011, 1016(2006).

⁵³ NEV. REV. STAT. ANN. § 533.438(1).

⁵⁴ *Id.* § 533.4385(1)-(2). In this case, the plan just must be submitted to the state engineer to verify its compliance with other laws and its practicability. *Id.* § 533.4385(3).

⁴⁸ *Id.* § 45-545(A).

⁴⁹ *Id.* § 45-559 (conditioning approval on a determination that the withdrawal will not "unreasonably increase damage to surrounding land").

⁵⁰ TEX. WATER CODE ANN. § 11.085(k)(1).

⁵¹ *See id.*

⁵² NEV. REV. STAT. ANN. § 533.370(3)(d).

⁵³ OR. REV. STAT. § 537.809.

⁵⁴ *See id.*

⁵⁵ CAL. WATER CODE ANN. §§ 10505, 10505.5.

other states, the Nevada transfer law earmarks this money for use by the county only for economic development, health care, and education purposes.⁶³

On the other hand, in Arizona, a person who transports groundwater—either directly or indirectly—withdrawn from a groundwater basin or subbasin, must annually pay transfer fees to the county in which the basin of origin is located.⁶⁴ The fee is determined for each acre-foot of water transported less any amount of the Central Arizona Project water used on the property from which the water is transported.⁶⁵ The fixed fee per acre-foot is established by the statute and updated annually to adjust for inflation.⁶⁶ However, unlike other western states that impose or allow fees, certain credits are allowed in Arizona.⁶⁷

Colorado has an entirely different compensation scheme for IBTs when the transfer involves a conservancy district project that takes water from the Colorado River Basin. It requires the diversion facilities to incorporate features that will protect consumptive uses in that basin without resulting in an increased cost of water.⁶⁸ In reality, this provision has prompted importing districts to build additional storage reservoirs to provide “compensatory storage” for the basin of origin.⁶⁹ Additionally, Colorado law authorizes its water courts to impose transition mitigation and bonded indebtedness payments on any person who files an application for removal of water as a part of a significant water development activity.⁷⁰

The laws in Texas do not require the imposition of transfer fees. In this way, Texas arguably encourages IBTs by balancing the ability of the source area to seek compensation while not

impeding transfers with large or complex fees to effectuate the transfer.

No injury rule

Common among the western states is that most, if not all, of the available water was appropriated decades ago. Where there is no water available for appropriation, an IBT must involve existing rights. The no injury rule is a “basic tenant of western water common law” that has worked its way into some states’ statutory schemes. It provides that the transfer of an existing water right can only be made if it causes no injury to other existing water rights.⁷¹ The rule is intended to serve as a safeguard of the interests of existing water rights holders, both senior and junior. Ultimately, it reduces the amount of water that may be transferred even though more water may appear to be available for transfer.⁷² Generally, the claimed injury arises from the transition from non-use of water to possible use, which may adversely impact junior water rights holders who were reliant upon the water allocated to senior rights. Typically, the burden of demonstrating that no injury will result is on the applicant.⁷³ Some western states have since codified the no injury rule to their general water code or regulations or others have adopted it with respect to their specific IBT law.

In Texas, the no injury rule applies generally to all water rights amendments.⁷⁴ For IBTs in particular, the Texas statute specifies that any proposed IBT of all or part of a water right is junior in priority to water rights granted before the application is accepted for filing by TCEQ.⁷⁵ In other words, the transfer of a water right out of the basin reorders the priority such that the transferred right gets a new priority date and therefore becomes the most junior right in the basin. This reordering often serves as a disincentive and discourages IBTs. It should be noted, however, that interbasin transfers are evaluated differently depending on whether the IBT is a new appropriation. Regardless, a new appropriation will be the most junior water right in the basin. Thus, the effect of junior prioritization is

⁷¹ Barbara Cosens et al., *The Eternal Quest for Water: Historical Overview and Current Examination of Interbasin Transfers of Water*, 55 RMMLF-INST 17-1, § 17.02 (2009).

⁷² *Id.*

⁷³ See, e.g., 30 TEX. ADMIN. CODE ANN. § 297.45(d).

⁷⁴ TEX. WATER CODE ANN. § 11.122(b); 30 TEX. ADMIN. CODE ANN. § 297.45; compare with TEX. WATER CODE ANN. § 11.085.

⁷⁵ TEX. WATER CODE ANN. § 11.085(s). Exceptions include transfers to adjoining coastal basins, emergency transfers, and transfers to any area of a county or municipality outside the basin in which the county or municipality is located, and transfers involving less than 3,000 acre-feet of water per year from a given water right, and transfers from a source wholly outside of the state for use in Texas that is transported using the bed and banks of any flowing, natural stream. *Id.* § 11.085(v).

⁶³ *Id.* § 533.438(5).

⁶⁴ ARIZ. REV. STAT. ANN. § 45-556(A).

⁶⁵ *Id.*

⁶⁶ *Id.* § 45-556(C).

⁶⁷ *Id.* § 45-556(D). The exclusive list of credits are: the amount of any increase in property tax revenues, an amount equal to the market value of land donated to the county if the country prohibits or limits groundwater withdrawal from the land, and an amount agreed by intergovernmental agreement between the county and the city, town, or other person transporting the groundwater. *Id.* § 45-556(E).

⁶⁸ COLO. REV. STAT. ANN. § 37-45-118.

⁶⁹ Lawrence J. MacDonnell, *Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches*, 57 U. COLO. L. REV. 527, 537 (1986).

⁷⁰ COLO. REV. STAT. ANN. § 37-92-305(4.5)(b)(I). The transition mitigation payment is imposed to balance the impacts of transfers on tax revenue in the source area. The bonded indebtedness payment is imposed in an amount equal to the reduction in bond repayment revenues that are attributable to the removal of water from the source and, money collected is distributed among the entities with bonded indebtedness proportionate to their share of the indebtedness.

most significant for existing appropriations with more senior priority that are being proposed to be transferred out of the basin.

Idaho has a similar no injury rule. It provides that the director of the Department of Water Resources shall approve a change in a water right in whole or in part if, among other requirements, no other water rights are injured thereby, which is sufficiently broad to protect both junior and senior rights holders.⁷⁶ In California, both the temporary and long-term transfer provisions contain a no injury rule.⁷⁷ However, this rule is qualified in that no *substantial* injury may result, which seems to provide less protection to existing water rights holders.⁷⁸ Oregon also follows this basic requirement that no injury to existing water rights may be caused by an IBT with the additional requirement that an IBT may not be approved if it will interfere with planned use or development within the basin of origin.⁷⁹ As in Texas, Oregon also subordinates rights that are transferred.⁸⁰

New Mexico's no injury rule provides that it will be unlawful for anyone to divert waters for use in other reservoirs or valleys "to the impairment of valid and subsisting prior appropriators of such waters."⁸¹ Moreover, a violation of New Mexico's no injury rule is punishable by a fine or imprisonment in a county jail.⁸² If irrigation water is being severed and transferred, it does not lose its priority; however, such a transfer is limited by the no injury rule in that the transfer cannot cause detriment to any existing water rights.⁸³

Under the Colorado no injury rule, changes in water rights or use must "not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."⁸⁴ If injury is anticipated, the water judge may impose terms or conditions in the water right that mitigate or even prevent such injury.⁸⁵ Such conditions may also address impacts to water quality.⁸⁶

In Nevada, the no injury rule likewise applies to existing rights and protectable interests in existing domestic wells.⁸⁷

However, unlike with protecting the basin of origin, the state engineer does not have to inventory all of the vested surface water and groundwater rights within the basin of origin prior to granting an IBT.⁸⁸ In Arizona, a person may not use a well for the withdrawing of water for transport to an AMA without approval from the relevant state agency; that approval is conditioned on a determination that the withdrawal will not "unreasonably increase damage . . . other water users from the concentration of the well."⁸⁹

Although all the western states discussed herein have some form of a no injury rule, Texas and Oregon are the most restrictive. Unlike the other states, an IBT in Texas requires the subordination of the water right to the date on which the transfer application was filed. More than any other element, this rule seems to be the most limiting for IBTs in Texas.

Public interest criteria and the public trust doctrine

Most western states have codified the common law public trust doctrine either directly in their water law or indirectly by embodying its essence in the form of public interest considerations required to be met in order for a water right or use to be granted. In this regard, the provision requires that a water right be denied if it is, in some way, detrimental or contrary to the public interest or welfare. Often, this protection is subsumed into the public trust doctrine in states that have specifically determined—judicially or statutorily—that water resources are held in trust for the benefit of the public.

In Texas, the waters of the state are explicitly held in trust for the public.⁹⁰ Thus, the preservation and conservation of water resources within the state are public duties.⁹¹ ⁹² This express adoption of the public trust doctrine is contrasted by states such as New Mexico that have only indirectly applied the public trust doctrine in the form of public interest considerations. In New Mexico, the state engineer *may* deny an application for a new water right if it is "contrary to the conservation of water within the state or detrimental to the public welfare of the state."⁹³

⁷⁶ IDAHO CODE ANN. § 42-222(1).

⁷⁷ CAL. WATER CODE ANN. §§ 1725, 1736.

⁷⁸ *Id.*

⁷⁹ OR. REV. STAT. §§ 537.803(1)(e), 537.860; *see also id.* § 540.530.

⁸⁰ *Id.* § 537.809.

⁸¹ N.M. STAT. ANN. § 72-8-5.

⁸² *Id.*

⁸³ *Id.* § 72-5-23.

⁸⁴ COLO. REV. STAT. § 37-92-305(3)(a).

⁸⁵ *Id.* § 37-92-305.

⁸⁶ *Id.*

⁸⁷ NEV. REV. STAT. ANN. §§ 533.370(2), 533.371(5).

⁸⁸ *Id.* § 533.364(2)(a).

⁸⁹ ARIZ. REV. STAT. ANN. § 45-559.

⁹⁰ TEX. CONST. ART. XVI § 59; TEX. WATER CODE ANN. § 11.0235(a).

⁹¹ *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 101 (Tex. 2006).

⁹² Additionally, the Commission, when making a decision on an application, must consider whether the proposed appropriation is "detrimental to the public welfare." TEX. WATER CODE ANN. § 11.134(b)(3)(C).

⁹³ N.M. STAT. ANN. § 72-5-7; *see also id.* § 72-5-23 (prohibiting he severance and transfer of irrigation water rights that are detrimental to the public welfare of the state); *id.* §72-12B-1 (recognizing that it is not in conflict with the public welfare of the state or the citizens of New Mexico to allow interstate water transfers).

Idaho has, in a general sense, codified the public trust doctrine for public lands.⁹⁴ However, in application, the Idaho public trust doctrine is just a limitation on the power of the state to alienate or encumber navigable waters on the state.⁹⁵ Moreover, the Idaho statute specifically limits the application of the public trust doctrine as it relates to appropriation of use of water and water rights.⁹⁶ However, the change of diversion statute still utilizes the general requirement that any change to a point of diversion, such as an IBT, be in the local public interest.⁹⁷ In Idaho, “local public interest” means “interest that the people in the area directly affected by a proposed water use have in the effects of such use on the public resource.”⁹⁸ Therefore, the public interest of both the receiving basin and basin of origin must be considered prior to granting a change to a point of diversion, irrespective of whether the public trust doctrine applies to such a change.⁹⁹ Unlike other states, Idaho also prohibits the director of the Department of Water Resources from approving a change of use “where such change would significantly affect the agricultural base of a local area.”¹⁰⁰

In Nevada, the water also belongs to the public.¹⁰¹ Although there is not an express codification of the public trust doctrine, an IBT cannot be approved if it is detrimental to the public interest.¹⁰² However, unlike all the other western states, Nevada also provides that a change in the place of beneficial use of water may involve energy generation outside of the state so long as it is in the public interest and economic welfare of Nevada.¹⁰³

Most western states have some sort of public interest consideration—whether a specific codification of the public trust doctrine or an enumerated statutory provision to consider impacts to the public. The laws and regulations concerning the public’s interest appear to be in line with other western states.

Stream flow and water quality protection

Following 2 rounds of litigation in which the Second Circuit ultimately held that IBTs were a “discharge of pollutants”

requiring a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act,¹⁰⁴ the Environmental Protection Agency issued a final rule in 2008 stating that “water transfers, as defined by the rule, do not require NPDES permits because they do not result in the ‘addition’ of a pollutant.”¹⁰⁵ However, the rule makes clear that although an NPDES permit is not required, states are allowed to impose water quality criteria on water transfers.¹⁰⁶ Some western states have exercised this right and imposed various water quality considerations and restrictions in their IBT laws.

Texas’s IBT statute only requires consideration of the impacts to water quality that are reasonably expected to occur as a result of the transfer.¹⁰⁷ However, although not specifically in the IBT legislation, the Texas Water Code explicitly provides that the TCEQ is required to “balance[] all other public interests to consider and . . . provide for the freshwater inflows and instream flows necessary to maintain the viability of the state’s streams, rivers, and bay and estuary systems”¹⁰⁸ Permits may be suspended to ensure that these environmental flows are maintained under certain circumstances to ensure the “biological soundness” of the state’s water systems.¹⁰⁹ Conversely, environmental flow requirements are also subject to temporary suspensions during emergencies, if necessary, so that water can instead be applied to essential beneficial uses. It should be noted, however, an amendment to an existing water right for an IBT that does not change the diversion point or diversion rate would not have to address environmental flows. If the application is for a new appropriation, on the other hand, TCEQ applies the environmental flow criteria in Texas Water Code § 11.147 (or the criteria in 11.147(e)(3), depending on the basin in which the new appropriation is located). Texas’s environmental flow requirement for a new appropriation is similar to Idaho, described below, in that Texas has adopted environmental flow standards for nineteen river basins and bay systems in the state.

Colorado, like Texas, grants the Colorado Water Conservation Board the exclusive authority to appropriate “such waters of natural streams and lakes as the board determines may be required for minimum streamflows . . . to preserve the natural

⁹⁴ See IDAHO CODE ANN. § 58-1203.

⁹⁵ *Id.* at § 58-1203(1)

⁹⁶ *Id.* (indicating that “the public trust doctrine shall not apply to . . . [t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights . . .”).

⁹⁷ *Id.* § 42-222(1).

⁹⁸ IDAHO CODE ANN. § 42-202B(3).

⁹⁹ *See id.*

¹⁰⁰ *Id.* § 42-222(1).

¹⁰¹ NEV. REV. STAT. ANN. §§ 533.025, 533.371.

¹⁰² *Id.* § 533.370(2).

¹⁰³ *Id.* § 533.372.

¹⁰⁴ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (Catskills I); *Catskills Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) (Catskills II).

¹⁰⁵ National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008).

¹⁰⁶ 73 Fed. Reg. at 33,699.

¹⁰⁷ TEX. WATER CODE ANN. § 11.085(k)(2)(F); 30 TEX. ADMIN. CODE ANN. § 297.45(b)(5)(B).

¹⁰⁸ TEX. WATER CODE ANN. § 11.0235(c).

¹⁰⁹ *Id.*

environment to a reasonable degree.”¹¹⁰ Although not within the context of an IBT, this requirement underpins all decisions relating to the appropriation of water.

Idaho’s IBT provision specifically mentions the maintenance of minimum streamflows.¹¹¹ The requisite criteria for minimum streamflow are not the local public interest, but rather the standard(s) established by the minimum streamflow statute elsewhere in the code.¹¹² Generally, the minimum streamflow requirement for Idaho is what is needed for “the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation rules, and water quality.”^{113, 114}

Unlike other states, Oregon only requires information on water quality; it does not require the permitting authority to consider water quality impacts. The applicant must provide information regarding whether the proposed use of the transferred water will adversely affect the quality of water that remains available for domestic and municipal use within the basin of origin.¹¹⁵

Texas’s requirement that environmental flows be maintained is 1 of the most stringent streamflow and water quality protections built into IBTs in the western states. Given the ongoing debate over what constitutes adequate environmental flows, this condition may limit or otherwise impose an obstacle to the utilization of IBTs in the state.

Fish and wildlife protection

Similar to the protections for streamflows and water quality, the IBT laws of the western states provide a range of protections for fish and wildlife that span from mere consideration of the impacts to outright mitigation.

The IBT law in Texas does not itself directly require consideration of fish and wildlife impacts nor does it directly require mitigation of any potential impact.¹¹⁶ It does, however, provide that the impacts to aquatic and riparian habitat must be considered along with the instream uses.¹¹⁷ However, in applications for new appropriations, which is applicable to IBTs, the grant-

ing of that right is contingent upon a favorable evaluation of the impact of the permit on fish and wildlife habitats.¹¹⁸ The permit may ultimately require the applicant to take reasonable measures to mitigate any adverse impacts to such habitat.¹¹⁹ However, when granting a permit, the net benefit that may result from the project may be considered and used to offset mitigation required under federal law.¹²⁰ Additionally, if a new appropriation is located in one of the basins for which Texas has adopted environmental flow standards, as described above, those adopted environmental flow standards would apply instead.¹²¹

In California, on the other hand, transfers (both temporary and long-term) are explicitly prohibited from unreasonably affecting fish or wildlife.¹²² In comparison to California, wildlife protection is only a secondary concern in Texas for the approval of an IBT. Other states vary in whether they have direct or indirect protection for fish and wildlife impacts. Texas appears to be more balanced in how it approaches this issue.

Balancing test for final approval

Administratively, the approval process for IBTs varies significantly across the western states. Some states mandate automatic approval of the transfer if certain conditions are met. For instance, the Idaho IBT law provides that “[t]he director of the department of water resources shall examine all the evidence and available information and *shall* approve the change in whole, or in part, or upon conditions, provided no water rights are injured thereby.”¹²³ Other IBT laws, however, are permissive and provide for approval if certain specified conditions are met. In these states, a balance test is often employed to weigh the value of transfer against the potential harm of the transfer.

Texas employs a balancing test in determining whether an IBT permit should be approved. The TCEQ *may* grant, in whole or in part, an application for an IBT “to the extent that . . . the detriments to the basin of origin during the proposed period are less than the benefits to the receiving basin during the proposed transfer period, as determined by the commission based on consideration of the factors described by [the IBT statute].”¹²⁴ Additionally, TCEQ may only approve the IBT if

¹¹⁰ COLO. REV. STAT. § 37-92-102(3).

¹¹¹ IDAHO CODE ANN. § 42.222(1).

¹¹² *Id.*

¹¹³ *Id.* § 42-1501.

¹¹⁴ Notably, Idaho also considers the minimum streamflow to be a beneficial use of the water. *Id.*

¹¹⁵ OR. REV. STAT. § 537.803(f).

¹¹⁶ TEX. WATER CODE ANN. § 11.085(k)(2)(F); 30 TEX. ADMIN. CODE ANN. § 297.45(b)(5)(B).

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 11.152.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* §§ 11.125; 11.147(e)(3); 30 Tex. Admin. Code, ch. 298.

¹²² CAL. WATER CODE ANN. §§ 1725, 1736.

¹²³ Idaho Code §42-222(1) (emphasis added).

¹²⁴ TEX. WATER CODE ANN. § 11.085(l)(1). This balancing test was first articulated in *City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752, 758 (Tex. 1966).

the applicant prepares a drought contingency plan and develops and implements a water conservation plan that employs the “highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant,” which is a much higher standard than non-IBT applications.¹²⁵ The intent and degree of implementation of this provision of law is currently embroiled in litigation.¹²⁶

The language of the California temporary and long-term transfer statutes has been interpreted to mean that the agency will apply a subjective balancing test in determining whether to grant the transfer. In relevant part, the code specifies that “[t]he board . . . *may* approve such a petition for a long-term transfer where the change would not result in *substantial* injury to any legal user of water and would not *unreasonably* affect fish, wildlife, or other instream beneficial uses.”¹²⁷ Again, this language does not specify the degree to which fish and wildlife are protected, but such effects must be considered and appropriately weighed in the consideration of whether to grant the transfer. Oregon also uses a balancing test when evaluating the transfer of water. In its analysis, however, the commission *must* consider the cumulative impacts of changing the water right and approve the transfer accordingly.¹²⁸

Among the states that employ a balancing test in determining whether to grant an IBT, Texas’s regulations appear to be reasonable. Although Texas may be strict in its water supply considerations, it does not necessitate consideration of some factors that are vital in other states.

Special interstate rules and compacts

In addition to intrastate transfers, some states also provide regulation of interstate, IBTs, through either special rules or interstate compacts. In Texas, the IBT statute specifically excludes from the scope of its coverage a transfer of water that is imported entirely from outside of Texas—except for transfers imported from Mexico—for use within Texas and transported using the bed and banks of a flowing, natural stream.¹²⁹

Interstate transfers of water are also allowed in California. However, an appropriation of water in California for beneficial use in another state may be made only when that state has a reciprocal law in which it may likewise transfer water into

California.¹³⁰ Idaho also allows the use of public waters outside of the state so long as a number of criteria are met, namely that sufficient water is available to Idaho presently and into the future, the receiving state needs the water, and how the transfer exacerbates the burden to Idaho’s water sources should the out-of-state use be granted.¹³¹

Colorado’s interstate IBT laws require a permit to transport water out of the state by ditch, canal, pipe, conduit, natural streams, watercourses, or otherwise.¹³² As a prerequisite to approval, the state engineer or judge must determine that the proposed use of water outside of the state is expressly authorized by an interstate compact or credited as a delivery to another state; alternatively, the proposed use must not impair the ability of the state to comply with its own water obligations.¹³³ Additionally, the use must maintain reasonable conservation of water resources and not deprive any Colorado citizen of the beneficial use of water.¹³⁴ The state engineer is allowed to assess and collect a fifty-dollar per acre-foot fee on all water transferred in Colorado for beneficial use in another state.¹³⁵

New Mexico allows water to be transferred out of state upon the successful completion of an application to the New Mexico Environment Department that involves public participation of affected persons.¹³⁶ The application for an interstate transfer may be approved if it satisfies the no injury rule, is not contrary to the state’s conservation goals, and is not detrimental to the public welfare of the citizens of New Mexico.¹³⁷ To make such a determination, the available water supply, the future water demands, water shortages, feasible transportation options, and the intended use in the receiving basin are all to be considered by the state engineer.¹³⁸

Arizona also requires an approval to transport water out of state. The beneficial use within another state must be considered along with the legal basis for acquiring and transporting the water, the proposed purpose for use, the amount of water requested annually, the duration of the permit (not to exceed

¹³⁰ See CAL. WATER CODE § 1230.

¹³¹ IDAHO CODE ANN. § 42-401(3).

¹³² See COLO. REV. STAT. ANN. § 37-81-101(2)(b).

¹³³ *Id.* § 37-81-101(3)(a).

¹³⁴ *Id.* § 37-81-101(3)(b)-(c). The Colorado transfer statute also provides that return flows or water introduced from a foreign source from an unconnected stream is unappropriated and an appropriator may make a succession of uses to the extent the volume from the foreign source can be distinguished from the volume of the stream. *Id.* § 37-82-106(1).

¹³⁵ *Id.* § 37-81-104(1)(a).

¹³⁶ N.M. Stat. Ann. § 72-12B-1(B).

¹³⁷ *Id.*

¹³⁸ *Id.* § 72-12B-1(D).

¹²⁵ TEX. WATER CODE ANN. § 11.085(l)(2).

¹²⁶ Briefs for Appellant and Appellee, *Upper Trinity Reg'l Water Dist. & Tex. Comm'n on Envtl. Qual. v. Nat'l Wildlife Fed'n*, No. 01-15-00374-CV (Tex. App.—Houston [1st Dist.] 2015).

¹²⁷ CAL. WATER CODE § 1736 (emphasis added).

¹²⁸ OR. REV. STAT. § 540.530.

¹²⁹ TEX. WATER CODE ANN. § 11.085(v)(5); 30 TEX. ADMIN. CODE ANN. § 297.45(c)(5).

fifty years), and studies demonstrating the hydrologic impact on the basin of origin.¹³⁹ Additionally, consistency with state water conservation goals, potential harm to the public welfare, the future water demands of Arizona, the feasibility of transport, and the availability of alternative sources are also considered.¹⁴⁰ Unique to Arizona, the director must continue to monitor a granted interstate transfer for compliance.¹⁴¹

California and Nevada have developed an interstate compact that permits IBTs between the states.¹⁴² In relevant part, it allows both states to use waters of the Truckee River in the Lake Tahoe Basin or the Carson River Basin and the waters of the Carson River in the Lake Tahoe Basin or the Truckee River Basin so long as the transfers do not adversely affect the other state.¹⁴³

Unlike other states, Texas does not explicitly have interstate IBT requirements, either generally or for specific basins. Thus, the presumption in Texas is that should an entity apply for an IBT, such a transfer would not be subject to any additional or special requirements as it would in other states. However, the no injury rule and other standards may apply.

RECOMMENDATIONS

Among the western states considered herein, Texas appears to have relatively strict IBT regulations. With more and more competing demands for limited water supplies, voluntary and efficient IBTs should be encouraged to address those needs as they arise.

To provide for a more balanced, robust, and efficient IBT framework and to reduce some of the impediments and high transaction costs associated with IBTs, Texas should at least consider revisions to its laws. These adjustments could be made in a way that facilitates transfers while still mitigating adverse impacts. Most importantly, Texas should repeal that portion of the IBT statute that subordinates the priority of an existing water right that is approved for an IBT, which seems, in practice, to be the most prevalent impediment to IBTs. Because most basins are already fully appropriated, this provision significantly disincentivizes IBTs. Additionally, Texas should consider eliminating the requirement that the applicant demonstrate the need for the transfer. Texas is one of two states that have such a requirement, and the purpose of this provision is already adequately addressed by the beneficial use provision and the source area protections in place. And, finally, the IBT

provision already includes certain exceptions in Texas Water Code § 11.085(v). These exceptions could be broadened to address issues and experiences that Texas has witnessed since implementation of S.B. 1.

¹³⁹ ARIZ. REV. STAT. ANN. § 45-292.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 45-293.

¹⁴² NEV. REV. STAT. ANN. § 538.600.

¹⁴³ *Id.*